REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL/APPELLATE JURISDICTION

CIVIL APPEAL NO. 8766-67 OF 2019
DIARY NO.24417 OF 2019

Committee of Creditors of Essar Steel India Limited
Through Authorised Signatory ...Appellant

Versus

Satish Kumar Gupta & Ors. ...Respondents

WITH

CIVIL APPEAL NOS.5634-5635 OF 2019

CIVIL APPEAL NOS.5636-5637 OF 2019

CIVIL APPEAL NOS.5716-5719 OF 2019

CIVIL APPEAL NO.5996 OF 2019

CIVIL APPEAL NO.6266 OF 2019

CIVIL APPEAL NO.6269 OF 2019

WRIT PETITION (CIVIL) NO.1055 OF 2019

WRIT PETITION (CIVIL) NO.1064 OF 2019

WRIT PETITION (CIVIL) NO.1049 OF 2019

WRIT PETITION (CIVIL) NO.1050 OF 2019

WRIT PETITION (CIVIL) NO.1057 OF 2019

WRIT PETITION (CIVIL) NO.1058 OF 2019

WRIT PETITION (CIVIL) NO.1061 OF 2019

WRIT PETITION (CIVIL) NO.1060 OF 2019

WRIT PETITION (CIVIL) NO.1056 OF 2019

CIVIL APPEAL NO.6409 OF 2019

WRIT PETITION (CIVIL) NO.1063 OF 2019

CIVIL APPEAL NOS.6433-6434 OF 2019

WRIT PETITION (CIVIL) NO.1066 OF 2019

WRIT PETITION (CIVIL) NO.1087 OF 2019

WRIT PETITION (CIVIL) NO.1110 OF 2019

WRIT PETITION (CIVIL) NO.1113 OF 2019

WRIT PETITION (CIVIL) NO.1121 OF 2019

CIVIL APPEAL NO. 8768 OF 2019

DIARY NO.31409 OF 2019

CIVIL APPEAL NO.7266 OF 2019

CIVIL APPEAL NO.7260 OF 2019

WRIT PETITION (CIVIL) NO.1246 OF 2019

CIVIL APPEAL NO. 8769 OF 2019
DIARY NO.36838 OF 2019

WRIT PETITION (CIVIL) NO.1296 OF 2019

J U D G M E N T

R.F. Nariman, J.

Delay Condoned in Civil Appeal Diary No. 31409 of 2019 and Civil Appeal Diary No. 36838 of 2019. I.A. No. 102638 of 2019 in Civil Appeal Diary No. 24417 of 2019 for Permission to File Appeal allowed. Appeal Admitted.

1. This group of appeals and writ petitions raises important questions as to the role of resolution applicants, resolution professionals, the Committee of Creditors that are constituted under the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "the Code"), and last, but by no means the least, the jurisdiction of the National Company Law Tribunal (hereinafter referred to as "NCLT"/"Adjudicating Authority") and the National Company Law

Appellate Tribunal (hereinafter referred to as “NCLAT”/“Appellate Tribunal”), qua resolution plans that have been approved by the Committee of Creditors. The constitutional validity of Sections 4 and 6 of the Insolvency and Bankruptcy Code (Amendment) Act, 2019 (hereinafter referred to as the “Amending Act of 2019”) have also been challenged. These appeals and writ petitions are an aftermath of this Court’s judgment dated 04.10.2018, reported as **ArcelorMittal India Private Limited v. Satish Kumar Gupta** (2019) 2 SCC 1.

2. On 02.08.2017, the NCLT, Ahmedabad admitted Company Petition (I.B.) No. 39 of 2017 filed by Standard Chartered Bank together with a Petition filed by the State Bank of India under Section 7 of the Code. One Satish Kumar Gupta was appointed as the interim resolution professional, who was later confirmed as resolution professional. On 06.10.2017, the resolution professional by way of an advertisement in the Economic Times, invited expressions of interest from all interested resolution applicants to present resolution plans for rehabilitating the corporate debtor, namely, Essar Steel India Limited. On 24.12.2017, the resolution professional issued a request for proposal (hereinafter referred to as “RFP”), *inter alia*, inviting resolution plans for the aforesaid corporate debtor, which was later amended on 08.02.2018. Two resolution plans were submitted on

12.02.2018, one by ArcelorMittal India Private Limited (hereinafter referred to as "ArcelorMittal") and another by Numetal Limited (hereinafter referred to as "Numetal") both of which were found to be ineligible under Section 29-A of the Code. On 02.04.2018, resolution plans were then submitted by ArcelorMittal, Numetal and one Vedanta Limited (hereinafter referred to as "Vedanta"). The resolution plan of ArcelorMittal specifically provided for an upfront payment of INR 35,000 crores in order to resolve debts amounting to INR 49,213 crores. It was stated that unsecured financial creditors shall be paid an aggregate amount of 5% of their admitted claims. Apart from the above, INR 8,000 crores of fresh capital infusion by way of capex and working capital was also to be infused. INR 3,339 crores - being the aggregate admitted claims of operational creditors, other than workmen and employees, was to be paid to the extent of INR 196 crores, but only to trade creditors and government creditors. Small trade creditors, defined as "having claims of less than one crore" were to be honoured in full, as was the claim of workmen and employees of the corporate debtor, amounting to INR 18 crores. Importantly, the resolution applicant empowered the Committee of Creditors to decide the manner in which the financial package being offered would be distributed among the secured financial creditors. Standard Chartered Bank, which was stated to be an unsecured creditor, was to be paid an aggregate amount of 5% of its admitted claims. On 19.04.2018, the Adjudicating Authority directed the Committee of Creditors of the corporate debtor, which by then had been set up by the interim resolution professional, to consider the eligibility of the aforesaid resolution applicants.

3. On 10.09.2018, Standard Chartered Bank was classified as a secured financial creditor of the corporate debtor by the resolution professional. On 04.10.2018, this Court declared both ArcelorMittal and Numetal ineligible by virtue of their resolution plans being hit by Section 29-A of the Code. However, an order was passed under Article 142 of the Constitution, stating that one more opportunity be granted to both ArcelorMittal and Numetal to pay off the NPAs of their related corporate debtors within two weeks of the Supreme Court judgment, failing which the corporate debtor would go into liquidation. On 18.10.2018, ArcelorMittal informed the resolution professional and the Committee of Creditors that it had made payments as per the Supreme Court's judgment dated 04.10.2018. However, Numetal did not make any such payment. As a result, on 19.10.2018, ArcelorMittal resubmitted its resolution plan of 02.04.2018, which was then evaluated by the Committee of Creditors on the same date - ArcelorMittal being declared as the highest evaluated resolution

applicant vis-a-vis Vedanta. On 25.10.2018, the final negotiated resolution plan of ArcelorMittal was approved by the Committee of Creditors by a 92.24% majority. After several proceedings before the NCLT and the NCLAT, the NCLT, by its judgment dated 08.03.2019 disposed of the application to allow the resolution plan filed by ArcelorMittal as follows:

> "…we are of the view that the dues of the operational creditors must get at least similar treatment as compared to the dues of the financial creditors on the principle of equity and fair play as well as the Wednesbury Principle of Unreasonableness and the Doctrine of Proportionality, so as to avoid disparity in making payments to the operational creditors having debt value of Rs.1 crore and above (a token of Re.1) and the allegation of discriminatory practice could be ruled out…Hence, in our view, if a reasonable formula for apportionment is worked out so that 85% of the amount offered by the resolution applicant is distributed among the financial creditors and the remaining 15% of the amount is distributed amongst the rest of the operational creditors, then the entire claim of the operational creditors, which comes to around Rs.4700 crore can be substantially paid off or at least the operational creditors can get 50% of their admitted and undisputed claim in the light of the judgment of the Hon'ble Supreme Court in ***Chitra Sharma*** *v.* ***Union of India*** **(*supra)***. Such object can be achieved, if the financial creditor and the members of the CoC are willing to sacrifice the interest component on their principal loan, because it is established position in the record that the principal loan liability of the corporate debtor company comes to around Rs.35,000 crore in the year 2017 when these IB Petitions were admitted, which includes the interest component also and by giving such hair-cut to the interest component to the extent possible by providing provision for 15% amount for the other operational creditors and stakeholders, we are of the

> view that debts of the entire operational creditors can be satisfied in a reasonable and fair manner and then such I.A.s preferred by the operational creditors would also become infructuous and this Adjudicating Authority would not be required to deal with the merits of each and every I.A. Thus, this would be beneficial to avoid multiplicity of legal proceedings and to remove any impediment for effective implementation of the resolution plan and to achieve the main theme and object of the present I & B Code."

4. By an interim order dated 20.03.2019 in the appeals that were filed before NCLAT, the NCLAT directed the Committee of Creditors to take a decision on certain suggestions that were made. Pursuant to this, on 27.03.2019 the Committee of Creditors decided - voting having concluded on 30.03.2019 - to appeal against the NCLAT's order, and, by a majority of 70.73% approved making an *ex gratia* payment of INR 1,000 crores to operational creditors above INR 1 crore. Appeals filed against the interlocutory orders of the NCLAT were then heard by this Court, which by its order dated 12.04.2019, *inter alia,* directed non-implementation of the judgment dated 08.03.2019 of the NCLT and expeditious disposal of the appeal before the NCLAT.

5. By its final judgment dated 04.07.2019, the NCLAT held that:

(i) In a resolution plan there can be no difference between a financial creditor and an operational creditor in the matter of payment of dues, and that therefore, financial creditors and operational creditors deserve equal treatment under a resolution plan. Accordingly, the NCLAT has re-distributed the proceeds payable under the approved resolution plan as per the method of calculation adopted by it so that all financial creditors and operational creditors be paid 60.7% of their admitted claims;

(ii) Securities and security interest is irrelevant at the stage of resolution for the purposes of allocation of payments, thereby directing that each financial creditor (whether secured or unsecured) with a claim equal to or more than INR 10 lakhs be paid 60.7% of its admitted claim irrespective of their security interest;

(iii) Operational creditors by definition have separate classes within themselves and can be classified into sub-classes for the purpose of distribution (while rejecting any classification amongst the financial creditors) on the basis of the admitted amounts thereby directing that operational creditors with a claim of equal to or more than INR 1 crore be paid 60.268% of their admitted claims.

(iv) Certain additional claims of operational creditors (some of which were highly belated and/or without sufficient proof) were admitted, such that the admitted operational debt of approximately INR 5,058 crores at the time of the approval of the approved resolution plan became an operational debt of approximately INR 19,719.20 crores.

(v) The profits generated by the corporate debtor during the Corporate Insolvency Resolution Process (hereinafter referred to as the "CIRP") would be distributed equally amongst the financial creditors and operational creditors of the corporate debtor.

(vi) A sub-committee or core committee cannot be constituted under the Code, being a foreigner thereto. The Committee of Creditors alone are to take all decisions by themselves.

(vii) The Committee of Creditors has not been empowered to decide the manner in which the distribution is to be made between one or other creditors, as there would be a conflict of interest between financial and operational creditors, financial creditors favouring themselves to the detriment of operational creditors.

(viii) Section 53 of the Code cannot be applied during the corporate resolution process but will apply only at the stage of liquidation.

(ix) Claims that have been decided by the resolution professional and affirmed by the Adjudicating Authority or the Appellate Tribunal are final and binding on all creditors. However, claims which have not been decided by the Adjudicating Authority or the Appellate Tribunal on merits may be decided by an appropriate forum in terms of Section 60(6) of the Code.

(x) Financial Creditors in whose favour guarantees were executed, as their total claim stands satisfied to the extent of the guarantee, cannot re-agitate such claims as against the principal borrower.

6. We have heard detailed arguments made by Shri Gopal Subramanium and Shri Rakesh Dwivedi, learned senior counsel, on behalf of the Committee of Creditors of Essar Steel India Limited. They have argued that the provisions of the Code provide for a broad classification of creditors as financial creditors and operational creditors on the basis of the nature of the transaction between creditors and a corporate debtor. They have further argued that the Code does not mandate identical treatment of differently situated creditors either *inter se* within financial creditors, who may be secured or unsecured, and/or financial creditors vis-a-vis operational creditors. The Code only posits equitable treatment of different classes of creditors recognising that different classes deserve differential treatment. According to them, financial creditors as a class have a superior status as against operational creditors, the same being the case with secured creditors vis-a-vis unsecured creditors. For this purpose, they relied upon certain provisions of the Code. They further

argued that the general law of the land as contained in Section 48 of the Transfer of the Property Act, 1882 and Section 77 of the Companies Act, 2013 would not have been taken away *sub-silentio* by the Code and have relied upon a large number of authorities for this purpose. They also referred to and relied upon the UNCITRAL Legislative Guide on Insolvency Law (hereinafter referred to as the "UNCITRAL Legislative Guide"), which was referred to by this Court in **Swiss Ribbons Private Limited v. Union of India** (2019) 4 SCC 17, and upon a report by the International Monetary Fund titled "Orderly and Effective Insolvency Procedures – Key Issues". They also referred to and relied upon judgments under Article 14 of the Constitution of India which highlight the fact that classification is permissible so as to differentiate persons who are unequal, who cannot then be treated equally. They also argued, relying strongly upon the IMF paper on "Development of Standards for Security Interest" by Pascale De Boeck and Thomas Laryea, in addition to several expert reports, that classification of creditors based on the nature of the debt and/or security interest is a *sine qua non* for any Insolvency Code. They argued that if secured financial creditors are to be treated at par with unsecured creditors, such secured creditors would rather vote for liquidation rather than Corporate Resolution, contrary to the main objective sought to be achieved by the Code.

They then argued that the health of the financial sector is critical for the overall health and growth of the economy, which would otherwise be subverted, if the impugned judgment were to be given effect. They relied strongly upon paragraphs 27 and 28 of **Swiss Ribbons** (supra), in particular, which differentiated between secured and unsecured creditors, most financial creditors being secured creditors and most operational creditors being unsecured. They also argued that the law laid down in **K. Sashidhar v. Indian Overseas Bank** 2019 SCCOnline SC 257, had made it clear that there is a judicial hands-off when it comes to the commercial wisdom of the Committee of Creditors, which has been directly infracted by the impugned judgment, which has held that the Committee of Creditors has nothing to do with the distribution of amounts which are infused by the resolution applicant for payment of the corporate debtor's erstwhile debts. They relied heavily upon the Bankruptcy Law Reforms Committee Report, 2015 (hereinafter referred to as the "BLRC Report") to buttress this submission, as well as the UNCITRAL Legislative Guide. They then submitted that a resolution plan is a consent-based plan proposed by the resolution applicant for a corporate debtor. The counterparty to such a plan is the Committee of Creditors, which is required to give a minimum consent of 66% voting share, which consent then becomes the basis for the Adjudicating

Authority to approve a resolution plan for the corporate debtor. Once approved by the Adjudicating Authority, such plan becomes binding on all stakeholders as is mentioned by Section 31 of the Code. Therefore, any modification, as has been done by the NCLAT, of such plan is illegal. They then argued that the Committee of Creditors has both the power and the jurisdiction to deal with all commercial aspects of a resolution plan, including distribution of proceeds under such plan, and also referred to and relied upon the recent amendments made to Section 30 of the Code. They stated that the ArcelorMittal plan, as amended, looked after all stakeholders including operational creditors, and stated that a staggering amount of INR 55,000 crores qua operational creditors was paid during the 600 odd days of CIRP being carried out, operational creditors whose claims were above INR 1 crore, now being paid approximately 20% of their admitted dues. They also highlighted the fact that the secured creditors have lost about INR 17,000 crores of interest in the last three years due to the account of the corporate debtor having been classified as NPA. They then argued that the setting up of a sub-committee by the Committee of Creditors is permissible under the Code, and referred to certain judgments to buttress this proposition. They further argued that no decision-making power was delegated to the sub-committee, nor did the sub-committee at any time decide or even recommend on distribution of amounts. They then argued that the NCLAT admitted various rejected/disputed/estimated claims worth INR 13,767 crores, which was more than the amount originally claimed by operational creditors. Various instances of non-application of mind were pointed out by which claims worth INR 11,278, which were not yet crystallized, were admitted by the NCLAT for payment, and various examples of double payment were also given. It was also argued that the NCLAT erroneously permitted several disputed claims to be raised outside the provisions of the Code after approval of the resolution plan, by referring to and relying upon Section 60(6) of the Code, which merely saved limitation for barred claims. They then argued that extinguishment of the right of creditors against individual guarantees extended by the promoters/promoter group of the corporate debtor was wholly illegal being contrary to several judgments of this Court and contrary to the terms of the guarantees themselves. They further argued that the profits that were made during the CIRP can obviously not be used for payment of the debts of the corporate debtor, as has been ordered by the NCLAT. Ultimately, according to the learned counsel, the impugned NCLAT judgment deserves to be set aside because it has curtailed the authority of the Committee of Creditors; expanded the jurisdiction of the Adjudicating Authority as well as the NCLAT beyond the bounds contained in the Code; and has transgressed the most basic tenet of the Committee of Creditors' commercial wisdom being reflected by an over 66% majority vote, which has been nullified by the NCLAT by completely modifying and substituting the resolution plan approved by the Committee of Creditors.

7. Shri Shyam Divan, learned senior advocate appearing on behalf of the State Bank of India, has supported the submission made on behalf of the Committee of Creditors of Essar Steel India Limited. According to the learned senior advocate, whereas his client and other secured creditors are secured to the extent of 99.66% of their outstanding dues, the only security of Standard Chartered Bank is a pledge of the shares held by the corporate debtor in an offshore Mauritian subsidiary, namely Essar Steel Offshore Limited (hereinafter referred to as "ESOL"), and the fair value of ESOL pledged shares has been determined at only INR 24.86 crores as against the total outstanding admitted dues of INR 3487.10 crores (being 0.7% of the total admitted debt of Standard Chartered Bank). Thus, according to him, Standard Chartered Bank is an unsecured creditor to the extent of INR 3462.14 crores, and as against a sum of INR 60.71 crores which was payable under the resolution plan as approved by the Committee of Creditors, the NCLAT has now upped

this figure to approximately INR 2160 crores completely beyond its limited jurisdiction under the Code. Apart from the above, he also argued that Standard Chartered Bank is precluded from raising any challenge to the constitution of a sub-committee as it had participated in several meetings in which it raised no objection to the sub-committee, and had in fact requested to be a part of the sub-committee. He then argued that negotiations that were undertaken by the sub-committee was in accordance with the mandate of the Committee of Creditors, which alone took all decisions; the sub-committee merely being an executive arm of the Committee of Creditors.

8. Shri Kapil Sibal, appearing on behalf of the Standard Chartered Bank, defended the NCLAT judgment on all aspects. According to him, the offer made by ArcelorMittal was to make a payment of INR 42,000 crores as an upfront amount in order to pay 100% of the principal outstanding of the secured financial creditors of the corporate debtor. That this sum came to be offered only as a result of an offer made by Numetal on 07.09.2018 to pay INR 37,000 crores as upfront payment to secured financial creditors. According to learned counsel, the sum of INR 42,000 crores cannot be worked out unless the principal amount owed to Standard Chartered Bank is also

included in the said figure. The figure of INR 42,000 crores was stated by the counsel of the Committee of Creditors before this Hon'ble Court, in the final hearing which took place before the judgment in **ArcelorMittal India** (supra), and that this sum could be the minimum value of payment with a scope for further negotiations. However, what ultimately turned out is a payment of a lesser value, namely INR 39,500 crores as upfront, INR 2,500 crores being added as an eyewash towards Guaranteed Working Capital Adjustment. The reason this was an eyewash is because Odisha Slurry Pipeline Infrastructure Limited (hereinafter referred to as "OSPIL"), a wholly owned subsidiary of the corporate debtor, owned a slurry pipeline. ArcelorMittal, in order to ensure unhindered usage of the said slurry pipeline, agreed that it would acquire the debts of OSPIL. In order to achieve such acquisition of the debts of OSPIL, the Core Committee of Creditors relieved ArcelorMittal from the solemn offer made to the Supreme Court of India to pay upfront a sum of INR 42,000 crores, and reduced from this said amount, a sum of INR 2,500 crores. Thus, the Core Committee's decision, as ratified by the Committee of Creditors, was to accept a sum lesser than that guaranteed as upfront payment by ArcelorMittal. Shri Sibal then trained his guns against the very formation of a Core Committee/Sub-Committee, stating that it is against the provisions of the Code, and that as originally conceived, it was only to facilitate representation before the Adjudicating Authority, which was over, in any case, by 31.05.2018. The Core Committee however went on conducting secret negotiations with ArcelorMittal by which it buried Standard Chartered Bank's debt almost completely. This was done by reducing Standard Chartered Bank's entitlement of INR 2585 crores (INR 2646 crores minus INR 61 crores), if it were to have outstanding payments made on the basis of value of debt instead of value of security. In any case, it was further argued that the resolution plan of ArcelorMittal was itself flawed in that it would be contrary to Regulation 38(1A) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (hereinafter referred to as the "2016 Regulations"), as it did not deal with the interests of all stakeholders. It would also be contrary to the RFP that was issued on 24.12.2017, clause 4.6.1(d) of which stated that the resolution plan should have contained a statement as to how it would deal with the interest of all stakeholders including, but not limited to, break up of amounts to be paid to secured financial creditors, unsecured financial creditors and operational creditors, all of which was left, thanks to secret negotiations with ArcelorMittal by the resolution plan to the Committee of Creditors. Learned counsel then argued that under the provisions of the Code, the role of the

Committee of Creditors is limited to considering the feasibility and viability of the resolution plan, which does not include the manner of distribution of the amount payable by the resolution applicant to the erstwhile creditors of the corporate debtor. In any event, the decision of the Committee of Creditors on the manner of distribution in the facts of this case is illegal and arbitrary, as once a creditor is classified as a financial creditor, such creditor is entitled to equal treatment with all other financial creditors, irrespective of whether it is secured or unsecured. For this purpose, the learned senior advocate relied upon the UNCITRAL Legislative Guide as well as the BLRC Report, 2015. According to the learned senior advocate, Parliament has advisedly chosen not to create different classes of financial or operational creditors when it comes to the process of resolution of debts; and importance is given to the value of debt, as opposed to, the value of security which is given importance only when the liquidation process is to take place. He argued that Section 53 of the Code would apply only during liquidation and not at the stage of resolving insolvency as is clear from the fact that “secured creditor” as defined by Section 3(30) of the Code is used only in Section 53 of the Code which is contained in Chapter III entitled “Liquidation Process” and not at all in Chapter II of the Code which is entitled “Corporate Insolvency Resolution Process”. In Chapter II, only financial and operational creditors, as defined, are spoken about. In point of fact, in the 17th meeting of the Committee of Creditors held on 09.08.2018, the Committee of Creditors had earlier decided that the upfront payment made shall be divided amongst financial creditors on the basis of their voting shares, which in turn is fixed on the basis of the debt that is owed to each one of them. He further argued that the Committee of Creditors could not possibly decide the manner of distribution as it would give rise to a serious conflict of interest, as the majority may get together to ride roughshod over the minority. He further argued that no categorisation can be made based on the security interest of financial creditors, which security interest may itself vary from first charge holders to second charge holders and then to subservient and residual charge holders. The fact that Standard Chartered Bank has been recognised, albeit only on 10.09.2018, as a secured financial creditor by the resolution applicant, is not challenged by any of the other financial creditors. Further, the valuation of pledged shares at INR 24.86 crores is itself a flawed evaluation, the actual value of the shares being in excess of US $600 million.

9. Shri Sibal then took us to the Amending Act of 2019 and Section 6 of the Amending Act of 2019 in particular, which amended

Section 30 of the Code, shortly after the judgment of NCLAT in the present case. This amendment was made in the Code with effect from 16.08.2019. Shri Sibal's first argument is that the aforesaid amendment would not apply to the facts of the present case, in as much as the amendment made is prospective in nature. Further, even under Explanation 2 that has been added by the amendment, the facts of the present case do not fall within sub-clauses (i) to (iii) of the aforesaid Explanation. A reading of the amended Section 30(2)(b) together with the Explanations contained therein, and the amendment of Section 30(4) would leave nobody in any manner of doubt that the purpose of the amendment was to get over the NCLAT judgment in order that the huge amount of around INR 2,100 crores, that is payable to a private foreign bank namely Standard Chartered Bank, gets reduced to around INR 61 crores, so that nationalised banks and other entities in which the Government has an interest may get a larger share of the pie to the detriment of Standard Chartered Bank. The legislature has, therefore, overstepped the separation of powers boundaries to step in and legislatively adjudicate the facts of a particular case. Even otherwise, according to learned counsel, the provision is an arbitrary exercise of power which brings in Section 53, which is applicable only when the corporate debtor gets liquidated, into the Corporate Resolution Process, contrary to the original scheme of the Code. Also, Explanation 1 directly interferes with the judicial function and cannot state that a distribution shall be fair and equitable, which can only be decided by the Adjudicating Authority and not by Parliament. Also, the amendment made to Section 30(4) cannot possibly include value of security interest of a secured creditor within the expression “feasibility and viability” which has been done only in order that it be applied to the present case.

