Educomp™
What Learning Can Be

Date: 11.10.2023

The Secretary Listing Department BSE Limited PJ Towers, Dalal Street, Mumbai - 400 001 **Script Code: 532696**	The Secretary Listing Department National Stock Exchange of India Limited Exchange Plaza, 5th Floor, Plot No. C/1, G Block, Bandra Kurla Complex, Bandra (East), Mumbai 400051 **Script Code: EDUCOMP**

Sub: Intimation under Regulation 30 of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015

Ref: NCLT (New Delhi) Order in the matter IA. No. 195/ND/2018, CA-160(PB)/2018 & IA No. 4845/2023 IN Company Petition No. (IB)-101/(PB)/2017.

Dear Sir/Madam,

This is to inform you that, in accordance with Regulations 30 and other provisions of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("SEBI LODR"), we hereby inform you that NCLT (New Delhi) Order dated 9th October and uploaded in the NCLT website on 10th October in the matter IA. No. 195/ND/2018, CA-160(PB)/2018 & IA No. 4845/2023 IN Company Petition No. (IB)-101/(PB)/2017 has ordered that IA(IBC)-195//2018 filed by the RP for approval of the Resolution Plan is allowed. The Plan submitted by the Ebix/SRA, certified by the RP is approved. The SRA shall furnish the Performance Bank Guarantee for an amount of Rs.32.5 Crore qua implementation of the Plan and shall implement the Plan qua Resolution of Insolvency of CD, submitted by it, in letter and spirit, with due deference to all the terms and conditions thereof. The Plan shall be binding on the Corporate Debtor and its employee, members, creditors (including the Central, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authority to whom the statutory dues are owed), Guarantors and other Stakeholders involved in the Resolution Plan.

A detailed copy of the NCLT Order along with the details of the resolution plan are enclosed with this letter.

You are requested to acknowledge and update the same in your records.

Thanking You,
Your Truly
For Educomp Solutions Limited

Manoj Garg
Chief Financial Officer

Encl.: *As above*

Educomp Solutions Limited
(CIN: L74999DL1994PLC061353)
Corporate office: 514, Udyog Vihar, Phase III, Gurgaon – 122001, Haryana (INDIA).
Tel.: 91-124-4529000.
Registered Office: 1211, Padma Tower I, 5, Rajendra Place, New Delhi-110008.
Web site www.educomp.com; email: investor.services@educomp.com

NATIONAL COMPANY LAW TRIBUNAL: NEW DELHI

SPECIAL BENCH (COURT-II)

IA. No. 195/ND/2018, CA-160(PB)/2018 & IA No. 4845/2023
IN
Company Petition No. (IB)-101/(PB)/2017

IN THE MATTER OF:

Educomp Solutions Limited **... Corporate Debtor**

AND IN THE MATTER OF IA. NO. 195/ND/2018:

Mr. Mahendar Singh Khandelwal,
Resolution Professional,
Educomp Solutions Limited
The Palm Springs Plaza,
Office No. 1501-8, 15th Floor
Sector-54, Golf Course Road
Gurgaon-122001 **... Applicant**

SECTION: Section 30(6) of IBC 2016

AND IN THE MATTER OF IA. NO. 4845/ND/2023:

EBIX Singapore Pte. Limited
Through its Authorised Signatory,
Having its officers at 143, Cecil Street,
No. 22-01 GB Building,
Singapore 069542 **... Applicant**

Versus

Mr. Mahendar Singh Khandelwal,
Resolution Professional,
Educomp Solutions Limited
The Palm Springs Plaza,
Office No. 1501-8, 15th Floor
Sector-54, Golf Course Road
Gurgaon-122001 **... Respondent**

SECTION: Section 60(5) of IBC 2016

Order Delivered on: 09.10.2023

CORAM:

SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)

SH. L. N. GUPTA, HON'BLE MEMBER (T)

PRESENT:

For the Applicant	**:**	Sr. Adv. Arvind Nayyar, Adv. Aditya Swarup, Adv. Akshay Joshi, Adv. Shubham Pandey, Adv. Mehaq Rao in IA. No. 4845/2023, Adv. Rajat Sehjal, Adv. Mehaq Rao for SRA
For the Respondent	**:**	Sr. Adv. Neeraj Malhotra, Adv. Abhishek Sharma, Adv. Gaurav Arora, Adv. Kritya Sinha, Adv. Nimish Kumar, Adv. Himanshu Kohli on behalf of R-1 (RP)
For the CoC	**:**	Adv. Siddhant Kant, Adv. Moulshree, Adv. Gayatri
For SBI Singapore	**:**	Adv. Ankur Mittal, Adv. Bhaskar

ORDER

PER: SH. ASHOK KUMAR BHARDWAJ, MEMBER (J)

The captioned application has been preferred by Mr. Mahender Kumar Khandelwal (IP) registration number IBBI/IPA-001/IP-P00033/2016-17/10086), Resolution Professional qua the Corporate Debtor viz. Educomp Solutions Limited for approval of the Resolution Plan submitted by Ebix Singapore Pte. Ltd.

2. The Educomp Solutions Limited (hereinafter referred to as CD) was incorporated on 07.09.1994 in terms of the provisions of the Companies Act, 2013 as, "Educomp Datamatics Private Limited" and was so included in the register of companies maintained by RoC, NCT of Delhi in Haryana. Upon being converted to a public company, it changed its name to "Educomp Datamatics

Limited" w.e.f. 18.09.2000. Subsequently on 22.08.2005 its name was changed to "Educomp Solutions Limited".

3. The Authorised Capital of the CD, as on the date of filing of (IB)-101(PB)/2017 was INR 40,00,00,000/- divided into twenty thousand Equity Shares of Rs.2 each. The issued, paid-up and subscribed capital of the CD as on said date was INR 24,49,34,336 divided into 12,24,67,168 Equity Shares of Rs.2 each. In December, 2005 the CD came out with Initial Public Offer (IPO) and its shares got listed in Bombay Stock Exchange (BSE). The CD expanded its business and allied with leading education providers to provide educational services beyond India.

4. Due to economic slowdown, the CD opted for loan restructuring and in July, 2013 it initiated the process under Corporate Debt Restructuring mechanism. The Corporate Debt Restructuring (CDR) was approved vide LOA dated 17.02.2014. The CD then prepared a revival plan to mitigate the challenges faced in the CDR package for the meeting of the joint lenders held on 29.07.2015. On 10.05.2017, the Board qua the CD passed a resolution for filing application under Section 10 of IBC, 2016 for initiation of Corporate Insolvency Resolution Process. The factual matrix qua the matter could be captioned by the Hon'ble Supreme Court in its judgment dated 13.09.2021 passed in Civil Appeal No.3324 of 2020, decided along with Civil Appeal Nos. 3560 of 2020 and 295 of 2021 (hereinafter referred to as "Judgement"). Such conspectus of the case given by the Hon'ble Supreme Court (ibid) reads thus:

"A.2 Initiation of CIRP

3. On 5 May 2017, Educomp filed a petition under Section 10 of

the IBC seeking to initiate voluntary CIRP. The NCLT admitted this petition on 30 May 2017, and appointed an IRP. Hence, 30 May 2017 would be taken as the 'Insolvency Commencement Date' for the purposes of Section 5(12) of the IBC.

4. E-CoC was then