10. Shri Arvind Datar supplemented the arguments of Shri Sibal and also appeared on behalf of the Standard Chartered Bank. He argued that the loan by Standard Chartered Bank to the wholly owned subsidiary of the corporate debtor is also a loan towards the project asset of the corporate debtor and that the State Bank of India was fully aware of such lending that was availed of by the corporate debtor. The wholly owned subsidiary is a Special Purpose Vehicle in order to ensure availability of coal for the corporate debtor to cater to enhanced production capacity.

11. He elaborated on the meaning of the expression “modifications” contained in Regulation 39(3) of the 2016 Regulations, arguing that the power to make modifications does not include the power to discriminate among creditors who are equally situated. Also, the Committee of Creditors cannot make rankings among financial

creditors or otherwise create a class within a class. He reiterated that the status of Standard Chartered Bank as a secured financial creditor has not been disputed by any member of the Committee of Creditors.

12. Shri Ranjit Kumar, learned senior advocate appearing on behalf of Ideal Movers Limited, an operational creditor of the corporate debtor, stated that the admitted claim by the resolution professional was INR 178,50,51,792, and the original resolution plan contained nothing by way of repayment to his client. It is only after the NCLT judgment when INR 1,000 crores extra was paid by ArcelorMittal for operational creditors generally, that his client would now receive 20.5% of the admitted claim. Of course under the NCLAT judgment, he would stand to gain much more. He argued from a reading of the preamble of the Code and some of its provisions that a key objective of the Code is to ensure that the corporate debtor goes on doing its business as a going concern during the CIRP as a result of which a large number of operational creditors have to be paid their dues – such as workmen, electricity dues, etc. It is for this reason that the CIRP has to ensure the balancing of interest of all stake holders which can only be achieved by a feasible and viable resolution plan which is capable of effective implementation. He, therefore, argued that the process of revival and the process of liquidation are distinct

and separate and have been so treated by the Code. This being so, priorities of payment which apply in liquidation obviously cannot apply when the corporate debtor is being run as a going concern as otherwise secured creditors alone will be paid and not operational creditors who are necessary for the running of the business. This stems from the fact that the insolvency resolution process is to maximise the value of assets of corporate debtors whereas the liquidation process is to recover outstanding dues by selling the assets of the corporate debtor. He relied strongly on certain observations in **Swiss Ribbons** (supra) to buttress the aforesaid proposition. He also argued that the UNCITRAL Legislative Guide, being a guide to legislation, ought not to be looked at once the Code has been enacted. He then argued, that it is obvious that the Amending Act of 2019 has been made in a great hurry in order that the NCLAT judgment be neutralised by law. This is clear from the fact that the NCLAT judgment is dated 04.07.2019 and the Amending Act of 2019 was passed only one month later i.e. on 06.08.2019. No Standing Committee was consulted, as was the case of all previous amendments made to the Code, resulting in completely arbitrary provisions being inserted. He trained his guns against Section 4 of the Amending Act of 2019, arguing that timelines cannot be imposed or stipulated for the adjudication of disputes by any court, least of all the Supreme Court of India. The period of time taken in court proceedings cannot possibly be included within a timeframe as it would then nullify the role of the Adjudicating Authority and the Appellate Tribunal, and would defeat the primary object and purpose of the Code, which is resolution rather than liquidation.

13. Shri Harin P. Raval, learned senior advocate appearing on behalf of Kamaljit Singh Ahluwalia in Writ Petition (Civil) No.1058 of 2019 also assailed the Amending Act of 2019. Apart from the arguments made by Shri Sibal and Shri Ranjit Kumar, he also argued that the amendments made in Section 30 would be contrary to the rationale and design of the BLRC Report, 2015. He also added that the Amending Act of 2019, insofar as it applied retrospectively, would be constitutionally infirm as it cannot be said that the amendments made thereto are in any manner clarificatory but are new substantive amendments.

14. Shri A.K. Gupta, learned advocate appearing for L&T Infrastructure Finance Co. Limited in Civil Appeal No.6409 of 2019, assailed the classification of his client as an operational creditor and stated that, on facts, the appellant had entered into a facility agreement, sanctioning a term loan of INR 75 crores to Essar Power Gujarat Limited, a subsidiary of the corporate debtor. The borrower

then entered into a Promoter Obligation Agreement by which one Essar Power Limited undertook an obligation to arrange for cheques from the corporate debtor. INR 62 crores of such post-dated cheques were issued in favour of this appellant, as a result of which this appellant is also entitled to be classified as a financial creditor and not an operational creditor. He thus assailed the finding of the resolution professional, the NCLT and the NCLAT on this aspect of his case.

15. Shri Mishra, learned advocate, appeared on behalf of Dakshin Gujarat Vij Company, in which he submitted that the NCLAT had rightly directed that the claim of his client should be considered with all other creditors, and prayed in the alternative that directions be issued that his client be entitled to recover the amount claimed, subject to the decision of the court, from the corporate debtor as a going concern. Similar were the submissions made by Smt. Ramachandran on behalf of the Gujarat Energy Transmissions Corporation Limited. Shri Maninder Singh, learned senior counsel, appeared on behalf of the State of Gujarat and supported paragraph 196 of the NCLAT judgment by which his client would be paid 60.26% of Sales Tax dues. Shri Mukul Rohatgi, learned senior advocate appearing on behalf of Mr. Prashant Ruia supported the findings of

the NCLAT, insofar as the NCLAT held that the personal guarantees given by his client had become ineffective in view of the payment of the debt by way of resolution to the original lenders. Further, Shri Rohatgi also argued that the right of subrogation and the right to be indemnified conferred on a guarantor under the Indian Contract Act would continue to exist in the absence of a positive waiver of such right by the said guarantor.

16. Shri Harish Salve, learned senior advocate appearing on behalf of ArcelorMittal, referred to the appeal filed by the Standard Chartered Bank, being Civil Appeal No. 6433 of 2019, and stated that the remedy sought therein was restricted to quashing the impugned judgment to the extent of paragraph 221 thereof which had held that financial creditors in whose favour guarantees were executed, could not re-agitate their claims against the principal borrower, as their total claim stands satisfied to the extent of the guarantee, and that therefore all the arguments made by Shri Sibal on behalf of Standard Chartered Bank, being outside the scope of the appeal, ought not to be considered at all. He further argued that since most of the arguments of Shri Sibal would go to the validity of the resolution plan, which Shri Sibal himself has stated that he is not assailing, should therefore be rejected on this ground alone. He also argued that it was

wholly incorrect to say that only INR 39,500 crores would be an upfront payment. He read to us certain documents which would show that the guaranteed upfront payment INR 42,000 crores which his client had committed very much continued and that INR 2,500 crores which formed part of this figure was allowed by the Committee of Creditors while negotiating with his client for very good reason.

17. Shri Neeraj Kishan Kaul, learned senior counsel also appearing on behalf of ArcelorMittal, stressed the fact that the importance of the insolvency resolution process is that not only is the corporate debtor to be put back on its feet, but that the resolution applicant whose plan is accepted must be able to start on a fresh slate. This being the case, obviously Shri Rohatgi’s argument, that the personal guarantees of the erstwhile promoters do not stand extinguished and that, at the very least, the right of subrogation cannot be taken away, would boomerang upon the successful resolution applicant if such right of subrogation were to be allowed to continue. Shri Salman Khurshid and Shri P. Tripathi, learned senior advocates appearing on behalf of Deutsche Bank, stressed that it was important to recognise separate classes of creditors and reiterated the arguments made on behalf of a number of their forbears as to how it is important to make a sub-classification among financial creditors, as also among

operational creditors, so that there may be real equality, that is, equality among equals. Shri Vikas Mehta, learned advocate appearing on behalf of GAIL, adverted to paragraph 84 of the impugned NCLAT judgment and argued that the facts qua his client were wrongly stated inasmuch as the admitted claim figures are wrongly stated.

18. Mrs. Madhavi Divan, learned Additional Solicitor General of India, replied to the arguments of Standard Chartered Bank and the operational creditors as to the constitutional invalidity of Sections 4 and 6 of the Amending Act, 2019. She argued that the amendments further the objects sought to be achieved by the Code, which is maximisation of value of the assets of the corporate debtor in a time-bound frame. She pithily stated that the value of assets and the passage of time within which insolvency resolution takes place are in inverse proportion as the passage of time erodes the value of these assets. She pointed out the previous experiments that had failed and adverted to certain judgments to show that the failure of previous acts such as The Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as “SICA”) and the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as “Recovery of Debts Act”) were due to enormous delays in disposal of

cases. It is this loophole that was sought to be plugged in accordance with the original conception for the framework of the Insolvency Code that is to be found in the BLRC Report of 2015. She also referred to Regulation 39-C of the 2016 Regulations and 32(e) and (f) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (hereinafter referred to as "Liquidation Process Regulations") together with Regulation 32-A(4) of Liquidation Process Regulations, to state that a longer period than was originally given by Section 12 of the Code is now given so that, taking into account court proceedings, there must now be an outer limit within which either resolution takes place or the company goes into liquidation. The Regulations pointed out also show that even if the corporate debtor goes into liquidation, 90 days is given to sell the undertaking of the corporate debtor as a going concern so that 90 days over and above 330 days are also available to dispose of the corporate debtor as a going concern. So far as the challenge to Section 6 of the Amending Act of 2019 is concerned, she argued that there is a symbiotic relationship between a resolution applicant and the Committee of Creditors, who alone are to take a commercial decision by the requisite majority whether or not to put the corporate debtor back on its feet. The reason for Explanation 1 to Section 30(2)(b) is that, what is fair and equitable must be determined within the framework of the

Code, which is the commercial wisdom of the Committee of Creditors, subject to certain minimum guidelines to be observed. Thus, operational creditors who were originally to be paid only a minimum calculated on the basis of what they would be paid in the event of liquidation of a corporate debtor, are now to be paid the higher of two amounts, thereby raising the threshold of what is to be paid by a resolution applicant by way of a minimum to operational creditors, being enhanced under the amended provision. Further, even dissentient financial creditors are now to be paid a minimum guaranteed amount for the first time, as 66% of the financial creditors may give a certain class of financial creditors 'nil' recovery, in which case this provision now comes to their rescue stating that they shall not be given anything less than the amount to be paid to such creditors in accordance with Section 53(1) of the Code. She also argued that it is important to realise that the mention made of Section 53 in Section 6 of the Amending Act of 2019 is not in order that the priorities as to liquidation be apportioned among creditors, but only in order that a minimum amount be calculated so as to see that operational creditors and dissentient financial creditors get something more than what they would have got pre-amendment. So far as the Explanation 2 of the substituted Section 30(2)(b) is concerned, she relied upon this Court's judgment in **ArcelorMittal India** (supra) and

Swiss Ribbons (supra), for the proposition that there is no vested right in a resolution applicant to have its plan accepted. This being the case, and an appeal being a continuation of the proceedings, there is nothing wrong with applying the amended law in the three cases that have been mentioned by Explanation 2. So far as the addition to Section 30(4) by the Amending Act of 2019 is concerned, the idea was to get over the judgment of the Appellate Tribunal in this very case stating that sub-classification among different classes of creditors may be done by the Committee of Creditors also on the basis of the value of the security interest of a secured creditor. She also read in copious detail, the Rajya Sabha Debate held on 29.07.2019 in which the Hon'ble Minister piloted this amendment. According to her, the Federation of Indian Chambers of Commerce and Industry (hereinafter referred to as "FICCI") gave a representation dated 17.07.2019 to the Secretary, Ministry of Corporate Affairs pointing out the flawed judgment of the NCLAT in this very case and asking the Government to swiftly amend the Code so as to reinstate the law as it originally stood, to which the Government and Parliament responded by enacting the Amending Act of 2019.

19. Shri Tushar Mehta, learned Solicitor General of India, has supplemented the submissions of the learned Additional Solicitor General by written arguments. He has argued that it is well settled that the legislature can always take away the basis of a judicial decision without directly interfering with the judgment of the Court, and has cited several decisions to buttress this point. He also argued that Shri Sibal's assault on the constitutional validity of Sections 4 and 6 of the Amending Act of 2019 on the ground that the Amendment was tailor-made to do away with the judgment in this very matter, so that his client may walk away without anything, is answered by the well settled principle that an Act of the legislature cannot be attacked on the ground of improper or bad motive, and cited certain judgments of this Court in support of the same.

Role of the resolution professional

20. The role of the resolution professional in the revival of the corporate debtor is stated in detail in several Sections of the Code read with the 2016 Regulations.

21. The ball starts rolling with the Adjudicating Authority, after admitting an application under either Sections 7, 9 or 10, ordering that a public announcement of the initiation of the CIRP together with calling for the submission of claims under Section 15 shall be made –

see Section 13(1)(b) of the Code. For this purpose, the Adjudicating Authority appoints an interim resolution professional in the manner laid down in Section 16 – see Section 13(1)(c) of the Code. In the public announcement of the CIRP, under Section 15(1), information as to the last date for submission of claims, as may be specified, is to be given; details of the interim resolution professional, who shall be vested with the management of the corporate debtor and be responsible for receiving claims, shall also be given, and the date on which the CIRP shall close is also to be given – see Section 15(1)(c), (d) and (f) of the Code. Under Section 17 of the Code, the management of the affairs of the corporate debtor shall vest in the interim resolution professional, the Board of Directors of the corporate debtor standing suspended by law. Among the important duties of the interim resolution professional is the receiving and collating of all claims submitted by creditors and the constitution of a Committee of Creditors – see Section 18(1)(b) and (c) of the Code. Under Section 20 of the Code, the interim resolution professional is to make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern.

22. At the first meeting of the Committee of Creditors, which shall be held within 7 days of its constitution, the Committee, by majority vote of not less than 66% of the voting share of financial creditors, must immediately resolve to appoint the interim resolution professional as a resolution professional, or to replace the interim resolution professional by another resolution professional – see Section 22(1) and (2) of the Code. Under Section 23(1), the resolution professional shall conduct the entire CIRP and manage the operations of the corporate debtor during the same. Importantly, all meetings of the Committee of Creditors are to be conducted by the resolution professional, who shall give notice of such meetings to the members of the Committee of Creditors, the members of the suspended board of directors, and operational creditors, provided the amount of their aggregate dues is not less than 10% of the entire debt owed. Like the duties of the interim resolution professional under Section 18 of the Code, it shall be the duty of the resolution professional to preserve and protect assets of the corporate debtor including the continued business operations of the corporate debtor – see Section 25(1) of the Code. For this purpose, he is to maintain an updated list of claims; convene and attend all meetings of the Committee of Creditors; prepare the information memorandum in accordance with Section 29 of the Code; invite prospective resolution

applicants; and present all resolution plans at the meetings of the Committee of Creditors – see Section 25(2)(e) to (i) of the Code. Under Section 29(1) of the Code, the resolution professional shall prepare an information memorandum containing all relevant information, as may be specified, so that a resolution plan may then be formulated by a prospective resolution applicant. Under Section 30 of the Code, the resolution applicant must then submit a resolution plan to the resolution professional, prepared on the basis of the information memorandum. After this, the resolution professional must present to the Committee of Creditors, for its approval, such resolution plans which conform to the conditions referred to in Section 30(2) of the Code – see Section 30(3) of the Code. If the resolution plan is approved by the requisite majority of the Committee of Creditors, it is then the duty of the resolution professional to submit the resolution plan as approved by the Committee of Creditors to the Adjudicating Authority – see Section 30(6) of the Code.

23. The aforesaid provisions of the Code are then fleshed out in the 2016 Regulations. Under Chapter IV of the aforesaid Regulations, claims by operational creditors, financial creditors, other creditors, workmen and employees are to be submitted to the resolution professional along with proofs thereof – see Regulations 7 to 12.

Thereafter, under Regulation 13, the resolution professional shall verify each claim as on the insolvency commencement date, and thereupon maintain a list of creditors containing the names of creditors along with the amounts claimed by them, the amounts admitted by him, and the security interest, if any, in respect of such claims, and constantly update the aforesaid list – see Regulation 13(1).

24. Chapter X of the Regulations then deals with resolution plans that are submitted. Under Regulation 35, "fair value" as defined by Regulation 2(hb)[1] and "liquidation value" as defined by Regulation 2(k)[2] shall be determined by two registered valuers appointed under Regulation 27, which shall be handed over the resolution professional.

25. After receipt of the resolution plans in accordance with the Code and the Regulations, the resolution professional shall then provide the fair value and liquidation value to every member of the Committee of Creditors – see Regulation 35(2). Regulation 36 is

1 Under Regulation 2(hb), Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 - "fair value" means the estimated realizable value of the assets of the corporate debtor, if they were to be exchanged on the insolvency commencement date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had acted knowledgeably, prudently and without compulsion

2 *Id.* Under Regulation 2(k) - "liquidation value" means the estimated realizable value of the assets of the corporate debtor, if the corporate debtor were to be liquidated on the insolvency commencement date.

important as it forms the basis for the submission of a resolution plan.

The information memorandum, spoken of by this regulation, must contain the following:

> “(a) assets and liabilities with such description, as on the insolvency commencement date, as are generally necessary for ascertaining their values.
>
> Explanation: “Description” includes the details such as date of acquisition, cost of acquisition, remaining useful life, identification number, depreciation charged, book value, and any other relevant details.
>
> (b) the latest annual financial statements;
>
> (c) audited financial statements of the corporate debtor for the last two financial years and provisional financial statements for the current financial year made up to a date not earlier than fourteen days from the date of the application;
>
> (d) a list of creditors containing the names of creditors, the amounts claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims;
>
> (e) particulars of a debt due from or to the corporate debtor with respect to related parties;
>
> (f) details of guarantees that have been given in relation to the debts of the corporate debtor by other persons, specifying which of the guarantors is a related party;
>
> (g) the names and addresses of the members or partners holding at least one per cent stake in the corporate debtor along with the size of stake;
>
> (h) details of all material litigation and an ongoing investigation or proceeding initiated by Government and statutory authorities;
>
> (i) the number of workers and employees and liabilities of the corporate debtor towards them;
>
> (j) ***

(k) ***

(l) other information, which the resolution professional deems relevant to the committee."

26. Under Regulation 36-A, the resolution professional shall then publish brief particulars of the invitation for expression of interest in Form G of the Schedule. This document must also, *inter alia*, provide for such basic information about the corporate debtor as may be required by a prospective resolution applicant for its expression of interest – see Regulation 36-A (4)(c). The resolution professional, once he receives a proposed resolution plan, must then conduct due diligence based on the material on record, in order that the prospective resolution applicant complies with Section 25(2)(h) of the Code (which, *inter alia*, requires prospective resolution applicants to fulfil such criteria as may be laid down, having regard to the complexity and scale of operations of the business of the corporate debtor); the provisions of Section 29-A; and other requirements as may be specified in the invitation for expression of interest – see Regulation 36-A(8). Once this is done, the resolution professional shall issue a provisional list of eligible prospective resolution applicants to the Committee of Creditors, and after considering any objection to their inclusion or exclusion, shall then issue the final list of prospective resolution applicants to the Committee of Creditors – see Regulation 36-A (10) to (12). Under Regulation 36-B, the

resolution professional shall issue the information memorandum, evaluation matrix, as defined by Regulation 2(h)(a)[3], and a request for resolution plan within the time stated. Importantly, the resolution professional shall endeavour to submit the resolution plan approved by the Committee of Creditors to the Adjudicating Authority, at least 15 days before the maximum period for completion of CIRP, along with a compliance certificate in Form H of the Schedule.

27. The detailed provisions that have been stated hereinabove make it clear that the resolution professional is a person who is not only to manage the affairs of the corporate debtor as a going concern from the stage of admission of an application under Sections 7, 9 or 10 of the Code till a resolution plan is approved by the Adjudicating Authority, but is also a key person who is to appoint and convene meetings of the Committee of Creditors, so that they may decide upon resolution plans that are submitted in accordance with the detailed information given to resolution applicants by the resolution professional. Another very important function of the resolution professional is to collect, collate and finally admit claims of all creditors, which must then be examined for payment, in full or in part or not at all, by the resolution applicant and be finally negotiated and

3 Under Regulation 2(ha), Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 – (ha) - “evaluation matrix” means such parameters to be applied and the manner of applying such parameters, as approved by the committee, for consideration of resolution plans for its approval

decided by the Committee of Creditors. In fact, in **ArcelorMital India** (supra), this Court referred to the role of the resolution professional under the Code and the aforesaid Regulations, making it clear that the said role is not adjudicatory but administrative, in the following terms:

> "**80.** However, it must not be forgotten that a Resolution Professional is only to "examine" and "confirm" that each resolution plan conforms to what is provided by Section 30(2). Under Section 25(2)(*i*), the Resolution Professional shall undertake to present all resolution plans at the meetings of the Committee of Creditors. This is followed by Section 30(3), which states that the Resolution Professional shall present to the Committee of Creditors, for its approval, such resolution plans which confirm the conditions referred to in sub-section (2). This provision has to be read in conjunction with Section 25(2)(*i*), and with the second proviso to Section 30(4), which provides that where a resolution applicant is found to be ineligible under Section 29-A(*c*), the resolution applicant shall be allowed by the Committee of Creditors such period, not exceeding 30 days, to make payment of overdue amounts in accordance with the proviso to Section 29-A(*c*). A conspectus of all these provisions would show that the Resolution Professional is required to examine that the resolution plan submitted by various applicants is complete in all respects, before submitting it to the Committee of Creditors. The Resolution Professional is not required to take any decision, but merely to ensure that the resolution plans submitted are complete in all respects before they are placed before the Committee of Creditors, who may or may not approve it. The fact that the Resolution Professional is also to confirm that a resolution plan does not contravene any of the provisions of law for the time being in force, including Section 29-A of the Code, only means that his prima facie opinion is to be given to the Committee of Creditors that a law has or has not been contravened. Section 30(2)(*e*) does not empower the Resolution Professional to "*decide*" whether the resolution

plan does or does not contravene the provisions of law. Regulation 36-A of the CIRP Regulations specifically provides as follows:

"**36-A. (8)** The resolution professional shall conduct due diligence based on the material on record in order to satisfy that the prospective resolution applicant complies with—

(*a*) the provisions of clause (*h*) of sub-section (2) of Section 25;

(*b*) the applicable provisions of Section 29-A, and

(*c*) other requirements, as specified in the invitation for expression of interest.

(9) The resolution professional may seek any clarification or additional information or document from the prospective resolution applicant for conducting due diligence under sub-regulation (8).

(10) The resolution professional shall issue a provisional list of eligible prospective resolution applicants within ten days of the last date for submission of expression of interest to the committee and to all prospective resolution applicants who submitted the expression of interest.

(11) Any objection to inclusion or exclusion of a prospective resolution applicant in the provisional list referred to in sub-regulation (10) may be made with supporting documents within five days from the date of issue of the provisional list.

(12) On considering the objections received under sub-regulation (11), the resolution professional shall issue the final list of prospective resolution applicants within ten days of the last date for receipt of objections, to the committee."

81. Thus, the importance of the Resolution Professional is to ensure that a resolution plan is complete in all respects, and to conduct a due diligence in order to report to the Committee of Creditors whether or not it is in order. Even though it is not necessary for the Resolution Professional to give reasons while submitting a resolution plan to the Committee of Creditors, it would be in the fitness of things if he appends the due diligence report carried out by him with respect to each of the resolution plans under consideration, and to state briefly as to why it does or does not conform to the law."

Role of the prospective resolution applicant

28. The UNCITRAL Legislative Guide discusses what ought to be the contents of a resolution plan in an Insolvency Code in the following terms:

> "**4.** The plan
>
> xxx xxx xxx
>
> **18.** The question of what is to be included in the plan is closely related to the procedure for approval of the plan, that is, which creditors are required to approve the plan and the level of support required for approval, the effect of the plan once approved, that is, will it bind dissenting creditors and secured creditors and who will be responsible for implementation of the plan and for ongoing management of the debtor, and whether or not there is a requirement for court confirmation. Many insolvency laws include provisions addressing the content of the reorganization plan. Some laws address the content of the plan by reference to general criteria, such as requirements that the reorganization plan should adequately and clearly disclose to all parties information regarding both the financial condition of the debtor and the transformation of legal rights that is being proposed in the plan, or by reference to minimal requirements, such as that the plan must make provision for payment of certain preferred claims. It should be noted that a plan need not modify or otherwise affect the rights of every class of creditor.
>
> **19.** Other laws set out more specific requirements as to what information is required in relation to the debtor's financial situation and the proposals that can be included in a plan. Information on the financial situation of the debtor could include asset and liability statements; cash flow statements; and information relating to the causes or reasons for the financial situation of the debtor. Information relating to what is proposed by the plan could include, depending upon the objective of the plan and the circumstances of a particular debtor, details of classes of

claims; claims modified or affected under the plan and the treatment to be accorded to each class under the plan; the continuation or rejection of contracts that are not fully executed; the treatment of unexpired leases; measures and arrangements for dealing with the debtor's assets (e.g. transfer, liquidation or retention); the sale or other treatment of encumbered assets; the disclosure and acceptance procedure; the rights of disputed claims to take part in the voting and provisions for disputed claims to be resolved; arrangements concerning personnel of the debtor; remuneration of management of the debtor; financing implementation of the plan; extension of the maturity date or a change in the interest rate or other term of outstanding security interests; the role to be played by the debtor in implementation of the plan and identification of those to be responsible for future management of the debtor's business; the settlement of claims and how the amount that creditors will receive will be more than they would have received in liquidation; payment of interest on claims; distribution of all or any part of the assets of the estate among those having an interest in those assets; possible changes to the instrument or organic document constituting the debtor (e.g. changes to by-laws or articles of association) or the capital structure of the debtor or merger or consolidation of the debtor with one or more persons; the basis upon which the business will be able to keep trading and can be successfully reorganized; supervision of the implementation of the plan; and the period of implementation of the plan, including in some cases a statutory maximum period.

20. Rather than specifying a wide range of detailed information to be included in a plan, it may be desirable for the insolvency law to identify the minimum content of a plan, focusing upon the key objectives of the plan and procedures for implementation. For example, the insolvency law may require the plan to detail the classes of creditors and the treatment each is to be accorded in the plan; the terms and conditions of the plan (such as treatment of contracts and the ongoing role of the debtor); and what is required for implementation of the plan (such

> as sale of assets or parts of the business, extension of maturity dates, changes to capital structure of the business and supervision of implementation).”

29. Under the Code, the prospective resolution applicant has a right to receive complete information as to the corporate debtor, debts owed by it, and its activities as a going concern, prior to the admission of an application under section 7, 9 or 10 of the Code. For this purpose, it has a right to receive information contained in the information memorandum as well as the evaluation matrix mentioned in Regulation 36-B. Once it evinces an expression of interest, what follows is laid down in Regulation 36-A(7) which reads as follows:

> “36-A. **Invitation for Expression of Interest**
>
> xxx xxx xxx
>
> (7) An expression of interest shall be unconditional and be accompanied by-
>
> (a) an undertaking by the prospective resolution applicant that it meets the criteria specified by the committee under clause (h) of sub-section (2) of section 25;
>
> (b) relevant records in evidence of meeting the criteria under clause (a);
>
> (c) an undertaking by the prospective resolution applicant that it does not suffer from any ineligibility under section 29A to the extent applicable;
>
> (d) relevant information and records to enable an assessment of ineligibility under clause (c);
>
> (e) an undertaking by the prospective resolution applicant that it shall intimate the resolution professional forthwith if it becomes ineligible at any time during the corporate insolvency resolution process;

> (f) an undertaking by the prospective resolution applicant that every information and records provided in expression of interest is true and correct and discovery of any false information or record at any time will render the applicant ineligible to submit resolution plan, forfeit any refundable deposit, and attract penal action under the Code; and
>
> (g) an undertaking by the prospective resolution applicant to the effect that it shall maintain confidentiality of the information and shall not use such information to cause an undue gain or undue loss to itself or any other person and comply with the requirements under sub-section (2) of section 29"

Thereafter, the resolution plan submitted by the prospective resolution applicant must provide for measures as may be necessary for the insolvency resolution of the corporate debtor for maximisation of the value of its assets, which may include transfer or sale of assets or part thereof, whether subject to security interests or not. The plan may provide for either satisfaction or modification of any security interest of a secured creditor and may also provide for reduction in the amount payable to different classes of creditors – see Regulation 37.

30. Accordingly, Regulation 38 then deals with the mandatory contents of a resolution plan, making it clear that such plan must contain a provision that the amount due to operational creditors shall be given priority in payment over financial creditors – see Regulation 38(1). Such plan must also include provisions as to how to deal with the interests of all stakeholders including financial creditors and

operational creditors of the corporate debtor – Regulation 38 (1A). It must then provide for the term of the plan, management and control of the business of the corporate debtor during such term, and its implementation. It must also demonstrate that it is feasible and viable, and that the resolution applicant has the capability to implement the said plan. Regulation 38, being important, is set out hereinbelow:

> "**38. Mandatory contents of the resolution plan**
>
> (1) The amount due to the operational creditors under a resolution plan shall be given priority in payment over financial creditors.
>
> (1A) A resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors, of the corporate debtor.
>
> (2) A resolution plan shall provide:
>
> (a) the term of the plan and its implementation schedule;
>
> (b) the management and control of the business of the corporate debtor during its term; and
>
> (c) adequate means for supervising its implementation.
>
> (3) A resolution plan shall demonstrate that –
>
> (a) it addresses the cause of default;
>
> (b) it is feasible and viable;
>
> (c) it has provisions for its effective implementation;
>
> (d) it has provisions for approvals required and the timeline for the same; and
>
> (e) the resolution applicant has the capability to implement the resolution plan."

Role of the committee of creditors in the corporate resolution process

31. 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. Thus, Section 21(2) of the Code mandates that the Committee of Creditors shall comprise all financial creditors of the corporate debtor. “Financial creditors” are defined in Section 5(7) of the Code as meaning persons to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred. “Financial debt” is then defined in Section 5(8) of the Code as meaning a debt along with interest, if any, which is disbursed against the consideration for the time value of money. “Secured creditor” is separately defined in Section 3(30) of the Code as meaning a creditor in favour of whom a security interest is created and “security interest” is defined by Section 3(31) as follows:

> “3. **Definitions**. – In this Code, unless the context otherwise requires. –
>
> xxx xxx xxx
>
> (31) "security interest" means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment

> or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person:
>
> Provided that security interest shall not include a performance guarantee;"

32. It is settled by several judgments of this Court that in order to trigger application of the Code, a neat division has been made between financial creditors and operational creditors. It has also been noticed in some of our judgments that most financial creditors are secured creditors and most operational creditors are unsecured creditors. The rationale for only financial creditors handling the affairs of the corporate debtor and resolving them is for reasons that have been deliberated upon by the BLRC Report of 2015, which formed the basis for the enactment of the Insolvency Code.

33. At this juncture, it is important to set out the relevant extracts from the aforementioned report:

> "2. **Executive Summary**
>
> xxx xxx xxx
>
> **The key economic question in the bankruptcy process**
>
> xxx xxx xxx
>
> <u>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</u>. 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.

xxx xxx xxx

5. **Process for legal entities**

xxx xxx xxx

Business decisions by a creditor committee

All decisions on matters of business will be taken by a committee of the financial creditors. This includes evaluating proposals to keep the entity as a going concern, including decisions about the sale of business or units, retiring or restructuring debt. The debtor will be a non-voting member on the creditors committee, and will be invited to all meetings. The voting of the creditors committee will be by majority, where the majority requires more than 75 percent of the vote by weight.

xxx xxx xxx

No prescriptions on solutions to resolve the insolvency

The choice of the solution to keep the entity as a going concern will be voted on by the creditors committee. There are no constraints on the proposals that the Resolution Professional can present to the creditors committee. Other than the majority vote of the creditors committee, the Resolution Professional needs to confirm to the Adjudicator that the final solution complies with three additional requirements. The first is that the solution must explicitly require the repayment of any interim finance and costs of the insolvency resolution process will be paid in priority to other payments. Secondly, the plan must explicitly include payment to all creditors not on the creditors committee, within a reasonable period after the solution is implemented. Lastly, the plan should comply with existing laws governing the actions of the entity while implementing the solutions.

xxx xxx xxx

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 percent 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 creditors committee, 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.

5.3.3 **Obtaining the resolution to insolvency in the IRP**

The Committee is of the opinion that there should be freedom permitted to the overall market to propose solutions on keeping the entity as a going concern. Since the manner and the type of possible solutions are specific to the time and environment in which the insolvency becomes visible, it is expected to evolve over time, and with the development of the market. The Code will be open to all forms of solutions for keeping the entity going without prejudice, within the rest of the constraints of the IRP. Therefore, how the insolvency is to be resolved will not be prescribed in the Code. There will be no restriction in the Code on possible ways in which the business model of the entity, or its financial model, or both, can be changed so as to keep the entity as a going concern. The Code will not state that the entity is to be revived, or the debt is to be restructured, or the entity is to be liquidated. This decision will come from the deliberations of the creditors committee in response to the solutions proposed by the market."

(emphasis supplied)

34. The aforesaid extracts follow what is stated in the UNCITRAL Legislative Guide which prescribes as follows:

> “**2.** Nature or form of a plan
>
> **3.** The purpose of reorganization is to maximize the possible eventual return to creditors, providing a better result than if the debtor were to be liquidated and to preserve viable businesses as a means of preserving jobs for employees and trade for suppliers. With different constituents involved in reorganization proceedings, each may have different views of how the various objectives can best be achieved. Some creditors, such as major customers or suppliers, may prefer continued business with the debtor to rapid repayment of their debt. Some creditors may favour taking an equity stake in the business, while others will not. Typically, therefore, there is a range of options from which to select in a given case**. <u>If an insolvency law adopts a prescriptive approach to the range of options available or to the choice to be made in a particular case, it is likely to be too constrictive</u>**. It is desirable that the law not restrict reorganization plans to those designed only to fully rehabilitate the debtor; prohibit debt from being written off; restrict the amount that must eventually be paid to creditors by specifying a minimum percentage; or prohibit exchange of debt for equity**. <u>A non-intrusive approach that does not prescribe such limitations is likely to provide sufficient flexibility to allow the most suitable of a range of possibilities to be chosen for a particular debtor</u>.**
>
> xxx xxx xxx
>
> **20. <u>Rather than specifying a wide range of detailed information to be included in a plan, it may be desirable for the insolvency law to identify the minimum content of a plan, focusing upon the key objectives of the plan and procedures for implementation</u>**. For example, the insolvency law may require the plan to detail the classes of creditors and the treatment each is to be accorded in the plan; the terms and conditions of the plan (such as treatment of contracts and the ongoing role of the debtor); and what is required for

> implementation of the plan (such as sale of assets or parts of the business, extension of maturity dates, changes to capital structure of the business and supervision of implementation)."
>
> (emphasis supplied)

35. Section 24 of the Code deals with meetings of the Committee of Creditors. Though voting on the approval of a resolution plan is only with the financial creditors who form the Committee of Creditors, yet the resolution professional is to conduct the aforesaid meeting at which members of the suspended board of directors may be present, together with one representative of operational creditors, provided that the aggregate dues owed to all operational creditors is not less than 10% of the entire debt owed – see Sections 24(2),(3) and (4) of the Code. Voting shall be in accordance with the voting share assigned to each financial creditor, which is based on the financial debts owed to such creditors – see Section 24(6) of the Code.

36. 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 corporate debtor without the prior approval of at least 66% of the votes of the Committee of Creditors. Section 28 of the Code is important and is set out hereinbelow:

“28. **Approval of committee of creditors for certain actions**

(1) Notwithstanding anything contained in any other law for the time being in force, the resolution professional, during the corporate insolvency resolution process, shall not take any of the following actions without the prior approval of the committee of creditors namely:—

(a) raise any interim finance in excess of the amount as may be decided by the committee of creditors in their meeting;

(b) create any security interest over the assets of the corporate debtor;

(c) change the capital structure of the corporate debtor, including by way of issuance of additional securities, creating a new class of securities or buying back or redemption of issued securities in case the corporate debtor is a company;

(d) record any change in the ownership interest of the corporate debtor;

(e) give instructions to financial institutions maintaining accounts of the corporate debtor for a debit transaction from any such accounts in excess of the amount as may be decided by the committee of creditors in their meeting;

(f) undertake any related party transaction;

(g) amend any constitutional documents of the corporate debtor;

(h) delegate its authority to any other person;

(i) dispose of or permit the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties;

(j) make any change in the management of the corporate debtor or its subsidiary;

(k) transfer rights or financial debts or operational debts under material contracts otherwise than in the ordinary course of business;

(l) make changes in the appointment or terms of contract of such personnel as specified by the committee of creditors; or

(m) make changes in the appointment or terms of contract of statutory auditors or internal auditors of the corporate debtor

(2) The resolution professional shall convene a meeting of the committee of creditors and seek the vote of the creditors prior to taking any of the actions under sub-section (1).

(3) No action under sub-section (1) shall be approved by the committee of creditors unless approved by a vote of sixty-six per cent of the voting shares.

(4) Where any action under sub-section (1) is taken by the resolution professional without seeking the approval of the committee of creditors in the manner as required in this section, such action shall be void.

(5) The committee of creditors may report the actions of the resolution professional under sub-section (4) to the Board for taking necessary actions against him under this Code."

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.

37. Regulation 18 to 26 of the 2016 Regulations deal with meetings to be conducted by the Committee of Creditors. The quorum at the meeting is fixed by Regulation 22, and the conduct of the meeting is to take place as under Regulation 24. Voting takes place under Regulation 25 and 26. Most importantly, Regulation 39(3) states:

> "39. **Approval of resolution plan**
>
> xxx xxx xxx
>
> (3) The committee shall evaluate the resolution plans received under sub-regulation (1) strictly as per the evaluation matrix to identify the best resolution plan and may approve it with such modifications as it deems fit
>
> Provided that the committee may approve any resolution plan with such modifications as it deems fit."

38. This Regulation fleshes out Section 30(4) of the Code, making it clear that ultimately it is the commercial wisdom of the Committee of Creditors which operates to approve what is deemed by a majority of such creditors to be the best resolution plan, which is finally accepted after negotiation of its terms by such Committee with prospective resolution applicants.

39. In **K. Sashidhar** (supra), the role of the Committee of Creditors in the corporate resolution process was laid down by this Court thus:

> "**20.** The CoC is constituted as per Section 21 of the I&B Code, which consists of financial creditors. The term

‘financial creditor’ has been defined in Section 5(7) of the I&B Code to mean any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to. Be it noted that the process of insolvency resolution and liquidation concerning corporate debtors has been codified in Part II of the I&B Code, comprising of seven Chapters. Chapter I predicates that Part II shall apply in matters relating to the insolvency and liquidation of corporate debtor where the minimum amount of default is Rs. 1,00,000/-. Section 5 in Chapter I is a dictionary clause specific to Part II of the Code. Chapter II deals with the gamut of procedure to be followed for the corporate insolvency resolution process. For dealing with the issue on hand, the provisions contained in Chapter II will be significant. From the scheme of the provisions, it is clear that the provisions in Part II of the Code are self-contained code, providing for the procedure for consideration of the resolution plan by the CoC.

21. The stage at which the dispute concerning the respective corporate debtors (KS&PIPL and IIL) had reached the adjudicating authority (NCLT) is ascribable to Section 30(4) of the I&B Code, which, at the relevant time in October 2017, read thus:

> “**30(4)-** The committee of creditors may approve a resolution plan by a vote of not less than seventy five per cent of voting share of the financial creditors.”

22. If the CoC had approved the resolution plan by requisite percent of voting share, then as per Section 30(6) of the I&B Code, it is imperative for the resolution professional to submit the same to the adjudicating authority (NCLT). On receipt of such a proposal, the adjudicating authority (NCLT) is required to satisfy itself that the resolution plan as approved by CoC meets the requirements specified in Section 30(2). No more and no less. This is explicitly spelt out in Section 31 of the I&B Code, which read thus (as in October 2017):

“**31. Approval of resolution plan.**-(1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section(2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan.

(2) Where the Adjudicating Authority is satisfied that the resolution plan does not confirm to the requirements referred to in sub-section (1), it may, by an order, reject the resolution plan.

(3) After the order of approval under sub-section (1),-

(a) the moratorium order passed by the Adjudicating Authority under section 14 shall cease to have effect; and

(b) the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its database.”

xxx xxx xxx

39. 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 the CoC muchless 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 Sick Industrial Companies Act, 1985 or under other such enactments which has now been forsaken. 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 nonjusticiable."

40. The importance of the majority decision of the Committee of Creditors is then stated in Section 31(1) of the Code which is set out as follows:

> "31. **Approval of resolution plan**
>
> (1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan."

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.

Jurisdiction of the Adjudicating Authority and the Appellate Tribunal

41. As has already been seen hereinabove, it is the Adjudicating Authority which first admits an application by a financial or operational creditor, or by the corporate debtor itself under Section 7, 9 and 10 of the Code. Once this is done, within the parameters fixed by the Code, and as expounded upon by our judgments in **Innoventive Industries Ltd. v. ICICI Bank**, (2018) 1 SCC 407 and **Macquarie Bank Ltd v. Shilpi Cable Technologies Ltd.** (2018) 2 SCC 674, the Adjudicating Authority then appoints an interim resolution professional who takes administrative decisions as to the day to day running of the corporate debtor; collation of claims and their admissions; and the calling for resolution plans in the manner stated above. After a resolution plan is approved by the requisite majority of the Committee of Creditors, the aforesaid plan must then pass muster of the Adjudicating Authority under Section 31(1) of the Code. The Adjudicating Authority's jurisdiction is circumscribed by Section 30(2) of the Code. In this context, the decision of this court in **K. Sashidhar** (supra) is of great relevance.

42. In **K. Sashidhar** (supra) this Court was called upon to decide upon the scope of judicial review by the Adjudicating Authority. This Court set out the questions to be determined as follows:

> "**18.** Having heard learned counsel for the parties, the moot question is about the sequel of the approval of the

> resolution plan by the CoC of the respective corporate debtor, namely KS&PIPL and IIL, by a vote of less than seventy five percent of voting share of the financial creditors; and about the correctness of the view taken by the NCLAT that the percentage of voting share of the financial creditors specified in Section 30(4) of the I&B Code is mandatory. Further, is it open to the adjudicating authority/appellate authority to reckon any other factor (other than specified in Sections 30(2) or 61(3) of the I&B Code as the case may be) which, according to the resolution applicant and the stakeholders supporting the resolution plan, may be relevant?
>
> xxx xxx xxx
>
> **25.** The Court, however, was not called upon to deal with the specific issue that is being considered in the present cases namely, the scope of judicial review by the adjudicatory authority in relation to the opinion expressed by the CoC on the proposal for approval of the resolution plan."

After adverting to the 2016 Regulations, the Court set out the jurisdiction of the Adjudicating Authority as well as the Appellate Tribunal as follows:

> "**42.** Whereas, the discretion of the adjudicating authority (NCLT) is circumscribed by Section 31 limited to scrutiny of the resolution plan "as approved" by the requisite percent of voting share of financial creditors. Even in that enquiry, the grounds on which the adjudicating authority can reject the resolution plan is in reference to matters specified in Section 30(2), when the resolution plan does not conform to the stated requirements. Reverting to Section 30(2), the enquiry to be done is in respect of whether the resolution plan provides: (i) the payment of insolvency resolution process costs in a specified manner in priority to the repayment of other debts of the corporate debtor, (ii) the repayment of the debts of operational creditors in

prescribed manner, (iii) the management of the affairs of the corporate debtor, (iv) the implementation and supervision of the resolution plan, (v) does not contravene any of the provisions of the law for the time being in force, (vi) conforms to such other requirements as may be specified by the Board. The Board referred to is established under Section 188 of the I&B Code. The powers and functions of the Board have been delineated in Section 196 of the I&B Code. None of the specified functions of the Board, directly or indirectly, pertain to regulating the manner in which the financial creditors ought to or ought not to exercise their commercial wisdom during the voting on the resolution plan under Section 30(4) of the I&B Code. The subjective satisfaction of the financial creditors at the time of voting is bound to be a mixed baggage of variety of factors. To wit, the feasibility and viability of the proposed resolution plan and including their perceptions about the general capability of the resolution applicant to translate the projected plan into a reality. The resolution applicant may have given projections backed by normative data but still in the opinion of the dissenting financial creditors, it would not be free from being speculative. These aspects are completely within the domain of the financial creditors who are called upon to vote on the resolution plan under Section 30(4) of the I&B Code.

43. For the same reason, even the jurisdiction of the NCLAT being in continuation of the proceedings would be circumscribed in that regard and more particularly on account of Section 32 of the I&B Code, which envisages that any appeal from an order approving the resolution plan shall be in the manner and on the grounds specified in Section 61(3) of the I&B Code. Section 61(3) of the I&B Code reads thus:

> "61. Appeals and Appellate Authority.-(1) Notwithstanding anything to the contrary contained under the Companies Act, 2013 (18 of 2013), any person aggrieved by the order of the Adjudicating Authority under this part may

prefer an appeal to the National Company Law Appellate Tribunal.

(2) xxx xxx xxx

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

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

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

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

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

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

xxxxxxxxx."

44. On a bare reading of the provisions of the I&B Code, it would appear that the remedy of appeal under Section 61(1) is against an "order passed by the adjudicating authority (NCLT)" - which we will assume may also pertain to recording of the fact that the proposed resolution plan has been rejected or not approved by a vote of not less than 75% of voting share of the financial creditors. Indubitably, the remedy of appeal including the width of jurisdiction of the appellate authority and the grounds of appeal, is a creature of statute. The provisions investing jurisdiction and authority in the NCLT or NCLAT as noticed earlier, has not made the commercial decision exercised by the CoC of not approving the resolution plan or rejecting the same, justiciable. This position is reinforced from the limited grounds specified for instituting an appeal that too against an order "approving a resolution plan" under Section 31. First, that the approved resolution plan is in contravention of the provisions of any law for the time being in force. Second, there has been material irregularity in exercise of powers "by the resolution professional" during the corporate insolvency resolution period. Third, the debts owed to operational creditors have not been provided for in the resolution plan in the prescribed manner. Fourth, the insolvency resolution plan costs have not been provided for repayment in priority to all other debts. Fifth, the resolution plan does not comply with any other criteria specified by the Board. Significantly, the matters or grounds - be it under Section 30(2) or under Section 61(3) of the I&B Code - are regarding testing the validity of the "approved" resolution plan by the CoC; and not for approving the resolution plan which has been disapproved or deemed to have been rejected by the CoC in exercise of its business decision.

45. Indubitably, the inquiry in such an appeal would be limited to the power exercisable by the resolution professional under Section 30(2) of the I&B Code or, at best, by the adjudicating authority (NCLT) under Section 31(2) read with 31(1) of the I&B Code. No other inquiry would be permissible. <u>Further, the jurisdiction bestowed upon the appellate authority (NCLAT) is also expressly circumscribed. It can examine the challenge only in relation to the grounds specified in Section 61(3) of the I&B Code, which is limited to matters "other than" enquiry into the autonomy or commercial wisdom of the dissenting financial creditors. Thus, the prescribed authorities (NCLT/NCLAT) have been endowed with limited jurisdiction as specified in the I&B Code and not to act as a court of equity or exercise plenary powers</u>.

46. 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. The fact that substantial or majority percent of financial creditors have accorded approval to the resolution plan would be of no avail, unless the approval is by a vote of not less than 75% (after amendment of 2018 w.e.f. 06.06.2018, 66%) of voting share of the financial creditors. To put it differently, the action of liquidation process postulated in Chapter-III of the I&B Code, is avoidable, only if approval of the resolution plan is by a vote of not less than 75% (as in October, 2017) of voting share of the financial creditors. Conversely, the legislative intent is to uphold the opinion or hypothesis of the minority dissenting financial creditors. That must prevail, if it is not less than the specified percent (25% in October, 2017; and now after the amendment w.e.f. 06.06.2018, 44%). The inevitable outcome of voting by not less than requisite percent of voting share of financial creditors to disapprove the proposed resolution plan, de jure, entails in its deemed rejection.

xxx xxx xxx

49. The argument, though attractive at the first blush, but if accepted, would require us to re-write the provisions of the I&B Code. It would also result in doing violence to the legislative intent of having consciously not stipulated that as a ground - to challenge the commercial wisdom of the minority (dissenting) financial creditors. Concededly, the process of resolution plan is necessitated in respect of corporate debtors in whom their financial creditors have lost hope of recovery and who have turned into non-performer or a chronic defaulter. The fact that the concerned corporate debtor was still able to carry on its business activities does not obligate the financial creditors to postpone the recovery of the debt due or to prolong their losses indefinitely. Be that as it may, the scope of enquiry and the grounds on which the decision of "approval" of the resolution plan by the CoC can be interfered with by the adjudicating authority (NCLT), has been set out in Section 31(1) read with Section 30(2) and by the appellate tribunal (NCLAT) under Section 32 read with Section 61(3) of the

I&B Code. No corresponding provision has been envisaged by the legislature to empower the resolution professional, the adjudicating authority (NCLT) or for that matter the appellate authority (NCLAT), to reverse the "commercial decision" of the CoC muchless of the dissenting financial creditors for not supporting the proposed resolution plan. Whereas, from the legislative history there is contra indication that the commercial or business decisions of the financial creditors are not open to any judicial review by the adjudicating authority or the appellate authority.

51. Suffice it to observe that in the I&B Code and the regulations framed thereunder as applicable in October 2017, there was no need for the dissenting financial creditors to record reasons for disapproving or rejecting a resolution plan. Further, as aforementioned, there is no provision in the I&B Code which empowers the adjudicating authority (NCLT) to oversee the justness of the approach of the dissenting financial creditors in rejecting the proposed resolution plan or to engage in judicial review thereof. Concededly, the inquiry by the resolution professional precedes the consideration of the resolution plan by the CoC. 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. To take any other view would enable even the minority dissenting financial creditors to question the logic or justness of the commercial opinion expressed by the

> majority of the financial creditors albeit by requisite percent of voting share to approve the resolution plan; and in the process authorize the adjudicating authority to reject the approved resolution plan upon accepting such a challenge. That is not the scope of jurisdiction vested in the adjudicating authority under Section 31 of the I&B Code dealing with approval of the resolution plan."

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** (supra).

43. However, Shri Sibal exhorted us to hold that **K. Sashidhar** (supra) missed a very vital provision of the Code which is contained in Section 60(5) of the Code. Section 60(5) reads as follows:

> "60. **Adjudicating Authority for corporate persons**
>
> xxx xxx xxx
>
> (5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of—
>
> (a) any application or proceeding by or against the corporate debtor or corporate person;
>
> (b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and

> (c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.”

It will be noticed that the non-obstante clause of Section 60(5) speaks of <u>any other law</u> for the time being in force, which obviously cannot include the provisions of the Code itself. Secondly, Section 60(5)(c) is in the nature of a residuary jurisdiction vested in the NCLT so that the NCLT may decide all questions of law or fact arising out of or in relation to insolvency resolution or liquidation under the Code. Such residual jurisdiction does not in any manner impact Section 30(2) of the Code which circumscribes the jurisdiction of the Adjudicating Authority when it comes to the confirmation of a resolution plan, as has been mandated by Section 31(1) of the Code. A harmonious reading, therefore, of Section 31(1) and Section 60(5) of the Code would lead to the result that the residual jurisdiction of the NCLT under Section 60(5)(c) cannot, in any manner, whittle down Section 31(1) of the Code, by the investment of some discretionary or equity jurisdiction in the Adjudicating Authority outside Section 30(2) of the Code, when it comes to a resolution plan being adjudicated upon by the Adjudicating Authority. This argument also must needs be rejected.

44. The minimum value that is required to be paid to operational creditors under a resolution plan is set out under Section 30(2)(b) of the Code as being the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under Section 53. The Insolvency Committee constituted by the Government in 2018 was tasked with studying the major issues that arise in the working of the Code and to recommend changes, if any, required to be made to the Code. The Insolvency Committee Report, 2018 (hereinafter referred to as "The Committee Report, 2018"), *inter alia*, deliberated upon the objections to Section 30(2)(b) of the Code, inasmuch as it provided for a minimum payment of a "liquidation value" to the operational creditors and nothing more, and concluded as follows:

> "**18.** VALUE GUARANTEED TO OPERATIONAL CREDITORS UNDER A RESOLUTION PLAN
>
> **18.1** Section 30(2)(b) of the Code requires the RP to ensure that every resolution plan provides for payment of at least the liquidation value to all operational creditors. Regulation 38(1)(b) of the CIRP Regulations provides that liquidation value must be paid to operational creditors prior in time to all financial creditors and within thirty days of approval of resolution plan by the NCLT. The BLRC Report states that the guarantee of liquidation value has been provided to operational creditors since they are not allowed to be part of the CoC which determines the fate of the corporate debtor. (BLRC Report, 2015)
>
> **18.2** However, certain public comments received by the Committee stated that, in practice, the liquidation value which is guaranteed to the operational creditors may be negligible as they fall under the residual category of

creditors under section 53 of the Code. Particularly, in the case of unsecured operational creditors, it was argued that they will have no incentive to continue supplying goods or services to the corporate debtor for it to remain a ‘going concern’ given that their chances of recovery are abysmally low.

18.3 The Committee deliberated on the status of operational creditors and their role in the CIRP. It considered the viability of using ‘fair value’ as the floor to determine the value to be given to operational creditors. Fair value is defined under regulation 2(1)(hb) of the CIRP Regulations to mean “the estimated realizable value of the assets of the corporate debtor, if they were to be exchanged on the insolvency commencement date between a willing buyer and a willing seller in an arm’s length transaction, after proper marketing and where the parties had acted knowledgeably, prudently and without compulsion.” However, it was felt that assessment and payment of the fair value upfront, may be difficult. The Committee also discussed the possibility of using 'resolution value' or 'bid value' as the floor to be guaranteed to operational creditors but neither of these were deemed suitable.

18.4 It was stated to the Committee that liquidation value has been provided as a floor and in practice, many operational creditors may get payments above this value. The Committee appreciated the need to protect interests of operational creditors and particularly Micro, Small and Medium Enterprises (“MSMEs”). In this regard, the Committee observed that in practice most of the operational creditors that are critical to the business of the corporate debtor are paid out as part of the resolution plan as they have the power to choke the corporate debtor by cutting off supplies. Illustratively, in the case of *Synergies-Dooray Automative Ltd.* (Company Appeal No. 123/2017, NCLT Hyderabad, Date of decision – 02 August, 2017), the original resolution plan provided for payment to operational creditors above the liquidation value but contemplated that it would be made in a staggered manner after payment to financial creditors, easing the burden of the 30-day mandate provided under regulation 38 of the CIRP Regulations. However, the same was modified by the NCLT

> and operational creditors were required to be paid prior in time, due to the quantum of debt and nature of the creditors. Similarly, the approved resolution plan in the case of *Hotel Gaudavan Pvt. Ltd.* (Company Appeal No. 37/2017, NCLT Principal Bench, Date of decision – 13 December, 2017) provided for payment of all existing dues of the operational creditors without any write-off. The Committee felt that the interests of operational creditors must be protected, not by tinkering with what minimum must be guaranteed to them statutorily, but by improving the quality of resolution plans overall. This could be achieved by dedicated efforts of regulatory bodies including the IBBI and Indian Banks' Association.
>
> **18.5** Finally, the Committee agreed that presently, most of the resolution plans are in the process of submission and there is no empirical evidence to further the argument that operational creditors do not receive a fair share in the resolution process under the current scheme of the Code. Hence, the Committee decided to continue with the present arrangement without making any amendments to the Code."
>
> (emphasis supplied)

Ultimately, the Committee decided against any amendment to be made to the existing scheme of the Code, thereby retaining the prescription as to the minimum value that was to be paid to the operational creditors under a resolution plan.

45. However, as has been correctly argued on behalf of the operational creditors, the preamble of the Code does speak of maximisation of the value of assets of corporate debtors and the balancing of the interests of all stakeholders. There is no doubt that a key objective of the Code is to ensure that the corporate debtor keeps operating as a going concern during the insolvency resolution

process and must therefore make past and present payments to various operational creditors without which such operation as a going concern would become impossible. Sections 5(26), 14(2), 20(1), 20(2)(d) and (e) of the Code read with Regulations 37 and 38 of the 2016 Regulations all speak of the corporate debtor running as a going concern during the insolvency resolution process. Workmen need to be paid, electricity dues need to be paid, purchase of raw materials need to be made, etc. This is in fact reflected in this court's judgment in **Swiss Ribbons** (supra) as follows:

> "**26.** The Preamble of the Code states as follows:
>
> "An Act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time-bound manner for maximisation 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."
>
> **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. <u>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</u>. 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] at para 83, fn 3)."
>
> (emphasis supplied)

46. This is the reason why Regulation 38(1A) speaks of a resolution plan including a statement as to how it has dealt with the interests of all stakeholders, including operational creditors of the corporate debtor. Regulation 38(1) also states that the amount due to operational creditors under a resolution plan shall be given priority in payment over financial creditors. If nothing is to be paid to operational creditors, the minimum, being liquidation value - which in most cases

would amount to nil after secured creditors have been paid - would certainly not balance the interest of all stakeholders or maximise the value of assets of a corporate debtor if it becomes impossible to continue running its business as a going concern. Thus, it is clear that when the Committee of Creditors exercises its commercial wisdom to arrive at a business decision to revive the corporate debtor, it must necessarily take into account these key features of the Code before it arrives at a commercial decision to pay off the dues of financial and operational creditors. There is no doubt whatsoever that the ultimate discretion of what to pay and how much to pay each class or sub-class of creditors is with the Committee of Creditors, but, the decision of such Committee must reflect the fact that it has taken into account maximising the value of the assets of the corporate debtor and the fact that it has adequately balanced the interests of all stakeholders including operational creditors. This being the case, judicial review of the Adjudicating Authority that the resolution plan as approved by the Committee of Creditors has met the requirements referred to in Section 30(2) would include judicial review that is mentioned in Section 30(2)(e), as the provisions of the Code are also provisions of law for the time being in force. Thus, while the Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of Creditors, the limited judicial review available is to see that the Committee of Creditors has taken into account the fact that the corporate debtor needs to keep going as a going concern during the insolvency resolution process; that it needs to maximise the value of its assets; and that the interests of all stakeholders including operational creditors has been taken care of. If the Adjudicating Authority finds, on a given set of facts, that the aforesaid parameters have not been kept in view, it may send a resolution plan back to the Committee of Creditors to re-submit such plan after satisfying the aforesaid parameters. The reasons given by the Committee of Creditors while approving a resolution plan may thus be looked at by the Adjudicating Authority only from this point of view, and once it is satisfied that the Committee of Creditors has paid attention to these key features, it must then pass the resolution plan, other things being equal.

<u>Secured and unsecured creditors; the equality principle</u>

47. The impugned NCLAT judgment has applied an equality principle down the board stating that whether creditors are secured or unsecured, financial or operational, equitable treatment demands that they all be treated as one group of creditors similarly situate, as a result of which no differences can be made in terms of the amount of debt to be repaid to them based on whether they are secured or

unsecured, and whether they are financial or operational creditors. The aforesaid judgment relies upon certain paragraphs of this Court's judgment in **Swiss Ribbons** (supra) to buttress the aforesaid finding.

48. The UNCITRAL Legislative Guide states:-

> "**Designing the key objectives and structure of an effective and efficient insolvency law**
>
> xxx xxx xxx
>
> **4.** Ensuring equitable treatment of similarly situated creditors
>
> **7.** <u>The objective of equitable treatment is based on the notion that, in collective proceedings, creditors with similar legal rights should be treated fairly, receiving a distribution on their claim in accordance with their relative ranking and interests. This key objective recognizes that all creditors do not need to be treated identically, but in a manner that reflects the different bargains they have struck with the debtor</u>. This is less relevant as a defining factor where there is no specific debt contract with the debtor, such as in the case of damage claimants (e.g. for environmental damage) and tax authorities. Even though the principle of equitable treatment may be modified by social policy on priorities and give way to the prerogatives pertaining to holders of claims or interests that arise, for example, by operation of law, it retains its significance by ensuring that the priority accorded to the claims of a similar class affects all members of the class in the same manner. The policy of equitable treatment permeates many aspects of an insolvency law, including the application of the stay or suspension, provisions to set aside acts and transactions and recapture value for the insolvency estate, classification of claims, voting procedures in reorganization and distribution mechanisms. An insolvency law should address problems of fraud and favouritism that may arise in cases of financial distress by providing, for example, that acts and

transactions detrimental to equitable treatment of creditors can be avoided.

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5. Approval of a plan

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(i) Classification of claims

27. The primary purpose of classifying claims is to satisfy the requirements to provide fair and equitable treatment to creditors, treating similarly situated claims in the same manner and ensuring that all creditors in a particular class are offered the same menu of terms by the reorganization plan. It is one way to ensure that priority claims are treated in accordance with the priority established under the insolvency law. <u>It may also make it easier to treat the claims of major creditors who can be persuaded to receive different treatment from the general class of unsecured creditors, where that treatment may be necessary to make the plan feasible</u>. Classification can, however, increase the complexity and costs of the insolvency proceedings, depending upon how many different classes are identified. An alternative, to ensure that creditors who should receive special treatment are not oppressed by the majority, may be to give those groups the opportunity to challenge the decision of the majority in court if they have not been treated in a fair and equitable manner. The fact that such a facility exists may operate to discourage majorities from making proposals that would unfairly disadvantage priority creditors.

(ii) Treatment of dissenting creditors

28. As to the treatment of dissenting creditors, it will be essential to provide a way of imposing a plan agreed by the majority of a class upon the dissenting minority in order to increase the chances of success of the reorganization. It may also be necessary, depending upon the mechanism that is chosen for voting on the plan and whether creditors vote in classes, to consider whether the plan can be made binding upon dissenting classes of creditors and other affected parties.

29. To the extent that a plan can be approved and enforced upon dissenting parties, there will be a need to ensure that the content of the plan provides appropriate protection for those dissenting parties and, in particular, that their rights are not unfairly affected. <u>The law might provide, for example, that dissenting creditors can not be bound unless assured of certain treatment. As a general principle, that treatment might be that the creditors will receive at least as much under the plan as they would have received in liquidation proceedings. If the creditors are secured, the treatment required may be that the creditor receives payment of the value of its security interest, while in the case of unsecured creditors it may be that any junior interests, including equity holders, receive nothing</u>. To the extent that the approval procedure results in a significant impairment of the claims of creditors and other affected parties without their consent (in particular secured creditors), there is a risk that creditors will be unwilling to provide credit in the future. The mechanism for approval of the plan, and the availability of appropriate safeguards, is therefore of considerable importance to the protection of these interests.

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(c) Approval by secured and priority creditors

(i) The need for secured and priority creditors to vote

34. In many cases of insolvency, secured claims will represent a significant portion of the value of the debt owed by the debtor. Different approaches can be taken to approval of the plan by secured and priority creditors. As a general principle, however, the extent to which a secured creditor is entitled to vote will depend upon the manner in which the insolvency regime treats secured creditors, the extent to which a reorganization plan can affect the security interest of the secured creditor and the extent to which the value of encumbered assets will satisfy the secured creditor’s claim.

35. Under one approach, where the insolvency law does not affect secured creditors and, in particular, does not preclude them from enforcing their rights against the encumbered assets, there is no need to give these creditors the right to vote since their security interests will not be affected by the plan. Priority creditors are in a similar position under this approach—the plan cannot impair the value of their claims and they are entitled to receive full payment before creditors without priority are paid. The limitation of this approach, however, is that it may reduce the chances for a successful reorganization where the encumbered assets or modification of the rights of such creditors are key to the success of the plan. If the secured creditor is not bound by the plan, the election by the secured creditor to enforce its rights, such as by repossessing and selling the encumbered asset, may make reorganization of the business impossible to implement. Similarly, there may be circumstances where ensuring a successful reorganization requires that priority creditors receive less than the full value of their claims upon approval of the plan. The prospects for reorganization may improve if priority creditors will accept payment over time and if secured creditors will acquiesce when the terms of the secured debt are modified over time. If these creditors are not included in the plan and entitled to vote on proposals affecting their rights, modification of those rights cannot be achieved.

(ii) Classes of secured and priority creditors

36. Recognizing the need for secured and priority creditors to participate, a second approach provides for these creditors to vote as classes separate from unsecured creditors on a plan that would modify or affect the terms of their claims, or to otherwise consent to be bound by the plan. Adopting such an approach provides a minimum safeguard for the adequate protection of these creditors and recognizes that the respective rights and interests of secured and priority creditors differ from those of unsecured creditors. In many cases, however, the rights of secured and priority creditors will differ from each other and it may not be feasible to require all secured creditors or all priority creditors to vote in a single class. In such cases, some laws provide that each secured creditor with separate rights to encumbered assets forms a class of its own. Those laws also provide that, where secured creditors do vote as a class (e.g. where there are multiple holders of bonds that are secured by the same assets), the requisite majority of a class of secured creditors would generally be the same as that required for approval by unsecured creditors, although there are examples of laws that require different majorities depending upon the manner in which secured creditors rights are to be affected by the plan (e.g. one law provides that a three-quarter majority is required where the maturity date is to be extended and a four-fifths majority where the rights are to be otherwise impaired). Similarly, each rank of priority claims would be a separate class under those laws.

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(iii) Where secured creditors are not fully secured

38. To the extent that the value of the encumbered asset will not satisfy the full amount of the secured creditor's claim, a number of insolvency laws provide that those secured creditors should vote with ordinary unsecured creditors in respect of the unsatisfied portion of the claim. This may raise difficult questions of valuation in order to determine whether, and to what extent, a secured creditor is in fact secured. For example, where three creditors hold security interests over the same asset, the value of that asset may only support the claim first in priority and part of the second in priority. The second creditor therefore may have a right to vote only in respect of the unsecured portion of its claim, while the third creditor will be totally unsecured. The valuation of the asset is therefore crucial to determining the extent to which these secured creditors are secured and whether or not they are entitled to vote as unsecured creditors with respect to any portion of their claim.

39. In determining which approach should be taken to this issue, it will be important to assess the effect of the desired approach upon the availability and cost of secured financing and to provide as much certainty and predictability as possible, balancing this against the objectives of insolvency law and the benefits to an economy of successful reorganization."

(emphasis supplied)

The BLRC Report, 2015 is of great help in understanding what is meant by respecting the rights of all creditors equally. Paragraph 3.4.2 of the said report states:

> "**3.4.2 Principles driving the design**
>
> The Committee chose the following principles to design the new insolvency and bankruptcy resolution framework:
>
> **IV.** The Code will ensure a collective process.
>
> **9.** The law must ensure that all key stakeholders will participate to collectively assess viability. <u>The law must ensure that all creditors who have the capability and the willingness to restructure their liabilities must be part of the negotiation process. The liabilities of all creditors who are not part of the negotiation process must also be met in any negotiated solution</u>.
>
> **V.** The Code will respect the rights of all creditors equally.
>
> **10.** The law must be impartial to the type of creditor in counting their weight in the vote on the final solution in resolving insolvency.
>
> **VI.** The Code must ensure that, when the negotiations fail to establish viability, the outcome of bankruptcy must be binding.
>
> **11.** The law must order the liquidation of an enterprise which has been found unviable. This outcome of the negotiations should be protected against all appeals other than for very exceptional cases.
>
> **VII.** The Code must ensure clarity of priority, and that the rights of all stakeholders are upheld in resolving bankruptcy.
>
> **12.** The law must clearly lay out the priority of distributions in bankruptcy to all stakeholders. The priority must be designed so as to incentivise all stakeholders to participate in the cycle of building enterprises with confidence.
>
> **13.** While the law must incentivise collective action in resolving bankruptcy, there must be a greater flexibility to allow individual action in resolution and recovery during

> bankruptcy compared with the phase of insolvency resolution."
>
> (emphasis supplied)

49. That equitable treatment of creditors is equitable treatment only within the same class is echoed in American Jurisprudence, 2d, Volume 9 (hereinafter referred to as "American Jurisprudence") as follows:

> "§ **6. Distribution**
>
> Equality of distribution is the theme of a bankruptcy act and a prime bankruptcy policy. <u>The bankruptcy system is designed to distribute an estate as equally as possible among similarly situated creditors. Thus, creditors of equal status must be treated equally and equitably</u>.
>
> One of the conditions placed upon the debtor's use of the Bankruptcy Code to obtain a fresh start is that the debtor treat all creditors fairly.
>
> The bankruptcy process is the process by which a res, under the constructive possession of the bankruptcy court, is administered for the purpose of allowing, disallowing, organizing, and prioritizing claims of creditors in, to, and upon the res. Although the central policy of the Bankruptcy Code is equality of distribution among all creditors, exceptions are made by granting priority to certain claims and subordinating others. Pursuant to the central policy, creditors of equal priority should receive a pro rata share of the debtor's property; thus, when there is not enough to go around, the bankruptcy judge must establish priorities and apportion assets among creditors with the same priority."
>
> (emphasis supplied)

Shri Sibal, however, relied upon the following statements in American Jurisprudence, which read as follows:

> "Chapter 11 reorganization, specifically, has been called a collective remedy, designed to find the optimum solution for

> all parties connected with a business – not solely for the business itself and not solely for its creditors.
>
> xxx xxx xxx
>
> Protecting creditors in general is an important objective as is protecting creditors from each other."

There is no doubt that even under our Code, reorganisation is a collective remedy designed to find an optimum solution for all parties connected with a business in the manner provided by the Code. Protecting creditors in general is, no doubt, an important objective - the observation that protecting creditors from each other is also important, which must be read with footnote 7 in the American Jurisprudence, which reads as under:

> "In re First Central Financial Corp., 377 F.3d 209 (2d Cir. 2004)
>
> The Bankruptcy Code generally does not imbue creditors with greater rights in a bankruptcy proceeding than they would enjoy under otherwise applicable non-bankruptcy law unless it is to serve some bankruptcy purpose. In re Vermont Elec. Generation & Transmission Co-op., Inc., 240 B.R. 476 (Bankr. D. Vt. 1999)"

A reading of this footnote will show that what is meant by protecting creditors from each other is only that a Bankruptcy Code should not be read so as to imbue creditors with greater rights in a bankruptcy proceeding than they would enjoy under the general law, unless it is to serve some bankruptcy purpose.

50. The importance of valuing security interests separately from interests of creditors who do not have security is well set out in the IMF paper on Development of Standards for Security Interest by Pascale De Boeck and Thomas Laryea, Counsel, IMF Legal Department. The learned authors state:

> "**I.**VALUE OF SECURITY INTERESTS
>
> In developing standards for the legal framework of security interests, it is important to recognize that security interests serve discernable economic goals. Security interests reduce credit risk by increasing the creditor's likelihood to be repaid, not only when payment is due, but also in the event of a default by its debtor. This increased likelihood of repayment produces wider economic benefits. First, the availability of credit is enhanced; borrowers obtain credit in cases where they would have otherwise failed absent a security interest. Second, credit is also made available on better terms involving, for instance, lower interest rates and longer maturities. The relative cost of secured credit under that of unsecured credit reflects the commercial recognition of the advantages of secured credit in connection with the recovery of the debt.
>
> The efficiency of the legal framework for secured credit is a critical factor in the strengthening of financial systems. In the face of financial sector crises, an effective legal framework of security interests enables banks and other credit institutions to mitigate the deterioration of their claims, it also facilitates corporate restructuring by providing tools to support interim financing. In the longer term, an effective framework for security interests fosters economic growth. Specifically, it supports access to affordable credit, thereby facilitating the acquisition of goods. Further, it increases the capacity of enterprises to finance expansion fueled by the supply of credit. Also, an effective framework for security interests can support the development of a sound banking system and promotion of capital markets founded on the efficient allocation of credit

and effective and predictable mechanisms for realizing credit claims.

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III. General Principles

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• Establish clear and predictable priority rules

The issue of priorities between various security interest devices and between various types of creditors is extremely complex, largely due to the myriad of possible competing interests. Whatever priority rules a legal framework establishes, they ought to be clear, predictable and transparent. They need to allow creditors to assess their position before creating a security interest and to enforce their rights in case of default in a timely, predictable and cost-efficient manner.

• Facilitate the enforcement of creditor rights

Enforcement is a critical factor in the law and functioning of secured credit. A security interest is of little value to a creditor unless the creditor is able to enforce it in a predictable, efficient and timely manner vis-à-vis the debtor and third parties. An effective framework needs to allow quick and predictable enforcement both within and outside insolvency proceedings."

51. Likewise the World Bank Report of 2015 titled Principles for Effective Insolvency and Creditor/Debtor Regimes states:

"**Claims and Claims Resolution Procedures**

Treatment of Stakeholder Rights and Priorities

C12.1 The rights of creditors and the priorities of claims established prior to insolvency proceedings under commercial or other applicable laws should be upheld in an insolvency proceeding to preserve the legitimate expectations of creditors and encourage greater predictability in commercial relationships. Deviations from this general rule should occur only where necessary to promote other compelling policies, such as the policy

> supporting reorganization, or to maximize the insolvency estate's value. Rules of priority should enable creditors to manage credit efficiently, consistent with the following additional principles:
>
> C12.2 The priority of secured creditors in their collateral should be upheld and, absent the secured creditor's consent, its interest in the collateral should not be subordinated to other priorities granted in the course of the insolvency proceeding. Distributions to secured creditors should be made as promptly as possible.
>
> C12.3 Following distributions to secured creditors from their collateral and the payment of claims related to the costs and expenses of administration, proceeds available for distribution should be distributed pari passu to the remaining general unsecured creditors, unless there are compelling reasons to justify giving priority status to a particular class of claims. Public interests generally should not be given precedence over private rights. The number of priority classes should be kept to a minimum.
>
> C12.4 Workers are a vital part of an enterprise, and careful consideration should be given to balancing the rights of employees with those of other creditors."

However, Shri Sibal stated that this report should not be relied upon as an earlier World Bank Report of 2010, titled "A Global View of Business Insolvency Systems" (hereinafter referred to as the "2010 Report") had opined to the contrary.

52. Quite apart from the fact that the 2010 report is an earlier report, which opined on the basis of the French system, that creditors are divided into two separate classes without any further sub-classification and that the advantage of such system is that it avoids

potential conflict of interest among creditors in a particular class, the report then goes on to state:

> "In some cases, classification makes it easier to treat the claims of major creditors, who may be persuaded to opt to receive a different treatment from the general class of unsecured creditors, where such treatment is necessary to render the plan feasible. In such cases, the treatment for these major creditors is generally on less favorable terms than other, similarly situated creditors. Finally, classification may be a useful means of overriding the vote of a class of creditors that votes against the plan where the class is otherwise treated in a fair and equitable manner.[4]"

Even according to this report, therefore, a "cramdown" on dissentient creditors would pass muster under an insolvency law if such creditors will receive, under a resolution plan, an amount at least equal to what such creditors would receive in a liquidation proceeding being "liquidation value".

53. Also, Philip R. Wood's book titled "Principles of International Insolvency" states:

> "Secured creditors are super-priority creditors on insolvency. Security must stand up on insolvency which is when it is needed most. Security which is valid between the parties but not as against the creditors of the debtor is futile. Bankruptcy law which freeze or delay or weaken or de-prioritise security on insolvency destroy what the law

4 This override, which has come to be known as a "cramdown" based on its effect, allows the court to conclude that a rejecting class should be compelled to accept the plan where the class is paid in strict accordance with the relative priority of creditor claims and will receive under the plan a distribution in an amount equal to or greater than such creditors would receive in a liquidation proceeding. The rationale is that these creditors cannot claim "foul" if their recovery is at least as good as they would have received if they had prevailed in having the enterprise liquidated.

created. Hence the end is more important than the beginning.

Rationale of security - The main purposes and policies of security are: protection of creditors on insolvency; the limitation of cascade or domino insolvencies; security encourages capital, e.g. enterprise finance; security reduces the cost of credit, e.g. margin collateral in markets; he who pays for the asset should have the right to the asset; security encourages the private rescue since the bank feels safer; security is defensive control, especially in the case of project finance; security is a fair exchange for the credit.

Main Objections to security The objections to security are mainly historical, but they resurrect and live on. The hostility may stem from: debtor-protection stirred by the ancient hostility to usurers and money-lending and now expressed in consumer protection statutes; the prevention of false wealth, i.e. the debtor has many possessions but few assets – this is usually met by a requirement for possession (inefficient because not public) or public registration; unsecured creditors get less on insolvency and this is seen as a violation of bankruptcy equality, although more often it is motivated by desire to protect unpaid employees and small creditors; security disturbs the safety of commercial transactions because of priority risks, e.g. the purchaser of goods; the secured creditor can disrupt a rescue by selling an essential asset."

54. Indeed, if an "equality for all" approach recognising the rights of different classes of creditors as part of an insolvency resolution process is adopted, secured financial creditors will, in many cases, be incentivised to vote for liquidation rather than resolution, as they would have better rights if the corporate debtor was to be liquidated rather than a resolution plan being approved. This would defeat the entire objective of the Code which is to first ensure that resolution of

distressed assets takes place and only if the same is not possible should liquidation follow.

55. Financial creditors are in the business of lending money. The RBI report on Trend and Progress of Banking in India, 2017-2018 reflects that the net interest margin of Indian banks for the financial year 2017-2018 is averaged at 2.5%. Likewise, the global trend for net interest margin was at 3.3% for banks in the USA and 1.6% for banks in the UK in the year 2016, as per the data published on the website of the bank. Thus, it is clear that financial creditors earn profit by earning interest on money lent with low margins, generally being between 1 to 4%. Also, financial creditors are capital providers for companies, who in turn are able to purchase assets and provide a working capital to enable such companies to run their business operation, whereas operational creditors are beneficiaries of amounts lent by financial creditors which are then used as working capital, and often get paid for goods and services provided by them to the corporate debtor, out of such working capital. On the other hand, market research carried out by India Brand Equity Foundation, a trust established by the Ministry of Commerce and Industry, as regards the Oil and Gas sector, has stated that the business risk of operational creditors who operate with higher profit margins and shorter cyclical

repayments must needs be higher. Also, operational creditors have an immediate exit option, by stopping supply to the corporate debtor, once corporate debtors start defaulting in payment. Financial creditors may exit on their long-term loans, either upon repayment of the full amount or upon default, by recalling the entire loan facility and/or enforcing the security interest which is a time consuming and lengthy process which usually involves litigation. Financial creditors are also part of a regulated banking system which involves not merely declaring defaulters as non-performing assets but also involves restructuring such loans which often results in foregoing unpaid amounts of interest either wholly or partially. All these differences between financial and operational creditors have been reflected, albeit differently, in the judgment of **Swiss Ribbons** (supra). Thus, this Court in dealing with some of the differences has held:

> "**50.** According to us, it is clear that most financial creditors, particularly banks and financial institutions, are secured creditors whereas most operational creditors are unsecured, payments for goods and services as well as payments to workers not being secured by mortgaged documents and the like. <u>The distinction between secured and unsecured creditors is a distinction which has obtained since the earliest of the Companies Acts both in the United Kingdom and in this country</u>. Apart from the above, the nature of loan agreements with financial creditors is different from contracts with operational creditors for supplying goods and services. Financial creditors generally lend finance on a term loan or for working capital that enables the corporate debtor to either set up and/or operate its business. On the other hand, contracts with

operational creditors are relatable to supply of goods and services in the operation of business. Financial contracts generally involve large sums of money. By way of contrast, operational contracts have dues whose quantum is generally less. In the running of a business, operational creditors can be many as opposed to financial creditors, who lend finance for the set-up or working of business. Also, financial creditors have specified repayment schedules, and defaults entitle financial creditors to recall a loan in totality. Contracts with operational creditors do not have any such stipulations. Also, the forum in which dispute resolution takes place is completely different. Contracts with operational creditors can and do have arbitration clauses where dispute resolution is done privately. Operational debts also tend to be recurring in nature and the possibility of genuine disputes in case of operational debts is much higher when compared to financial debts. A simple example will suffice. Goods that are supplied may be substandard. Services that are provided may be substandard. Goods may not have been supplied at all. All these qua operational debts are matters to be proved in arbitration or in the courts of law. On the other hand, financial debts made to banks and financial institutions are well documented and defaults made are easily verifiable.

51. Most importantly, financial creditors are, from the very beginning, involved with assessing the viability of the corporate debtor. They can, and therefore do, engage in restructuring of the loan as well as reorganisation of the corporate debtor's business when there is financial stress, which are things operational creditors do not and cannot do. Thus, preserving the corporate debtor as a going concern, while ensuring maximum recovery for all creditors being the objective of the Code, financial creditors are clearly different from operational creditors and therefore, there is obviously an intelligible differentia between the two which has a direct relation to the objects sought to be achieved by the Code.

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75. Since the financial creditors are in the business of moneylending, banks and financial institutions are best equipped to assess viability and feasibility of the business of the corporate debtor. Even at the time of granting loans, these banks and financial institutions undertake a detailed market study which includes a techno-economic valuation report, evaluation of business, financial projection, etc. Since this detailed study has already been undertaken before sanctioning a loan, and since financial creditors have trained employees to assess viability and feasibility, they are in a good position to evaluate the contents of a resolution plan. On the other hand, operational creditors, who provide goods and services, are involved only in recovering amounts that are paid for such goods and services, and are typically unable to assess viability and feasibility of business. The BLRC Report, already quoted above, makes this abundantly clear.

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76. Quite apart from this, the United Nations Commission on International Trade Law, in its *Legislative Guide on Insolvency Law* (the UNCITRAL Guidelines) recognises the importance of ensuring equitable treatment to similarly placed creditors and states as follows:

"*Ensuring equitable treatment of similarly situated creditors*

7. The objective of equitable treatment is based on the notion that, in collective proceedings, creditors with similar legal rights should be treated fairly, receiving a distribution on their claim in accordance with their relative ranking and interests. This key objective recognises that all creditors do not need to be treated identically, but in a manner that reflects the different bargains they have struck with the debtor. This is less relevant as a defining factor where there is no specific debt contract with the debtor, such as in the case of damage claimants (e.g. for environmental damage) and tax authorities. Even though the principle of equitable treatment may be modified by social policy on priorities and give way to the prerogatives pertaining to holders of claims or interests that arise, for example, by operation of law, it retains its significance by *UNCITRAL Legislative Guide on Insolvency Law* ensuring

that the priority accorded to the claims of a similar class affects all members of the class in the same manner. The policy of equitable treatment permeates many aspects of an insolvency law, including the application of the stay or suspension, provisions to set aside acts and transactions and recapture value for the insolvency estate, classification of claims, voting procedures in reorganisation and distribution mechanisms. An insolvency law should address problems of fraud and favouritism that may arise in cases of financial distress by providing, for example, that acts and transactions detrimental to equitable treatment of creditors can be avoided."

77. NCLAT has, while looking into viability and feasibility of resolution plans that are approved by the Committee of Creditors, always gone into whether operational creditors are given roughly the same treatment as financial creditors, and if they are not, such plans are either rejected or modified so that the operational creditors' rights are safeguarded. It may be seen that a resolution plan cannot pass muster under Section 30(2)(*b*) read with Section 31 unless a minimum payment is made to operational creditors, being not less than liquidation value. Further, on 5-10-2018, Regulation 38 has been amended. Prior to the amendment, Regulation 38 read as follows:

"**38.** ***Mandatory contents of the resolution plan***.—(1) A resolution plan shall identify specific sources of funds that will be used to pay the—

(*a*) insolvency resolution process costs and provide that the insolvency resolution process costs, to the extent unpaid, will be paid in priority to any other creditor;

(*b*) liquidation value due to operational creditors and provide for such payment in priority to any financial creditor which shall in any event be made before the expiry of thirty days after the approval of a resolution plan by the adjudicating authority; and

(*c*) liquidation value due to dissenting financial creditors and provide that such payment is made before any recoveries are made by the financial creditors who voted in favour of the resolution plan."

Post amendment, Regulation 38 reads as follows:

> “**38. *Mandatory contents of the resolution plan***.—(1) The amount due to the operational creditors under a resolution plan shall be given priority in payment over financial creditors.
>
> (1-A) A resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors, of the corporate debtor.”
>
> The aforesaid Regulation further strengthens the rights of operational creditors by statutorily incorporating the principle of fair and equitable dealing of operational creditors' rights, together with priority in payment over financial creditors.”

(emphasis supplied)

56. By reading paragraph 77 *de hors* the earlier paragraphs, the Appellate Tribunal has fallen into grave error. Paragraph 76 clearly refers to the UNCITRAL Legislative Guide which makes it clear beyond any doubt that equitable treatment is only of <u>similarly situated creditors</u>. This being so, the observation in paragraph 77 cannot be read to mean that financial and operational creditors must be paid the same amounts in any resolution plan before it can pass muster. On the contrary, paragraph 77 itself makes it clear that there is a difference in payment of the debts of financial and operational creditors, operational creditors having to receive a minimum payment, being not less than liquidation value, which does not apply to financial creditors. The amended Regulation 38 set out in paragraph 77 again does not lead to the conclusion that financial and operational creditors, or secured and unsecured creditors, must be paid the same

amounts, percentage wise, under the resolution plan before it can pass muster. Fair and equitable dealing of operational creditors' rights under the said Regulation involves the resolution plan stating as to how it has dealt with the interests of operational creditors, which is not the same thing as saying that they must be paid the same amount of their debt proportionately. Also, the fact that the operational creditors are given priority in payment over all financial creditors does not lead to the conclusion that such payment must necessarily be the same recovery percentage as financial creditors. So long as the provisions of the Code and the Regulations have been met, it is the commercial wisdom of the requisite majority of the Committee of Creditors which is to negotiate and accept a resolution plan, which may involve differential payment to different classes of creditors, together with negotiating with a prospective resolution applicant for better or different terms which may also involve differences in distribution of amounts between different classes of creditors.

57. Indeed, by vesting the Committee of Creditors with the discretion of accepting resolution plans only with financial creditors, operational creditors having no vote, the Code itself differentiates between the two types of creditors for the reasons given above. Further, as has been reflected in **Swiss Ribbons** (supra), most

financial creditors are secured creditors, whose security interests must be protected in order that they do not go ahead and realise their security in legal proceedings, but instead are incentivised to act within the framework of the Code as persons who will resolve stressed assets and bring a corporate debtor back to its feet. Shri Sibal's argument that the expression "secured creditor" does not find mention in Chapter II of the Code, which deals with the resolution process, and is only found in Chapter III, which deals with liquidation, is for the reason that secured creditors as a class are subsumed in the class of financial creditors, as has been held in **Swiss Ribbons** (supra). Indeed, Regulation 13(1) of the 2016 Regulations mandates that when the resolution professional verifies claims, the security interest of secured creditors is also looked at and gets taken care of. Similarly, Regulation 36(2)(d) when it provides for a list of creditors and the amounts claimed by them in the information memorandum (which is to be submitted to prospective resolution applicants), also provides for the amount of claims admitted and security interest in respect of such claims. Under Regulation 39(4), the compliance certificate of the resolution professional as to the CIRP being successful is contained in Form H to the Regulations. This statutory form, in paragraphs 6 and 7, states as under:

"6. The Resolution Plan includes a statement under regulation 38(1A) of the CIRP Regulations as to how it has dealt with the interests of all stakeholders in compliance with the Code and regulations made thereunder.

7. The amounts provided for the stakeholders under the Resolution Plan is as under:

(Amount in Rs. Lakh)

Sl. No.	**Category of Stakeholder**	**Amount Claimed**	**Amount Admitted**	**Amount Provided under the Plan**	**Amount Provided to the Amount Claimed (%)**
1	Dissenting Secured Financial Creditors				
2	Other Secured Financial Creditors				
3	Dissenting Unsecured Financial Creditors				
4	Other Unsecured Financial Creditors				
5	Operational Creditors				
	Government				
	Workmen				
	Employees				
	…				
4	Other Debts and Dues				
Total					

Quite clearly, secured and unsecured financial creditors are differentiated when it comes to amounts to be paid under a resolution plan, together with what dissenting secured or unsecured financial creditors are to be paid. And, most importantly, operational creditors are separately viewed from these secured and unsecured financial creditors in S.No.5 of paragraph 7 of statutory Form H. Thus, it can be seen that the Code and the Regulations, read as a whole, together with the observations of expert bodies and this Court's judgment, all lead to the conclusion that the equality principle cannot be stretched to treating unequals equally, as that will destroy the very objective of the Code - to resolve stressed assets. Equitable treatment is to be accorded to each creditor depending upon the class to which it belongs: secured or unsecured, financial or operational.

58. However, Shri Sibal relied strongly upon a judgment of this Court being **Mihir R. Mafatlal v. Mafatlal Industries Ltd.** (1997) 1 SCC 579, and in particular paragraph 28 thereof, which stated as follows:

> "**28.** …On a conjoint reading of the relevant provisions of Sections 391 and 393 it becomes at once clear that the Company Court which is called upon to sanction such a scheme has not merely to go by the ipse dixit of the majority of the shareholders or creditors or their respective classes who might have voted in favour of the scheme by requisite majority but the Court has to consider the pros and cons of the scheme with a view to finding out whether the scheme is fair, just and reasonable and is not contrary to any provisions of law and it does not violate any public policy. This is implicit in the very concept of compromise or

arrangement which is required to receive the imprimatur of a court of law. No court of law would ever countenance any scheme of compromise or arrangement arrived at between the parties and which might be supported by the requisite majority if the Court finds that it is an unconscionable or an illegal scheme or is otherwise unfair or unjust to the class of shareholders or creditors for whom it is meant. Consequently it cannot be said that a Company Court before whom an application is moved for sanctioning such a scheme which might have got the requisite majority support of the creditors or members or any class of them for whom the scheme is mooted by the company concerned, has to act merely as a rubber stamp and must almost automatically put its seal of approval on such a scheme. It is trite to say that once the scheme gets sanctioned by the Court it would bind even the dissenting minority shareholders or creditors. Therefore, the fairness of the scheme qua them also has to be kept in view by the Company Court while putting its seal of approval on the scheme concerned placed for its sanction. It is, of course, true that so far as the Company Court is concerned as per the statutory provisions of Sections 391 and 393 of the Act the question of voidability of the scheme will have to be judged subject to the rider that a scheme sanctioned by majority will remain binding to a dissenting minority of creditors or members, as the case may be, even though they have not consented to such a scheme and to that extent absence of their consent will have no effect on the scheme. It can be postulated that even in case of such a scheme of compromise and arrangement put up for sanction of a Company Court it will have to be seen whether the proposed scheme is lawful and just and fair to the whole class of creditors or members including the dissenting minority to whom it is offered for approval and which has been approved by such class of persons with requisite majority vote."

The very next paragraph, however, states as follows:

> "**29.** However further question remains whether the Court has jurisdiction like an appellate authority to minutely scrutinise the scheme and to arrive at an independent conclusion whether the scheme should be permitted to go through or not when the majority of the creditors or members or their respective classes have approved the scheme as required by Section 391 sub-section (2). On this aspect the nature of compromise or arrangement between the company and the creditors and members has to be kept in view. It is the commercial wisdom of the parties to the scheme who have taken an informed decision about the usefulness and propriety of the scheme by supporting it by the requisite majority vote that has to be kept in view by the Court. The Court certainly would not act as a court of appeal and sit in judgment over the informed view of the parties concerned to the compromise as the same would be in the realm of corporate and commercial wisdom of the parties concerned. The Court has neither the expertise nor the jurisdiction to delve deep into the commercial wisdom exercised by the creditors and members of the company who have ratified the Scheme by the requisite majority. Consequently the Company Court's jurisdiction to that extent is peripheral and supervisory and not appellate. The Court acts like an umpire in a game of cricket who has to see that both the teams play their game according to the rules and do not overstep the limits. But subject to that how best the game is to be played is left to the players and not to the umpire."

In **Mihir Mafatlal** (supra), the Court was dealing with schemes of amalgamation under Section 391 of the Companies Act, 1956. Under Section 392 of the said Act, the High Court is vested with a supervisory jurisdiction, which includes the power to give directions and make modifications in such schemes, as it may consider necessary, for the proper working of the said Schemes. This power in Section 392 is conspicuous by its absence when it comes to the

Adjudicating Authority under the Code, whose jurisdiction is circumscribed by Section 30(2). It is the Committee of Creditors, under Section 30(4) read with Regulation 39(3), that is vested with the power to approve resolution plans and make modifications therein as the Committee deems fit. It is this vital difference between the jurisdiction of the High Court under Section 392 of the Companies Act, 1956 and the jurisdiction of the Adjudicating Authority under the Code that must be kept in mind when the Adjudicating Authority is to decide on whether a resolution plan passes muster under the Code. When this distinction is kept in mind, it is clear that there is no residual jurisdiction not to approve a resolution plan on the ground that it is unfair or unjust to a class of creditors, so long as the interest of each class has been looked into and taken care of. It is important to note that even under Sections 391 and 392 of the Companies Act, 1956, ultimately it is the commercial wisdom of the parties to the scheme, reflected in the 75% majority vote, which then binds all shareholders and creditors. Even under Sections 391 and 392, the High Court cannot act as a court of appeal and sit in judgment over such commercial wisdom.

The constitution of a sub-committee by the Committee of Creditors

59. A large part of Shri Sibal's submission was centered around the fact that the Committee of Creditors delegated its functions to a sub-committee, which delegation is impermissible. As a result of this delegation, the sub-committee secretly made negotiations with ArcelorMittal, which secret negotiations then produced a wholly inequitable result in that Standard Chartered Bank, though a financial creditor, was only paid 1.74% of its admitted claim of INR 3487 crores as opposed to other financial creditors who were paid 74.8% of what was claimed by them.

60. Under Section 21(8) of the Code, all decisions by the Committee of Creditors can be taken by a 51% majority vote, unless, a higher percentage is required under other specific provisions of the Code.

61. In **Pradyat Kumar Bhose v. The Hon'ble the Chief Justice of Calcutta High Court** (1955) 2 SCR 1331 at page 1345-1346, this Court, when dealing with the Chief Justice of the High Court of Calcutta's administrative powers held:

> **"**The further subordinate objections that have been raised remain to be considered. The first objection that has been urged is that even if the Chief Justice had the power to dismiss, he was not, in exercise of that power, competent to delegate to another Judge the enquiry into the charges but should have made the enquiry himself. This contention proceeds on a misapprehension of the nature of the power.

As pointed out in *Barnard* v. *National Dock Labour Board* [(1953) 2 QB 18, 40] at p. 40, it is true that "no judicial tribunal can delegate its functions unless it is enabled to do so expressly or by necessary implication". But the exercise of the power to appoint or dismiss an officer is the exercise not of a judicial power but of an administrative power. It is nonetheless so, by reason of the fact that an opportunity to show cause and an enquiry simulating judicial standards have to precede the exercise thereof. It is well-recognised that a statutory functionary exercising such a power cannot be said to have delegated his functions merely by deputing a responsible and competent official to enquire and report. That is the ordinary mode of exercise of any administrative power. What cannot be delegated except where the law specifically so provides — is the ultimate responsibility for the exercise of such power. As pointed out by the House of Lords in *Board of Education* v. *Rice* [(1911) AC 179, 182] , a functionary who has to decide an administrative matter, of the nature involved in this case, can obtain the material on which he is to act in such manner as may be feasible and convenient, provided only the affected party "has a fair opportunity to correct or contradict any relevant and prejudicial material". The following passage from the speech of Lord Chancellor in *Local Government Board* v. *Arlidge* [(1915) AC 120, 133] is apposite and instructive:

"My Lords, I concur in this view of the position of an administrative body to which the decision of a question in dispute between parties has been entrusted. The result of its inquiry must, as I have said, be taken, in the absence of directions in the statute to the contrary, to be intended to be reached by its ordinary procedure. In the case of the Local Government Board it is not doubtful what this procedure is. The Minister at the head of the Board is directly responsible to Parliament like other Ministers. He is responsible not only for what he himself does but for all that is done in his department. The volume of work entrusted to him is very great and he cannot do the great bulk of it himself. He is expected to obtain his materials vicariously through his officials, and he has discharged his duty if he sees that they obtain these materials for him properly. To try to extend his duty beyond this and to insist

> that he and other members of the Board should do everything personally would be to impair his efficiency. Unlike a Judge in a Court he is not only at liberty but is compelled to rely on the assistance of his staff."
>
> In view of the above clear statement of the law the objection to the validity of the dismissal on the ground that the delegation of the enquiry amounts to the delegation of the power itself is without any substance and must be rejected."

Likewise, in **High Court of Judicature at Bombay through its Registrar v. Shirishkumar Rangrao Patil & Anr.** (1997) 6 SCC 339, this Court, in dealing with the constitution of various committees for the administration of the High Court, when dealing with question of delegation held:

> "**10.** It would thus be settled law that the control of the subordinate judiciary under Article 235 is vested in the High Court. After the appointment of the judicial officers by the Governor, the power to transfer, maintain discipline and keep control over them vests in the High Court. The Chief Justice of the High Court is first among the Judges of the High Court. The action taken is by the High Court and not by the Chief Justice in his individual capacity, nor by the Committee of Judges. For the convenient transaction of administrative business in the Court, the Full Court of the Judges of the High Court generally passes a resolution authorising the Chief Justice to constitute various committees including the committee to deal with disciplinary matters pertaining to the subordinate judiciary or the ministerial staff working therein. Article 235, therefore, relates to the power of taking a decision by the High Court against a member of the subordinate judiciary. Such a decision either to hold an enquiry into the conduct of a judicial officer, subordinate or higher judiciary, or to have the enquiry conducted through a District or Additional District Judge etc. and to consider the report of the enquiry officer for taking further action is of the High Court. Equally, the decision to consider the report of the enquiry officer

> and to take follow-up action and to make appropriate recommendation to the Disciplinary Committee or to the Governor, is entirely of the High Court which acts through the Committee of the Judges authorised by the Full Court. Once a resolution is passed by the Full Court of the High Court, there is no further necessity to refer the matter again to the Full Court while taking such procedural steps relating to control of the subordinate judiciary."

62. We find, that when it comes to the exercise of the Committee of Creditors' powers on questions which have a vital bearing on the running of the business of the corporate debtor, Section 28(1)(h) provides that though these powers are administrative in nature, they shall not be delegated to any other person, meaning thereby, that the Committee of Creditors alone must take the decisions mentioned in Section 28 and not any person other than such Committee. When it comes to approving a resolution plan under Section 30(4), there is no doubt whatsoever that this power also cannot be delegated to any other body as it is the Committee of Creditors alone that has been vested with this important business decision which it must take by itself. However, this does not mean that sub-committees cannot be appointed for the purpose of negotiating with resolution applicants, or for the purpose of performing other ministerial or administrative acts, provided such acts are in the ultimate analysis approved and ratified by the Committee of Creditors. We find, having gone through the minutes of all the important creditors' meetings that were held, that

every single administrative decision qua approving and administering the resolution plan submitted by ArcelorMittal was in fact done by the requisite majority of the Committee of Creditors itself, the sub-committee having been used only for purposes of initiating proceedings and negotiating with ArcelorMittal, which ultimately culminated in the resolution plan as finally negotiated, being passed by the requisite majority of creditors on 23.10.2018. In point of fact, Standard Chartered Bank voted in favour of the constitution of a sub-committee on the 12th committee of creditors meeting of 02.05.2018, as also, in favour of decisions of the Committee of Creditors finalizing drafts of sub-committees on eligibility of resolution applicants at the 13th Committee of Creditors meeting on 05.05.2018. Also, as a matter of fact, on 31.05.2018, at the 16th Committee of Creditors meeting, a request was made by Standard Chartered Bank to be a member of the sub-committee, which request was later withdrawn. We also find that in the authorisation to the sub-committee to negotiate with ArcelorMittal, mooted at the 20th Committee of Creditors meeting on 19.10.2018, a request was made by Standard Chartered Bank for inclusion in the said sub-committee. However, Standard Chartered Bank did not agree to put the reconstitution of the sub-committee to vote by the Committee of Creditors. Given these facts, we find, therefore, that it is only when Standard

Chartered Bank found that things were going against it that it started raising objections on the technical plea that sub-committees cannot be constituted under the Code. This is not a *bonafide* plea. For all these reasons, this objection of Standard Chartered Bank is also rejected.

<u>Extinguishment of Personal Guarantees and Undecided Claims</u>

63. Shri Gopal Subramanium and Shri Rakesh Dwivedi have also appealed against the extinguishment of the rights of creditors against guarantees that were extended by the promoters/promoter group of the corporate debtor. According to them, this was done by a side wind by the Appellate Tribunal without any reasons for the same.

64. Shri Prashant Ruia a promoter/director of the corporate debtor in his personal guarantee dated 28.09.2013, specifically stated as follows:

> "7. The obligations of the Guarantor under this Guarantee shall not be affected by any act, omission, matter or thing that, but for this Guarantee, would reduce, release or prejudice any of its obligations under this Guarantee (without limitation and whether or not known to it or any Secured Party) including :
>
> xxx xxx xxx
>
> (g) any insolvency or similar proceedings."

Also, under the caption “terms of settlement”, the final resolution plan dated 02.04.2018, as approved on 23.10.2018, specifically provided:

> “Financial Creditors:
>
> Pursuant to the approval of this Resolution Plan by the Adjudicating Authority, each of the Financial Creditors shall be deemed to have agreed and acknowledged the following terms:
>
> • The payment to the Financial creditors in accordance with this Resolution Plan shall be treated as full and final payment of all outstanding dues of the Corporate Debtor to each of the Financial Creditors as of the Effective Date, and all agreements and arrangements entered into by or in favour of each of the Financial Creditors, including but not limited to loan agreements and security agreements (other than corporate or personal guarantees provided in relation to the Corporate Debtor by the Existing Promoter Group or their respective affiliates) shall be deemed to have been (i) assigned / novated to the Resolution applicant, or any Person nominated by the Resolution applicant, with effect from the effective Date, with no rights subsisting or accruing to the Financial Creditors for the period prior to such assignment or novation; and (ii) to the extent not legally capable of assigned or novated- terminated with effect from the effective Date, with no rights accruing or subsisting to the Financial Creditors for the period prior to termination.
>
> • In relation to the loan and financial assistance provided to the Corporate Debtor; each of the Financial Creditors, as the case maybe, shall:
>
> - Assign/ novate all security given (including but not limited to Encumbrance over assets of the Corporate Debtor, pledge of shares of the Corporate Debtor (other than corporate guarantees and personal guarantees) related in any manner to the Corporate Debtor) to the Resolution Applicant and /or its Connected Persons, and /or banks or financial institutions designated by the Resolution Applicant

in this regard, pursuant to the Acquisition Structure, with effect from the Effective Date;

- Issue such letters and communications, and take such other actions, as may be required or deemed necessary for the release, assignment or novation of (i) the Encumbrance over the assets of the Corporate Debtor; and (ii) the pledge over the shares of the Corporate Debtor; within 5(five) Business Days from the Effective Date; and

- Be deemed to have waived all claims and dues (including interest and penalty, if any) from the Corporate Debtor arising on and from the insolvency Commencement Date, until the effective Date."

65. Shri Rohatgi, learned senior advocate appearing on behalf of Shri Prashant Ruia, also pointed out Section XIII (1)(g) of the resolution plan dated 23.10.18, in which it is stated as follows:

> "Upon the approval of the Resolution Plan by the Adjudicating Authority in relation to guarantees provided for and on behalf of, and in order to secure the financial assistance availed by the Corporate Debtor, which have been invoked prior to the Effective Date, <u>claims of the guarantor on account of subrogation, if any, under any such guarantee shall be deemed to have been abated, released, discharged and extinguished</u>.
>
> It is hereby clarified that, the aforementioned clause shall not apply in any manner which may extinguish/affect the rights of the Financial Creditors to enforce the corporate guarantees and personal guarantees issued for and on behalf of the Corporate Debtor by Existing Promoter Group or their respective affiliates, which guarantees shall continue to be retained by the Financial Creditors and shall continue to be enforceable by them."
>
> (emphasis supplied)

We were also informed by the learned senior counsel that the personal guarantees of the promoter group have been invoked and legal proceedings in respect thereof are pending. It has been pointed out to us that Shri Prashant Ruia and other members of the promoter group, who are guarantors, are not parties to the resolution plan submitted by ArcelorMittal and hence, the resolution plan cannot bind them to take away rights of subrogation, which they may have if they are ordered to pay amounts guaranteed by them in the pending legal proceedings.

66. Section 31(1) of the Code makes it clear that once a resolution plan is approved by the Committee of Creditors it shall be binding on all stakeholders, including guarantors. This is for the reason that this provision ensures that the successful resolution applicant starts running the business of the corporate debtor on a fresh slate as it were. In **State Bank of India v. V. Ramakrishnan, 2018 (9) SCALE 597**, this Court relying upon Section 31 of the Code has held:

> "**22**. Section 31 of the Act was also strongly relied upon by the Respondents. This Section only states that once a Resolution Plan, as approved by the Committee of Creditors, takes effect, it shall be binding on the corporate debtor as well as the guarantor. This is for the reason that otherwise, Under Section 133 of the Indian Contract Act, 1872, any change made to the debt owed by the corporate debtor, without the surety's consent, would relieve the guarantor from payment. Section 31(1), in fact, makes it clear that the guarantor cannot escape payment as the Resolution Plan, which has been approved, may well include provisions as to payments to be made by such guarantor. This is perhaps the reason that Annexure VI(e) to Form 6 contained in the Rules and Regulation 36(2)

> referred to above, require information as to personal guarantees that have been given in relation to the debts of the corporate debtor. Far from supporting the stand of the Respondents, it is clear that in point of fact, Section 31 is one more factor in favour of a personal guarantor having to pay for debts due without any moratorium applying to save him."

Following this judgment, it is difficult to accept Shri Rohatgi's argument that that part of the resolution plan which states that the claims of the guarantor on account of subrogation shall be extinguished, cannot be applied to the guarantees furnished by the erstwhile directors of the corporate debtor. So far as the present case is concerned, we hasten to add that we are saying nothing which may affect the pending litigation on account of invocation of these guarantees. However, the NCLAT judgment being contrary to Section 31(1) of the Code and this Court's judgment in **State Bank of India** (supra), is set aside.

67. For the same reason, the impugned NCLAT judgment in holding that claims that may exist apart from those decided on merits by the resolution professional and by the Adjudicating Authority/Appellate Tribunal can now be decided by an appropriate forum in terms of Section 60(6) of the Code, also militates against the rationale of Section 31 of the Code. A successful resolution applicant cannot suddenly be faced with "undecided" claims after the resolution plan

submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the successful resolution applicant does on a fresh slate, as has been pointed out by us hereinabove. For these reasons, the NCLAT judgment must also be set aside on this count.

Utilisation of profits of the corporate debtor during CIRP to pay off creditors

68. The RFP issued in terms of Section 25 of the Code and consented to by ArcelorMittal and the Committee of Creditors had provided that distribution of profits made during the corporate insolvency process will not go towards payment of debts of any creditor – see Clause 7 of the first addendum to the RFP dated 08.02.2018. On this short ground, this part of the judgment of the NCLAT is also incorrect.

Constitutional Validity of Section 4 and 6 of the Amending Act, 2019

69. In **Swiss Ribbons** (supra) this Court was at pains to point out, referring, *inter alia*, to various American decisions in paras 17 to 24, that the legislature must be given free play in the joints when it comes to economic legislation. Apart from the presumption of constitutionality which arises in such cases, the legislative judgment in economic choices must be given a certain degree of deference by the courts. In para 120 of the said judgment, this Court held:

> "**120.** The Insolvency Code is a legislation which deals with economic matters and, in the larger sense, deals with the economy of the country as a whole. Earlier experiments, as we have seen, in terms of legislations having failed, "trial" having led to repeated "errors", ultimately led to the enactment of the Code. The experiment contained in the Code, judged by the generality of its provisions and not by so-called crudities and inequities that have been pointed out by the petitioners, passes constitutional muster. To stay experimentation in things economic is a grave responsibility, and denial of the right to experiment is fraught with serious consequences to the nation. We have also seen that the working of the Code is being monitored by the Central Government by Expert Committees that have been set up in this behalf. Amendments have been made in the short period in which the Code has operated, both to the Code itself as well as to subordinate legislation made under it. This process is an ongoing process which involves all stakeholders, including the petitioners."

It is in this background that the constitutional challenge to the Amending Act of 2019 will have to be decided.

70. Closely on the heels of the impugned NCLAT judgment which was delivered on 04.07.2019, a representation dated 17.07.2019 was written by the Deputy Secretary General, FICCI to the Secretary,

Ministry of Corporate Affairs, pointing out the flaws of the NCLAT judgment and suggesting that the Government may consider amendment of the Code to reinstate the law as it was and should be. This representation stated:

> "A case in point is the recent NCLAT judgment which, in effect, places Secured and unsecured Financial Creditors as well as Financial and Operational Creditors on an equal footing, thus virtually erasing the distinction specifically carved between these two classes of creditors by the provisions of the Code. It may be noted that the consequences of this order stretch beyond this particular case.
>
> The doctrine that secured creditors shall rank ahead of unsecured creditors is a core principle of banking. It allows banks to lend to companies and individuals at lower rates of interest in a secured lending because they know that their loan is secured and in the eventuality of a default, their losses would be mitigated. By virtue of this order, the borrowing rates for all classes would go up in the future because banks can't be sure of protecting their losses. The fundamental principles of credit analysis and rating no longer hold true. This would also result in unjust enrichment for some creditors who, knowing that they don't have benefit of the security, lent at a much higher rate as compared to the secured lenders. Besides earning far more money than secured creditors, due to higher interest rate during the pre insolvency stage they now have the benefit of higher share in the plan value, at the expense of secured creditors. In fact the ruling puts in question the very concept of security – what is the use of a charge/security if it is meaningless in insolvency? Even other statutes, including the Companies Act, 2013 clearly lay down a distinction between secured and unsecured creditors and if both are treated at par it will be a huge disincentive for secured creditors…In fact, in its judgement on the constitutionality of the IBC earlier this year, the Supreme Court had justified the difference between

financial and operational creditors. The NCLAT order effectively negates that distinction, which is against the fundamental theme of the IBC. If the distinction between secured and unsecured financial creditors and between financial and operational creditors is not maintained, bankers would be reluctant to use the IBC provisions for resolution of stressed assets, and would prefer for the companies to enter liquidation, which is certainly not the intent of the Code. The decision may also open the flood-gates for reopening of previously concluded cases as well as filing of fresh applications and appeals by operational creditors, alleging discrimination and seeking parity with financial creditors and also by unsecured financial creditors, alleging discrimination and seeking parity with secured financial creditors.

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We would like to draw your attention to Sections 30 and 31 of the Code which contain detailed provisions on submission and approval of the resolution plan. As per section 31(1), once the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors meets the requirements of section 30, it *shall* approve the resolution plan. The Insolvency and Bankruptcy Board of India has also prescribed rules and regulations on mandatory requirements of resolution plan. The statute thus clearly empowers the committee of creditors to decide the distribution of funds. It also recognizes that as long as the resolution plan is in conformity with law, the Adjudication Authority must approve the resolution plan, as is evidenced by the usage of the word 'shall' in section 31(1). In *K. Sashidhar* case the Supreme Court has clearly held that commercial decisions of the committee of creditors are not open to judicial review. We would like to clarify that the fundamental principle that there should be no discrimination between similarly situated creditors is not being questioned by the industry. The question is whether we can redefine class to mean all financial creditors irrespective of inter-creditor arrangement or their security. Such a finding is a complete rewrite of laws, practices and the agreement and bargain of parties at the time of financing (or when goods or services were provided).

We therefore strongly suggest that the Government may consider amendment of the Code to expressly clarify the distinction between secured and unsecured creditors and between financial and operational creditors. Also, decisions of resolution applicant, as accepted by the committee of creditors should be considered final unless they are found to be contrary to law. This would avoid any confusion; be in line with the global practices and held India retain its status of preferred investment destination."

71. Pursuant to this and representations from Banks and industry, the Amending Act of 2019 was then made. Sections 4 and 6 of the Amending Act of 2019 read as under:

"4. **Amendment of section 12**.

In section 12 of the principal Act, in sub-section (3), after the proviso, the following provisos shall be inserted, namely:—

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

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

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6. **Amendment to section 30.**

In section 30 of the principal Act,—

(a) in sub-section (2), for clause (b), the following shall be substituted, namely:—

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

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

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

whichever is higher, and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor.

Explanation 1.—For the removal of doubts, it is hereby clarified that a distribution in accordance with the provisions of this clause shall be fair and equitable to such creditors.

Explanation 2.—For the purposes of this clause, it is hereby declared that on and from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019, the provisions of this clause shall also apply to the corporate insolvency resolution process of a corporate debtor—

(i) where a resolution plan has not been approved or rejected by the Adjudicating Authority;

(ii) where an appeal has been preferred under section 61 or section 62 or such an appeal is not time barred under any provision of law for the time being in force; or

(iii) where a legal proceeding has been initiated in any court against the decision of the Adjudicating Authority in respect of a resolution plan;”

> b) in sub-section (4), after the words "feasibility and viability,", the words, brackets and figures "the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of section 53, including the priority and value of the security interest of a secured creditor" shall be inserted."

72. The frontal attack of Shri Sibal on Sections 4 and 6 of the Amending Act of 2019 is that it was tailor-made to do away with the judgment of the NCLAT in this very matter. This being so, such legislation would be clearly outside the bounds of the legislature as the legislature cannot interfere with a particular judgment and set it aside.

73. There is no doubt that the Amending Act of 2019 consists of several Sections which have been enacted/amended as difficulties have arisen in the working of the Code. While it is true that it may well be that the law laid down by the NCLAT in this very case forms the basis for some of these amendments, it cannot be said that the legislature has directly set aside the judgment of the NCLAT. Since an appeal against the judgment of the NCLAT lies to the Supreme Court, the legislature is well within its bounds to lay down laws of general application to all persons affected, bearing in mind what it considers to be a curing of a defective reading of the law by an Appellate Tribunal. There can be no doubt whatsoever

that apart from the present case the amendments made by the Amending Act of 2019 apply down the board to all persons who are affected by its provisions. Also, it is settled law that bad faith, in the sense of improper motives, cannot be ascribed to a legislature making laws. This is settled law ever since the celebrated judgment of B.K. Mukherjea,J. In **K.C. Gajapati Narayan Deo and Others v. State of Orissa** 1954 SCR 1. This was felicitously laid down as follows:

> "…As the question is of some importance and is likely to be debated in similar cases in future, it would be necessary to examine the precise scope and meaning of what is known ordinarily as the doctrine of "colourable legislation".
>
> It may be made clear at the outset that the doctrine of colourable legislation does not involve any question of bona fides or mala fides on the part of the legislature. The whole doctrine resolves itself into the question of competency of a particular legislature to enact a particular law. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand, if the legislature lacks competency, the question of motive does not arise at all. Whether a statute is constitutional or not is thus always a question of power [Vide *Cooley's Constitutional Limitations*, Vol 1 p 379] . A distinction, however, exists between a legislature which is legally omnipotent like the British Parliament and the laws promulgated by it which could not be challenged on the ground of incompetence, and a legislature which enjoys only a limited or a qualified jurisdiction. If the Constitution of a State distributes the legislative powers amongst different bodies, which have to act within their respective spheres marked out by specific legislative entries, or if there are limitations on the legislative

> authority in the shape of fundamental rights, questions do arise as to whether the legislature in a particular case has or has not, in respect to the subject-matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers."

Likewise, a 7-Judge Bench in **STO v. Ajit Mills Ltd.** (1977) 4 SCC 98, has also clearly stated as follows:

> "**16.** Before scanning the decisions to discover the principle laid down therein, we may dispose of the contention which has appealed to the High Court based on "colourable device'. Certainly, this is a malignant expression and when flung with fatal effect at a representative instrumentality like the legislature, deserves serious reflection. If, forgetting comity, the Legislative wing charges the Judicature wing with "colourable" judgments, it will be intolerably subversive of the rule of law. Therefore, we too must restrain ourselves from making this charge except in absolutely plain cases and pause to understand the import of the doctrine of colourable exercise of public power, especially legislative power. In this branch of law, "colourable" is not "tainted with bad faith or evil motive' ; it is not pejorative or crooked. Conceptually, "colourability" is bound up with incompetency. "Colour', according to Black's Legal Dictionary, is "an appearance, semblance or *simulacrum*, as distinguished from that which is real ... a deceptive appearance ... a lack of reality'. A thing is colourable which is, in appearance only and not in reality, what it purports to be. In Indian terms, it is *maya*. In the jurisprudence of power, colourable exercise of or fraud on legislative power or, more frightfully, fraud on the Constitution, are expressions which merely mean that the legislature is incompetent to enact a particular law although the label of competency is stuck on it, and then it is colourable legislation. It is very important to notice that if the legislature is competent to pass the particular law, the motives which impel it to pass the law are really irrelevant. To put it more relevantly to the case on hand, if a legislation, apparently enacted under one Entry in

> the List, falls in plain truth and fact, within the content, not of that Entry but of one assigned to another legislature, it can be struck down as colourable even if the motive were most commendable. In other words, the letter of the law notwithstanding, what is the pith and substance of the Act? Does it fall within any entry assigned to that legislature in pith and substance, or as covered by the ancillary powers implied in that Entry? Can the legislation be read down reasonably to bring it within the legislature's constitutional powers? If these questions can be answered affirmatively, the law is valid. Malice or motive is beside the point, and it is not permissible to suggest parliamentary incompetence on the score of mala fides."

It is clear therefore for all these reasons that Sections 4 and 6 of the Amending Act of 2019 cannot be struck down on this score.

74. So far as Section 4 is concerned, it is clear that the original timelines in which a CIRP must be completed have now been extended to 330 days, which is 60 days more than 180 plus 90 days (which is equal to 270 days). But this 330-day period includes the time taken in legal proceedings in relation to such resolution process of the corporate debtor. This provision is to get over what is stated in the judgment in **ArcelorMittal India** (supra) at paragraph 86, that the time taken in legal proceedings in relation to the corporate resolution process must be excluded from the timeline mentioned in Section 12. Secondly, the third proviso added to the Section also mandates that where the period of 330 days is over on the date of commencement of the Amending Act of 2019, a further grace period of 90 days from

such date is given, within which such process shall either be completed or the corporate debtor be sent into liquidation.

75. The raison d’être for this provision comes from the experience that has been plaguing the legislature ever since SICA was promulgated. The problems of SICA and other successor enactments was stated in graphic detail in **Madras Petrochem Limited v. BIFR** (2016) 4 SCC 1 at paragraphs 17 to 23. It will be seen from these paragraphs that though SICA, the Recovery of Debts Act of 1993 and the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (hereinafter referred to as “SARFAESI Act”) all provided for expeditious determination and timely detection of sickness in industrial companies, yet, legal proceedings under the same dragged on for years as a result of which all these statutory measures proved to be abject failures in resolving stressed assets. It is for this reason that the BLRC Report of 2015 stated:

> “In limited circumstances, if 75 % of the creditors committee decides that the complexity of a case requires more time for a resolution plan to be finalised, a onetime extension of the 180 day period for up to 90 days is possible with the prior approval of the adjudicator. This is starkly different from certain present arrangements which permit the debtor / promoter to seek extensions beyond any limit.
>
> This approach has many strengths:

• Asset stripping by promoters is controlled after and before default.

• The promoters can make a proposal that involves buying back the company for a certain price, alongside a certain debt restructuring.

• Others in the economy can make proposals to buy the company at a certain price, alongside a certain debt restructuring.

• All parties knows that if no deal is struck within the stipulated period, the company will go into liquidation. This will help avoid delaying tactics. The inability of promoters to steal from the company, owing to the supervision of the IP, also helps reduce the incentive to have a slow lingering death.

• The role of the adjudicator will be on process issues: To ensure that all financial creditors were indeed on the creditors committee, and that 75% of the creditors do indeed support the resolution plan.

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Speed is of essence

Speed is of essence for the working of the bankruptcy code, for two reasons. First, while the „calm period‟ can help keep an organisation 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 realisation 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 realisation 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 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.

Identifying and addressing the sources of delay

Before the IRP can commence, all parties need an accurate and undisputed set of facts about existing credit, collateral that has been pledged, etc. Under the present arrangements, considerable time can be lost before all parties obtain this information. Disputes about these facts can take up years to resolve in court. The objective of an IRP that is completed in no more than 180 days can be lost owing to these problems.

Hence, the Committee envisions a competitive industry of „information utilities‟ who hold an array of information about all firms at all times. When the IRP commences, within less than a day, undisputed and complete information would become available to all persons involved in the IRP and thus address this source of delay.

The second important source of delays lies in the adjudicatory mechanisms. In order to address this, the Committee recommends that the National Company Law Tribunals (for corporate debtors) and Debt Recovery Tribunals (for individuals and partnership firms) be provided with all the necessary resources to help them in realising the objectives of the Code.

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Conclusion

The failure of some business plans is integral to the process of the market economy. When business failure takes place, the best outcome for society is to have a rapid renegotiation between the financiers, to finance the going concern using a new arrangement of liabilities and with a new management team. If this cannot be done, the best outcome for society is a rapid liquidation. When such arrangements can be put into place, the market process of creative destruction will work smoothly, with greater competitive vigor and greater competition."

76. The speech of the Hon’ble Minister on the floor of the House of the Rajya Sabha also reflected the fact that with the passage of time the original intent of quick resolution of stressed assets is getting diluted. It is therefore essential to have time-bound decisions to reinstate this legislative intent. It was also pointed out on the floor of the House that the experience in the working of the Code has not been encouraging. The Minister in her speech to the Rajya Sabha gives the following facts and figures:

> “Now, regarding the Corporate Insolvency Resolution Process (CIRP), under the Code, I want to give you data again as of 30th June, 2019. First, I will talk about the status of CIRPs. Number of admitted cases is 2162; number of cases closed on appeal, which I read out about, is 174; number of cases closed by withdrawal under Section 12A, is 101, I have given you a slightly later data; number of cases closed by resolution is 120; closed by liquidation, 475; and ongoing CIRPs are 1292. So, now, I would like to mention the number of days of waiting. I would like to mention here the details of the ongoing CIRPs, along with the timelines. Ongoing CIRPs are 1,292, the figure just now I gave you. Over 330 days, 335 cases; over 270 days, 445 cases; over 180 days and less than 270 days, 221 cases; over 90 days but less than 180 days, 349 cases; less than 90 days, 277 cases. The number of days' pending includes time, if any, excluded by the tribunals. So, that gives you a picture on what is the kind of wait and, therefore, why we want to bring the Amendments for this speeding up.”

Mrs. Madhvi Divan also pointed out that the Hon’ble Minister’s speech had also adverted to the strengthening of the NCLT as follows:

> "In view of the increasing number of cases, the Government has increased the number of benches of NCLT from 10 to 15, during just the last one year. In one year, we have increased it from 10 to 15. The number of members has also been increased in a phased manner. Recently, 26 new members have joined bringing the total number of members to 52. Sir, more than one court has been operationalised in the benches where a large number of cases are pending, such as, in Mumbai, Delhi, Chennai and Kolkata. The projects like e-governance and e-courts have also been implemented for faster and speedier disposal of the cases."

77. Shri Sibal vehemently objected to any reliance on the speech of the Minister and cited **K.P. Varghese v. ITO** (1982) 1 SCR 629 and **K.S. Paripoornan v. State of Kerala** (1994) 5 SCC 593. In **Varghese** (supra) this Court held, at page 645, as follows:

> "…Now it is true that the speeches made by the Members of the Legislature on the floor of the House when a Bill for enacting a statutory provision is being debated are inadmissible for the purpose of interpreting the statutory provision but the speech made by the Mover of the Bill explaining the reason for the introduction of the Bill can certainly be referred to for the purpose of ascertaining the mischief sought to be remedied by the legislation and the object and purpose for which the legislation is enacted. This is in accord with the recent trend in juristic thought not only in western countries but also in India that interpretation of a statute being an exercise in the ascertainment of meaning, everything which is logically relevant should be admissible. In fact there are at least three decisions of this Court, one in *Loka Shikshana Trust* v. *CIT* [(1976) 1 SCC 254 : 1976 SCC (Tax) 14 : 101 ITR 234 : 1976 LR 1] , the other in *Indian Chamber of Commerce* v. *Commissioner of Income Tax* [(1976) 1 SCC 324 : 1976 SCC (Tax) 41 : 101 ITR 796 : 1976 Tax LR 210] and the third in *Additional Commissioner of Income Tax* v. *Surat Art Silk Cloth Manufacturers' Association* [(1980) 2 SCC 31 : 1980 SCC (Tax) 170 : 121

> ITR 1] where the speech made by the Finance Minister while introducing the exclusionary clause in Section 2, clause (15) of the Act was relied upon by the Court for the purpose of ascertaining what was the reason for introducing that clause."

In **Paripoornan** (supra), the Court held as follows:

> "**77.** In support of the construction placed on Section 23(1-A) of the principal Act and Section 30(1) of the amending Act in *Zora Singh* [(1992) 1 SCC 673] the learned counsel for the claimants have referred to the Statement of Objects and Reasons appended to the Bill in 1982 as well as the Bill of 1984 and have submitted that the said Statement of Objects and Reasons show that the object underlying the enactment of Section 23(1-A) was to remove the hardship to the affected parties on account of pendency of acquisition proceedings for a long time which renders unrealistic the amounts of compensation offered to them. Our attention has also been invited to the speeches made by members at the time when the Bill was considered and was adopted by Parliament. It has been urged that a construction which advances the said object must be adopted. We are unable to accept this contention. As regards the Statement of Objects and Reasons appended to the Bill the law is well settled that the same cannot be used except for the limited purpose of understanding the background and the state of affairs leading to the legislation but it cannot be used as an aid to the construction of the statute. (See *Aswini Kumar Ghosh* v. *Arabinda Bose* [1953 SCR 1, 28 : AIR 1952 SC 369] ; *State of W.B.* v. *Subodh Gopal Bose* [1954 SCR 587, 628 : AIR 1954 SC 92] per Das, J.; *State of W.B.* v. *Union of India* [(1964) 1 SCR 371, 383 : AIR 1963 SC 1241] .) Similarly, with regard to speeches made by the members in the House at the time of consideration of the Bill it has been held that they are not admissible as extrinsic aids to the interpretation of the statutory provisions though the speech of the mover of the Bill may be referred to for the purpose of finding out the object intended to be achieved by the Bill. (See *State of Travancore-Cochin* v. *Bombay Co. Ltd.* [1952 SCR 1112 : AIR 1952 SC 366] and *Aswini Kumar* v. *Arabinda Bose* [1953 SCR 1, 28 : AIR 1952 SC

> 369] .) On a perusal of the Bills of 1982 and 1984 we find that they did not contain the provisions found in Section 23(1-A) of the principal Act and Section 30(1) of the amending Act. These provisions were inserted when the 1984 Bill was under consideration before Parliament. The Statement of Objects and Reasons does not, therefore, throw any light on the circumstances in which these provisions were introduced."

As the speech of the Hon'ble Minister on the floor of the House only indicates the object for which the amendment was made and as it contains certain data which it is useful to advert to, we take aid from the speech not in order to construe the amended Section 12, but only in order to explain why the Amending Act of 2019 was brought about.

78. Given the fact that timely resolution of stressed assets is a key factor in the successful working of the Code, the only real argument against the amendment is that the time taken in legal proceedings cannot ever be put against the parties before the NCLT and NCLAT based upon a Latin maxim which sub-serves the cause of justice namely, *actus curiae neminem gravabit*.

79. In **Atma Ram Mittal v. Ishwar Singh Punia** (1988) 4 SCC 284, this Court applied the maxim to time taken in legal proceedings under the Haryana Urban (Control of Rent and Eviction) Act, 1973, holding:

> "**8.** It is well-settled that no man should suffer because of the fault of the court or delay in the procedure. Broom has stated the maxim "*actus curiae neminem gravabit*" — an act of court shall prejudice no man. Therefore, having regard to the time normally consumed for adjudication, the

> ten years' exemption or holiday from the application of the Rent Act would become illusory, if the suit has to be filed within that time and be disposed of finally. It is common knowledge that unless a suit is instituted soon after the date of letting it would never be disposed of within ten years and even then within that time it may not be disposed of. That will make the ten years holiday from the Rent Act illusory and provide no incentive to the landlords to build new houses to solve problem of shortages of houses. The purpose of legislation would thus be defeated. Purposive interpretation in a social amelioration legislation is an imperative irrespective of anything else."

Likewise, in **Sarah Mathew v. Institute of Cardio Vascular Diseases,** (2014) 2 SCC 62, this Court held that for the purpose of computing limitation under Section 468 of the Code of Criminal Procedure, 1973 the relevant date is the date of filing of the complaint and not the date on which the Magistrate takes cognizance, applying the aforesaid maxim as follows:

> "**39.** As we have already noted in reaching this conclusion, light can be drawn from legal maxims. Legal maxims are referred to in *Bharat Kale* [*Bharat Damodar Kale* v. *State of A.P.*, (2003) 8 SCC 559 : 2004 SCC (Cri) 39] , *Japani Sahoo* [*Japani Sahoo* v. *Chandra Sekhar Mohanty*, (2007) 7 SCC 394 : (2007) 3 SCC (Cri) 388] and *Vanka Radhamanohari* [*Vanka Radhamanohari* v. *Vanka Venkata Reddy*, (1993) 3 SCC 4 : 1993 SCC (Cri) 571]. The object of the criminal law is to punish perpetrators of crime. This is in tune with the well-known legal maxim *nullum tempus aut locus occurrit regi*, which means that a crime never dies. At the same time, it is also the policy of law to assist the vigilant and not the sleepy. This is expressed in the Latin maxim *vigilantibus et non dormientibus, jura subveniunt*. Chapter XXXVI CrPC which provides limitation period for certain types of offences for which lesser sentence is provided draws support from this maxim. But, even certain offences such as Section 384 or 465 IPC, which have

> lesser punishment may have serious social consequences. The provision is, therefore, made for condonation of delay. Treating date of filing of complaint or date of initiation of proceedings as the relevant date for computing limitation under Section 468 of the Code is supported by the legal maxim *actus curiae neminem gravabit* which means that the act of court shall prejudice no man. It bears repetition to state that the court's inaction in taking cognizance i.e. court's inaction in applying mind to the suspected offence should not be allowed to cause prejudice to a diligent complainant. Chapter XXXVI thus presents the interplay of these three legal maxims. The provisions of this Chapter, however, are not interpreted solely on the basis of these maxims. They only serve as guiding principles."

Both these judgments have been followed in **Neeraj Kumar Sainy v. State of Uttar Pradesh** (2017) 14 SCC 136 at paragraphs 29 and 32. Given the fact that the time taken in legal proceedings cannot possibly harm a litigant if the Tribunal itself cannot take up the litigant's case within the requisite period for no fault of the litigant, a provision which mandatorily requires the CIRP to end by a certain date - without any exception thereto - may well be an excessive interference with a litigant's fundamental right to non-arbitrary treatment under Article 14 and an excessive, arbitrary and therefore unreasonable restriction on a litigant's fundamental right to carry on business under Article 19(1)(g) of the Constitution of India. This being the case, we would ordinarily have struck down the provision in its entirety. However, that would then throw the baby out with the bath water, inasmuch as the time taken in legal proceedings is certainly an important factor which causes delay, and which has made previous statutory experiments fail as we have seen from **Madras Petrochem** (supra). Thus, while leaving the provision otherwise intact, we strike down the word "mandatorily" as being manifestly arbitrary under Article 14 of the Constitution of India and as being an excessive and unreasonable restriction on the litigant's right to carry on business under Article 19(1)(g) of the Constitution. The effect of this declaration is that <u>ordinarily</u> the time taken in relation to the corporate resolution process of the corporate debtor must be completed within the outer limit of 330 days from the insolvency commencement date, including extensions and the time taken in legal proceedings. However, on the facts of a given case, if it can be shown to the Adjudicating Authority and/or Appellate Tribunal under the Code that only a short period is left for completion of the insolvency resolution process beyond 330 days, and that it would be in the interest of all stakeholders that the corporate debtor be put back on its feet instead of being sent into liquidation and that the time taken in legal proceedings is largely due to factors owing to which the fault cannot be ascribed to the litigants before the Adjudicating Authority and/or Appellate Tribunal, the delay or a large part thereof being attributable to the tardy process of the Adjudicating Authority and/or the Appellate Tribunal itself, it may be open in such cases for the Adjudicating Authority and/or Appellate

Tribunal to extend time beyond 330 days. Likewise, even under the newly added proviso to Section 12, if by reason of all the aforesaid factors the grace period of 90 days from the date of commencement of the Amending Act of 2019 is exceeded, there again a discretion can be exercised by the Adjudicating Authority and/or Appellate Tribunal to further extend time keeping the aforesaid parameters in mind. It is only in such exceptional cases that time can be extended, the general rule being that 330 days is the outer limit within which resolution of the stressed assets of the corporate debtor must take place beyond which the corporate debtor is to be driven into liquidation.

80. When it comes to the validity of the substitution of Section 30(2)(b) by Section 6 of the Amending Act of 2019, it is clear that the substituted Section 30(2)(b) gives operational creditors something more than was given earlier as it is the higher of the figures mentioned in sub-clauses (i) and (ii) of sub-clause (b) that is now to be paid as a minimum amount to operational creditors. The same goes for the latter part of sub-clause (b) which refers to dissentient financial creditors. Mrs. Madhavi Divan is correct in her argument that Section 30(2)(b) is in fact a beneficial provision in favour of operational creditors and dissentient financial creditors as they are

now to be paid a certain minimum amount, the minimum in the case of operational creditors being the higher of the two figures calculated under sub-clauses (i) and (ii) of clause (b), and the minimum in the case of dissentient financial creditor being a minimum amount that was not earlier payable. As a matter of fact, pre-amendment, secured financial creditors may cramdown unsecured financial creditors who are dissentient, the majority vote of 66% voting to give them nothing or next to nothing for their dues. In the earlier regime it may have been possible to have done this but after the amendment such financial creditors are now to be paid the minimum amount mentioned in sub-section (2). Mrs. Madhavi Divan is also correct in stating that the order of priority of payment of creditors mentioned in Section 53 is not engrafted in sub-section (2)(b) as amended. Section 53 is only referred to in order that a certain minimum figure be paid to different classes of operational and financial creditors. It is only for this purpose that Section 53(1) is to be looked at as it is clear that it is the commercial wisdom of the Committee of Creditors that is free to determine what amounts be paid to different classes and sub-classes of creditors in accordance with the provisions of the Code and the Regulations made thereunder.

81. As has been held in this judgment, it is clear that Explanation 1 has only been inserted in order that the Adjudicating Authority and the Appellate Tribunal cannot enter into the merits of a business decision of the requisite majority of the Committee of Creditors. As has also been held in this judgment, there is no residual equity jurisdiction in the Adjudicating Authority or the Appellate Tribunal to interfere in the merits of a business decision taken by the requisite majority of the Committee of Creditors, provided that it is otherwise in conformity with the provisions of the Code and the Regulations, as has been laid down by this judgment.

82. Equally, Explanation 2 applies the substituted Section to pending proceedings either at the level of the Adjudicating Authority or the Appellate Authority or in a Writ or Civil Court. As has been held in **Swiss Ribbons** (supra) and **ArcelorMittal India** (supra) (see paragraph 97 of **Swiss Ribbons** (supra) and paragraph 82, 84 of **ArcelorMittal India** (supra)), no vested right inheres in any resolution applicant to have its plan approved under the Code. Also, the Federal Court in **Lachmeshwar Prasad Shukul v. Keshwar Lal Chaudhuri** AIR 1941 FC 5 and later, this Court in **Shiv Shakti Coop. Housing Society, Nagpur v. Swaraj Developers & Ors.** (2003) 6 SCC 659 (at paragraphs 16 and 17) have held that an appellate proceeding is a

continuation of an original proceeding. This being so, a change in law can always be applied to an original or appellate proceeding. For this reason also, Explanation 2 is constitutionally valid, not having any retrospective operation so as to impair vested rights.

83. The challenge to sub-clause (b) of Section 6 of the Amending Act of 2019, again goes to the flexibility that the Code gives to the Committee of Creditors to approve or not to approve a resolution plan and which may take into account different classes of creditors as is mentioned in Section 53, and different priorities and values of security interests of a secured creditor. This flexibility is referred to in the BLRC report, 2015 (see paragraph 33 of this judgment). Also, the discretion given to the Committee of Creditors by the word "may" again makes it clear that this is only a guideline which is set out by this sub-section which may be applied by the Committee of Creditors in arriving at a business decision as to acceptance or rejection of a resolution plan. For all these reasons, therefore, it is difficult to hold that any of these provisions is constitutionally infirm.

<u>The resolution plan of ArcelorMittal as amended and objections thereto</u>

84. The resolution plan submitted by ArcelorMittal on 02.04.2018 proposed an upfront payment of INR 35,000 crores towards

resolution of the debt of INR 49,213 crores of financial creditors. This was buttressed by a letter of commitment from Credit Agricole Corporate and Investment Bank. From this upfront cash recovery, unsecured financial creditors were to be paid only an aggregate amount of 5% of their admitted claims. Apart from this, INR 8,000 crores of upfront fresh capital infusion for improving operations and enhancing revival prospects of the corporate debtor was also proposed. So far as operational creditors were concerned, it was proposed that workmen and employees were to be paid INR 18 crores in full against their admitted claims, and out of other operational creditors, those small trade creditors defined as "having admitted claims of less than INR 1 crore" were to be paid in full, as opposed to trade and government creditors of over INR 1 crore, who were to be paid aggregate amount INR 196 crores. Other operational creditors were to be given nothing, liquidation value being payable to operational creditors as a class being in any case nil (INR 3339 crores were the aggregate admitted claims of all operational creditors as a class). Under the caption "Treatment of various stake holders" the plan provided as follows:-

"**VIII.** Treatment of Various Stakeholders"

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Stakeholder	**Proposed Treatment**
Financial Creditors	As per the Liquidation Value of the Corporate Debtor, the Secured Financial Creditors would realize amounts which were lower than the current outstandings on a cumulative basis. However, the Resolution Applicant recognizes the sacrifices already made by the Financial Creditors till date and the fact that debt restructuring attempts by the Financial Creditors have failed in the past. The Resolution Applicant is proposing to pay the Secured Financial Creditors, the amounts stated under Section V which is significantly higher than the reconvenes that the Secured Financial Creditors as a class would realize in case of liquidation. The payments proposed to be made by the Resolution Applicant to the unsecured Financial Creditors is also higher than the recoveries that the unsecured Financial Creditors as a class would realize in case of liquidation, since the Liquidation Value realizable by unsecured Financial Creditors is *nil.* The Resolution Applicant has empowered the Committee of Creditors to decide the manner in which the financial

	package being offered by the Resolution Applicant to the Financial Creditors will be distributed to the Secured Financial Creditors. All such allocations to the Financial Creditors will be binding on all stakeholders. The unsecured Financial Creditors (including those Secured Financial Creditors who may have claims admitted against unsecured instruments) i.e. Standard Chartered Bank. The Bank of New York Mellon, London Branch, AXIS bank, ICICI Bank. Bank of Baroda, SBI Rupee Notes and Individual Rupee Notes to Melwani Gopal Thrumal and /or Melwani Vinod, Mr. Arvinlal N Shah & Mrs. Indumati A Shah, Mr. jiwat k Dansanghani and Mrs. Neetu J Dhansanghani and Nathu Ram Verma, who have Admitted claims as of 28 February 2018 (based on document 2.5.8 uploaded on VDR on 6 March 2018 which provides Breakup of Secured and Unsecured financial Creditors), shall be paid an aggregate amount of 5% of their Admitted Claims. Furthermore, in accordance with the RFP, it is clarified that:

	a) any surplus cash being the positive difference between actual working capital of the Corporate Debtor as on Plan Approval Date and normalized working capital as at 31 December 2017, shall be added to upfront cash recovery as a closing adjustment under the Resolution Plan; and b) the EBITDA generated by the Corporate Debtor between the Plan Approval Date and the date on which the Financial Creditors are paid the up-front cash amount shall be available to the Financial Creditors over and above the upfront cash recovery under the Resolution Plan. However, notwithstanding anything stated herein, a Dissenting Financial Creditor will be entitled to only receive Liquidation Value realizable by such Financial Creditor in case of liquidation of the Corporate Debtor, which shall be paid out of the upfront cash recovery amount being offered.

Operational Creditors (other than Workmen, Employees and Governmental Operational Creditors)	The Resolution Applicant recognizes the role that the various Trade Creditors have played in connection with the business of the Corporate Debtor. Whilst Operational Creditors as a class of Creditors would receive *nil* returns on liquidation of the Corporate Debtor, the Resolution Applicant has agreed to settle part of the Admitted Claims to the extent set out in Section V above. Without prejudice to the above, the Resolution Applicant is desirous of setting aside amounts under the financial package to settle at least part of the Claims of the small Trade Creditors. This class of Trade Creditors are being provided such payments since the Resolution applicant understands that these Persons typically form a part of small scale/medium sector enterprises, which enterprises play a key role in the Indian economy and given their scale of operations may not be in a position to weather macroeconomic and financial shocks. The identified Trade Creditors are being paid out on the assumption that they will continue their arrangements with the Corporate Debtor and shall in no manner commit any acts or omissions which would adversely impact the business

	of the Corporate Debtor. Acceptance of payments by the Trade Creditors shall be considered as an acceptance of the above condition. The Resolution Applicant recognizes and understands that additional payment to certain Operational Creditors may have to be made as a part of revitalising the business and is prepared to do so, on a case by case basis.
Governmental Operational Creditors	The Resolution Applicant aims at establishing a good working relationship between the Governmental Authorities and the Corporate Debtor and will cause the Corporate Debtor to duly pay the statutory dues that will be incurred by the Corporate Debtor going forward from the Plan Approval Date in a timely manner. The revival of the Corporate Debtor will also enhance the tax collection by the Governmental Authorities in the geographies where the Corporate Debtor operates.

85. On 22.10.2018, various changes were made in the original resolution plan as follows:

> "The representatives of AM India of AM India thanked the RP. Thereafter, they presented a brief summary of the revisions made to the financial proposal. They informed that as per the directives of the CoC, AM India had deliberated and negotiated with the Sub-Committee.

> Thereafter, the representative highlighted certain key revisions made to the resolution plan, which *inter alia* included revisions in relation to (a) upfront cash recovery available to secured and unsecured financial creditors of ESIL; (b) upfront fresh capital infusion; (c) process of closing adjustment, which included provision of audit. He further added that they had not provided how the upfront cash would be distributed and the same has been left at the discretion of the CoC. He further added that the business plan has not undergone any substantial changes and the negotiations were largely around the financial proposal and that AM India is committed to implement the plan, as agreed. Thereafter, the representative of AM India also deliberated with the members of the CoC regarding the revised financial proposal and responded to the queries raised in relation thereto."

It was stated that the value and quality of security should be the basis on which proceeds should be distributed by most of the secured financial creditors. This amended resolution plan was approved by a majority of 92.24% of financial creditors. The sharing ratio between secured financial creditors having charge on project assets of the corporate debtor was 99.86% as opposed to 0.14%, so far as Standard Chartered Bank was concerned, which only had a charge on the pledge of shares of ESOL, being an offshore subsidiary of the corporate debtor. The upfront payment to secured financial creditors on the effective date would now be INR 41,909.29 crores and INR 60.71 crores to Standard Chartered Bank. It was pointed out that this was based on the worth of those shares as security, being only INR

24.86 crores. The reasons given for acceptance of this amended resolution plan was stated as follows:

> "By majority consensus of COC (except Standard Chartered Bank and SREI), it was agreed that fairness of distribution would be reflected only if distribution be made based on underlying security value and quality of security. Based on a comparison of the two suggested options based on fair value and liquidation value, in the interest of all stake holders and with the objective of the Code it is proposed to the COC to accept the sharing ratio as per the Liquidation Valuation Report and also to Secured Financial Creditors having Charge on Project Asset of ESIL for taking a sacrifice of Rs.37.76 Crores (for adopting the sharing ratio as per the Liquidation Valuation Report instead of fair value) which shall be allocated to Secured Financial Creditors having Charge on Pledge of Shares of ESOL.
>
> While allocation of the Resolution Amount it is pertinent to note that the *Committee of creditors has the widest discretion to determine the terms of the resolution plan.*
>
> A. At the outset it is important to be noted that the legislature in their wisdom under the provisions of the Insolvency and Bankruptcy Code, 2016 (Code) have left the decision-making in respect of commercial matters completely in the domain of the Committee of Creditors (COC). In fact even the Bankruptcy Law Reforms Committee report (which formed the basis for the enactment of the Code) specifically notes the deliberate scheme of the Code, where the law does not prescribe any particular manner of insolvency resolution and leaves this commercial decision making process to the COC without the interference of the legislature as well as judiciary.
>
> B. Further, pro rate distribution cannot be the only method of distribution of assets, as it would lead to the disastrous consequences where the creditors would lose their freedom to restructure the debt as they deem fit. This an important commercial decision which is required to be made by the Code and a strait jacket formula for all cases would result in dilution of the provisions of the Code and

would incentivize all secured creditors to liquidate the company rather than opt for resolution. It was noted that generally all secured financial creditors are prudent entities which grant loans after exercising due-diligence and are presumed to be able to evaluate their interest and risks sufficiently. Moreover it may negatively impact the credit market and discourage banks and other financial creditors from granting large project loans which are more often than not granted against property or other valuable collateral.

C. The Report of the Insolvency Law Committee provides valuable insights on the principles governing inter-creditor agreements and their relevance to distribution arrangements. In practice, subordination agreements inter-se creditors were respected in practice. This was also the stated position in insolvency resolution proceedings other jurisdiction and in other developed countries.

D. The Hon'ble National Company Law Appellate Tribunal has held that the COC has the discretion to approve any resolution plan and its decision to approve the same cannot be interfered with by the Adjudicating Authority or the Appellate Authority, except for in terms of Section 31(1) to examine compliance of Section 30(2) read with relevant regulations. (See Kannan Tiruvengandram Vs. M.K. Shah Exports Ltd. & Ors. in and Darshak Enterprise Pvt. Ltd. and Ors. v. Chhaparia Industries Pvt. Ltd. and Ors.

E. The Code specifically provides the COC with the power under section 30(4) of the Code, to approve a resolution with requisite majority as set out thereunder. It is an accepted position in law, and as enunciated in various pronouncements of the Supreme Court of India that where a power is conferred or a duty is imposed by a statute, and there is nothing expressly inhibiting the exercise of the power or the performance of the duty by any limitations or restrictions it is reasonable to hold that it carries with it all power of doing all such acts or employing all such means as are reasonably necessary for its execution. The below mentioned provisions of the Code and the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons). Regulation 2016 (CIR Regulations) set out the powers of the COC in this regard:

Section 31 of the Code (Approval of Resolution Plan):

"(1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan.

Regulation 39 of the CIR Regulations, 2016;

"(2) The resolution professional shall present all resolution plans that meet the requirements of the Code and these Regulations to the Committee for its consideration.

(3) The committee may approve any resolution plan with such modifications as it deems fit

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K. It is a recognized principle of insolvency law that creditor rights and ranking of priority claims existing before commencement of insolvency must be recognized and respected in the insolvency proceedings. Recognition of such ranking of priorities of existing and post-commencement creditor claims provide predictability to lenders and ensure consistent application of the rules, create confidence in the proceedings and enable participants to adopt appropriate measures to manage risk. At macro level, it helps create certainty in the market and facilitate the provision of credit, in particular with respect to the rights and priorities of secured creditors. It is also well established that best practices require that priority to claims that are not based on commercial bargains should be minimalized. This principle is unequivocally articulated in the United Nations Commission on International Trade Law (UNCITRAL) Legislative Guide on Insolvency law (hereinafter, the "UNCITRAL Guide") in the chapter that

> recommends the policy and legislative design of the "key objectives and structure of an effective and efficient insolvency law"
>
> L. Further, in recognition of the principle that creditor rights and ranking of priority claims existing before commencement of insolvency must be recognised and expected in the insolvency proceedings. To protect/respect the creditor rights and ranking of priority claims, the IBC does not in any manner impose any prescription, mandatory or otherwise on the resolution applicant that would be disruptive of the creditor rights and priority claims of the secured creditors as on insolvency commencement date. If this rule was not to be recognised, it will lead to a free-for-all situation, no short of chaos, as any rights on differential security interest would then be ignored.
>
> M. Therefore in conclusion, since the Code provides the COC with the power to approve a resolution for the Corporate Debtor, the manner in which such resolution shall be executed including but not limited to the decision as to the methodology of distribution or the amount a money to be paid to individual stakeholders would also be a decision which the COC would be permitted to take, especially in the absence of any express provision in the Code prohibiting such a decision by the COC. As long as such decisions are not contrary to the provisions of the Code."

86. The final resolution plan as approved on 23.10.2018 was as follows - in the place of INR 35,000 crores to be paid on the effective date as an upfront amount, INR 39,500 crores and INR 2500 crores, aggregating INR 42,000 crores was to be paid. The resolution applicant agreed that the Committee of Creditors will decide the manner in which the financial package being offered by the resolution applicant to financial creditors will be distributed to secured financial

creditors. The payment of INR 17.4 crore was to be made to unsecured financial creditors with a claim amount of more than INR 10 lakhs, and INR 30.55 lakhs to such creditors with a claim amount of less than INR 10 lakhs, with the fresh capital infusion for improving operations and enhancing revival prospects of the corporate debtor remaining at INR 8,000 crores. So far as operational creditors were concerned, there was no change made.

87. At the 22nd meeting of the Committee of Creditors dated 27.03.2019, the NCLT order of 08.03.2019 was discussed and it was felt that INR 1,000 crores extra be paid for operational creditors over and above INR 1 crore each, as follows:

> "The representative of EARC mentioned that without prejudice to the appeals, a lump sum amount may be set-aside and put to vote as they are not averse to examining it. The representative of SBI concurred with the views of the representative of EARC. He further mentioned that CoC as well as SCB has challenged the NCLT Order. SBI proposed to set aside a capped amount of INR 1,000 Crore for operational creditors (without prejudice to their right to appeal). He requested that a resolution to that effect may be voted upon.
>
> The RP requested the SBI representative to clarify if the proposed amount of INR 1,000 Crore would be over and above the INR 196 Crore which is already included in the Resolution Plan for operational creditors. The SBI representative confirmed that the same would be over and above the current proposal, however this additional amount will be capped to INR 1,000 crores."

Under the caption "discussion on the suggestions of the Hon'ble NCLT in relation to distribution of amounts proposed to be paid to financial creditors", the minutes of the meeting reflect that the Committee of Creditors had sought for and obtained the opinion of retired Justice B.N. Srikrishna. This opinion dated 23.03.2019 stated as follows:

> "In view of this peculiar situation, where a financial creditor has advanced money to the corporate debtor assessing the commercial risk and covers his risk by a charge on the assets of the corporate debtor, there can be no question of his being entitled to the liquidation value or any other fixed value towards his debt. In any event, the plan formulated by the resolution applicant, has to be placed before the COC for its final approval. It is at that juncture the commercial wisdom of lenders forming the COC comes into play and they are entitled to take a call on either to approve or not to approve the resolution plan which the FRP has put forward before the COC for its approval. In my view, therefore, the Approved Resolution Plan would be fully justified in classifying between secured and unsecured financial creditor, and also according to the value of their securities and apportioning the amounts payable to them in the best manner which is considered reasonable. I might add here that irrespective of what the RP considers as reasonable, it is always open to the COC to adjudge the commercial wisdom of the resolution plan while approving it. As pointed out by the Supreme Court in K. Sashidhar vs Indian Overseas Bank & Ors. (Civil Appeal No. 10673 of 2018) such commercial decision of the COC is not subject to appeal under the Code.
>
> In the premises, I am of the opinion that SCB was differently placed than other financial creditors in view of the fact it did not have any charge or security on the project assets but had advanced a large amount of loan amounting to Rs.3000 crores on the basis of the pledge over the shares of an offshore company and a corporate guarantee

extended by the Corporate Debtor. The resolution plan as finally approved by COC was fully justified in treating SCB as differently placed based on the cogent and intelligible differentia that is apparent from the facts of the case. I see nothing in the provisions of the Code of the Regulations which would militate against the decision taken by the COC.

I might add here that the commercial wisdom of the lenders who are voting for the resolution of the COC is evidenced by the fact that they had created securities on the project assets of the Corporate Debtor after assessing the commercial risk involved. In the case of SCB, however, there seems to have been gross under security for the large amount of Rs.3000 crores by merely seeking a corporate guarantee from the Corporate Debtor along with a charge only on the shares of the offshore company held by the Corporate Debtor, wherein the liquidation value of such shares is a mere Rs.60.71 crores. In fact, in view of the fact situation, I find it hard to understand whether SCB can really be treated as a secured creditor in the first place. I am of the opinion that even if the corporate guarantee were to be enforced, SCB would at best stand as a secured creditor only to the extent of the value of the shares of the offshore company as on the date of enforcement of the guarantee and as an unsecured creditor with respect to the rest of the loan advanced by it. This is an equally valid consideration which might have moved the COC while approving the resolution plan by which the ultimate discretion for distribution is left to the COC with a declaration that such allocation to the financial creditors will be binding on all stake holders, which also would include SCB.

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In the facts and circumstances, I am of the opinion that the manner in which the resolution plan was formulated and approved by the overwhelming majority of 92.24% of the voting creditors, is not only perfectly justified but is also equitable. As the Supreme Court has pointed out in Swiss Ribbons (supra), “equitable” does not mean equal distribution; it means distribution which does justice to every stakeholders involved in the process. In my opinion, mere equal distribution would definitely do injustice to the large majority of 92.24% shareholders who in their commercial wisdom had ensured that the security was created on project assets, while SCB was content with creating a charge only on the shares of the offshore company and seeking a corporate guarantee from the Corporate Debtor."

88. The aforesaid opinion was shared with all Committee of Creditors members including Standard Chartered Bank. Importantly, the minutes record:

> "At this point, the representative from Canara Bank stated that he requires clarity on the following questions before he can consider the revised apportionment to SCB: (a) Whether any NOCs were taken from the lenders before taking corporate guarantee, as it is a financial covenant in the sanctions of the lenders? (b) When SCB had funded Essar Steel Offshore Ltd. (ESOL), whether SCB had not taken security of Trinity coal mines as collateral, and the cash flows and credentials from the assets as security? (c) What is the end-use of the loan and was that end-use ensured? At what stage is the project? Were the funds really invested in the project?
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> xxx xxx xxx
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> The representatives of SCB raised issue of valuation and mentioned that value of above INR 24 crores of ESOL shares has not been estimated appropriately and is erroneous. The value has been estimated based on desktop valuation and the valuer has not considered valuation of underlying assets. A valuation report of equity of Trinity was shared by RP after receipt of same from Corporate Debtor which shows value in excess of USD 600 mn.
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>
> Further, the representatives of EARC added that they required clarify as to whether the underlying loans has been enforced against the principal borrower and whether any money has been recovered from the principal

> borrower. SCB representative replied that these questions were not relevant at this time and they were choosing not to answer these questions. SBI representative pointed out that these questions have been raised earlier and SCB has never replied to these queries.
>
> xxx xxx xxx
>
> <u>After several requests of the lenders, it was noted that SCB declined to share the documents and did not answer any of the questions as asked by the members of the CoC stating that the same were irrelevant at this stage</u>.
>
> xxx xxx xxx
>
> ICICI Bank also stated that it should be recorded that SCB rejected offer of INR 200 crores was not considered by SCB. The representative of SBI mentioned that the proposal offered by ICICI Bank in its individual capacity and not by other lenders. The representative of SCB mentioned it is evident that the offer was only hypothetical.
>
> It was also suggested by EARC that revised distribution to SCB matter as per NCLT Order should also be voted upon and the other lenders concurred with the same."
>
> (emphasis supplied)

Finally, the allocation of INR 1,000 crore extra to operational creditors was approved by a majority of 70.73% of the Committee of Creditors.

89. Given the aforesaid facts, Shri Sibal's submissions on behalf of Standard Chartered Bank, that the offer made by ArcelorMittal of payment of INR 42,000 crores as upfront in order to pay 100% principal outstanding of secured financial creditors of the corporate debtor cannot be accepted. Given that Standard Chartered Bank was reclassified as a secured financial creditor of the corporate debtor only on 10.09.2018 and that the aforesaid upfront payment of INR

42,000 crores would include the principal amount payable to Standard Chartered Bank as well, we have seen how in the course of negotiation, the vast majority of financial creditors have ultimately decided that Standard Chartered Bank will only get an amount based on its security interest, which was accepted by ArcelorMittal. Shri Sibal also argued that the final resolution plan ultimately offered a sum of INR 39,500 crores instead of INR 42,000 crores, being a minimum upfront payment from which it was possible to negotiate upwards but not downwards. We cannot arrive at the conclusion that the acceptance of the resolution plan by the majority of the Committee of Creditors should be set aside on this score, *inter alia*, for the reason that Shri Sibal assured us that he was not attacking the acceptance of the revised plan but only distribution of amounts payable under the said plan. This being so, it is also not possible to accept the submission of Shri Sibal, that “feasibility and viability” of a resolution plan will not include distribution of the amount of debt under the said plan. It is also not possible to accept Shri Sibal’s submission that the resolution plan must itself provide for distribution *inter se* between secured financial creditors. It is enough that under the Code and the Regulations, the resolution plan provides for distribution of amounts payable towards debts based upon a classification of various types of creditors. This both the original plan as well as the negotiated plan of ArcelorMittal have already done, as has been seen by us hereinabove, both plans containing the amount to be paid to workmen separately, operational creditors of INR 1 crore and less separately, operational creditors of INR 1 crore and over separately and financial creditors, subdivided into secured and unsecured as sub-classes, separately. All that was left for distribution by ArcelorMittal was distribution *inter se* between secured financial creditors which was then done by a majority of 92.24%, as has been seen above based upon the value of their respective security interests. Therefore, the allegation that the Committee of Creditors relieved ArcelorMittal from the solemn offer made before the Supreme Court by reducing the offer amount of INR 42,000 crores by INR 2,500 crores so that ArcelorMittal could acquire the debts of OSPIL, is again a matter for negotiation being a business decision taken by the Committee of Creditors with ArcelorMittal. In any case ultimately INR 35,000 crores was upped to INR 42,000 crores, it being made clear in the final resolution plan that upfront payment of INR 42,000 crores is a committed amount, even if working capital adjustment turns out to be below INR 2,500 crores.

90. Shri Sibal also made an alternative submission that on the facts of this case, a half-way house can be found so that Standard

Chartered Bank would get payment of something more above the value of its security interest. The argument is that, assuming, whilst denying, that classification amongst secured financial creditors is permissible, such classification should be on the liquidation value of the security enjoyed by the creditor and the balance distributed to all secured financial creditors pro-rata. This methodology of distribution has, according to him, been applied in **State Bank of India v. Orissa Manganese and Minerals Ltd.** CA(IB) No. 391/KB/2018, approved by the NCLT and not disturbed by the NCLAT. Therefore, it is argued that, applying the aforesaid classification, the average liquidation value of the security in the instant case, is to be as per the report of DUFF & Phelps and RBSA, being a sum of INR 15,838 crores. This, according to him, is the amount required to be distributed to the secured financial creditors according to the value of their respective security interests (viz. first charge, second charge, subservient charge, residuary charge, etc.) and the balance to be distributed pro-rata amongst all financial creditors irrespective of their security. The sum of INR 42,000 crores offered by ArcelorMittal would therefore, according to him, be a sum of INR 15,838 crores paid over to the secured financial creditors according to the value of their security and the balance amount of INR 26,162 crores would then have to be distributed amongst all financial creditors on a pro-rata basis.

91. What is important to note is that when one reads the abovementioned judgment, it is a majority of 66% of the Committee of Creditors who has exercised the discretion vested in it under the Code in this particular manner, which has then correctly not been disturbed by the NCLT and NCLAT. Far from helping Shri Sibal's client, the principle that is applied in such a case is that ultimately it is the commercial wisdom of the requisite majority of the Committee of Creditors that must prevail on the facts of any given case, which would include distribution in the manner suggested in **Orissa Manganese** (supra). It is, therefore, not possible to accept the argument that the Adjudicatory Authority and consequently the Appellate Authority would be vested with the discretion to apply what was applied by the Committee of Creditors in the **Orissa Manganese** case (supra). This submission is also devoid of merit and is, therefore, rejected.

92. The other argument of Shri Sibal that Section 53 of the Code would be applicable only during liquidation and not at the stage of resolving insolvency is correct. Section 30(2)(b) of the Code refers to Section 53 not in the context of priority of payment of creditors, but only to provide for a minimum payment to operational creditors. However, this again does not in any manner limit the Committee of

Creditors from classifying creditors as financial or operational and as secured or unsecured. Full freedom and discretion has been given, as has been seen hereinabove, to the Committee of Creditors to so classify creditors and to pay secured creditors amounts which can be based upon the value of their security, which they would otherwise be able to realise outside the process of the Code, thereby stymying the corporate resolution process itself.

93. The other argument based upon serious conflict of interest between secured and unsecured financial creditors, as the majority may get together to ride roughshod over the minority, is an argument which flies in the face of the majority of financial creditors being given complete discretion over feasibility and viability of resolution plans, which includes the manner of distribution of debts that is contained in them, subject to following the provisions of the Code relating, *inter alia*, to dealing with the interests of all stakeholders including operational creditors. The Committee of Creditors does not act in any fiduciary capacity to any group of creditors, as is sought to be suggested by Shri Sibal. On the contrary, it is to take a business decision based upon ground realities by a majority, which then binds all stakeholders, including dissentient creditors. It is important to note that the original threshold required by way of majority was 75%. It is

during the working of the Code that this was found to be unrealistic and therefore reduced to 66% - see the amendments made to Section 28(3) and 30(4) of the Code by the Insolvency and Bankruptcy Code (Second Amendment) Act of 2018. For all these reasons therefore, it is not possible to accept Shri Sibal's arguments.

94. The NCLAT judgment which substitutes its wisdom for the commercial wisdom of the Committee of Creditors and which also directs the admission of a number of claims which was done by the resolution applicant, without prejudice to its right to appeal against the aforesaid judgment, must therefore be set aside.

95. So far as Civil Appeal No. 6409 of 2019 is concerned, we have perused paragraphs 70 to 76 of the impugned NCLAT judgment to the effect that the cheques issued by the corporate debtor due to its payment obligation towards Bhandar Power Limited were not issued with a view to secure any payment obligation of the principal borrower i.e. EPGL, is a finding of fact which dislodges the claim of this appellant to be regarded as a financial creditor. We find no infirmity in the aforesaid finding. This appeal is consequently dismissed.

96. So far as Civil Appeal Diary No. 36838 is concerned, we have perused the relevant documents and paragraphs 63 and 64 of the impugned NCLAT judgment and find that the NCLAT has erred

inasmuch as it has added the claim of this Appellant to the tune of INR 861.19 crore despite the fact that the claim had already been admitted by the resolution professional thereby resulting in a double counting of the debt of this Appellant. This being the position, we find it necessary to set aside this part of the impugned NCLAT judgment as well.

97. So far as Civil Appeal No. 6266 of 2019, we have perused paragraphs 78 to 81 of the impugned NCLAT judgment and find no reason to dislodge the finding of the NCLAT that the claim was filed by the Appellant after the approval of the resolution plan. However, the NCLAT's finding that the said claim is subject to arbitration and that it was open for the Appellant to pursue the matter in terms of Section 60(6) of the Code deserves to be aside in terms of this judgment. This Appeal is consequently dismissed.

98. So far as Civil Appeal No. 6269 of 2019 is concerned, we have perused paragraphs 83, 84 and 196 of the impugned NCLAT judgment and find force in the contention of the Appellant that there has been an error in the impugned NCLAT judgment in as much as it notes the claim amount, as admitted, as being a sum of INR 124.88 crores, but later in the same judgment notes the said amount as INR 2.47 crores based on a chart submitted by the resolution

professional. This chart submitted by the resolution professional specifies the amount of INR 2.47 crore (added after the NCLT judgment dated 08.03.2019), which is in addition to the amount of INR 124.88 crores already admitted by the resolution professional. Therefore, the NCLAT has erred in noting INR 2.47 crore amount as the amount of the Appellant's claim, and this part of the judgment also deserves to be set aside. Thus, the claim of the appellant shall be the claim as admitted and registered by the resolution professional. This apart, we find no merit in the submission of the Appellant with respect to the sum of INR 121.72 crores as the same has been rightly rejected by the NCLAT in view of the fact that the said claim was filed after the completion of the CIRP period. However, the NCLAT's judgment inasmuch as it left it open for the Appellant to pursue the matter in terms of Section 60(6) of the Code deserves to be aside in terms of this judgment. This Appeal is thus partly allowed.

99. So far as Civil Appeal No. 7266 of 2019 and Civil Appeal No. 7260 of 2019 are concerned, the resolution professional has rejected the claim of the Appellants on the ground of non-availability of duly stamped agreements in support of their claim and the failure to furnish proof of making payment of requisite stamp duty as per the Indian Stamp Act despite repeated reminders having been sent by

the resolution professional. The application filed by the Appellants before the NCLT came to be dismissed by an order dated 14.02.2019 on the ground of non-prosecution. The subsequent restoration application filed by the appellants then came to be rejected by the NCLT through judgment dated 08.03.2019 on two grounds: one, that the applications could not be entertained at such a belated stage; and two, that notwithstanding the aforementioned reason, the claim had no merit in view of the failure to produce duly stamped agreements. The impugned NCLAT judgment, at paragraphs 93 and 94, upheld the finding of the NCLT and the resolution professional. In view of these concurrent findings, the claim of the Appellants therefore requires no interference. Further, the submission of the Appellants that they have now paid the requisite stamp duty, after the impugned NCLAT judgment, would not assist the case of the Appellants at this belated stage. These appeals are therefore dismissed.

100. So far as Writ Petition (Civil) No. 1064 of 2019 is concerned, we have perused the relevant documents and paragraph 36 of the impugned NCLAT judgment and find force in the contention of the Writ Petitioner that the NCLAT has wrongly noted that the claim amount was notionally admitted by the resolution professional at INR 1 only. The resolution professional has admitted the claim of the Writ

Petitioner to a tune of INR 17.09 crore and the same is recorded in the list of creditors prepared by the resolution professional. In view of the same, this part of the NCLAT judgment is thus erroneous and the claim shall be the claim as admitted and registered by the resolution professional. The Writ Petition is thus allowed to this extent.

101. So far as Writ Petition (Civil) No. 1049 of 2019 is concerned, the Petitioner is admittedly the operational creditor of one Wind World India Ltd whose CIRP proceedings are pending before the NCLT, Ahmedabad. The Petitioner has *inter alia* sought for permission to raise various issues arising out of the facts of its own case (which has been raised before us herein) in the matter pending before the NCLT. In view of the fact that this judgment has not opined on the merits of the case of the Writ Petitioner pending before the NCLT, it is open to the Writ Petitioner to raise all contentions as permissible under the applicable law before the NCLT in the pending proceedings. This Writ Petition is thus allowed to this extent.

102. So far as Dakshin Gujarat Vij Co. (Respondent No. 11 in Civil Appeal Diary No. 24417 of 2019), State Tax Officer (Respondent No. 12 in Civil Appeal Diary No. 24417 of 2019), Gujarat Energy Transmission Corporation Ltd. (Respondent No. 17 in Civil Appeal Diary No. 24417 of 2019) and Indian Oil Corporation Ltd.

(Respondent No. 18 in Civil Appeal Diary No. 24417 of 2019) are concerned, the resolution professional admitted the claim of the abovementioned respondents notionally at INR 1 on the ground that there were disputes pending before various authorities in respect of the said amounts. However, the NCLT through its judgment dated 08.03.2019 directed the resolution professional to register the entire claim of the said respondents. The NCLAT in paragraphs 43 and 196 of the impugned judgment upheld the order passed by the NCLT as aforesaid and admitted the claim of the abovementioned respondents. We therefore hold that this part of the impugned judgment deserves to be set aside on the ground that the resolution professional was correct in only admitting the claim at a notional value of INR 1 due to the pendency of disputes with regard to these claims.

103. The appeals filed by the Committee of Creditors of Essar Steel Limited and other Civil Appeals are allowed. The impugned NCLAT judgment is set aside, except insofar as Civil Appeal No. 6409 of 2019, Civil Appeal No. 7266 of 2019, Civil Appeal No. 7260 of 2019 are concerned, which are dismissed. Insofar as Civil Appeal No. 6266 of 2019 and Civil Appeal No. 6269 of 2019 is concerned, the Appeals are partly allowed in terms of this judgment. The Writ Petitions are

disposed of in terms of the judgment. It is made clear that the CIRP of the corporate debtor in this case will take place in accordance with the resolution plan of ArcelorMittal dated 23.10.2018, as amended and accepted by the Committee of Creditors on 27.03.2019, as it has provided for amounts to be paid to different classes of creditors by following Section 30(2) and Regulation 38 of the Code.

………………………………..J.
(R.F. Nariman)

………………………………..J.
(Surya Kant)

………………………………..J.
(V. Ramasubramanian)

New Delhi;
November 15, 2019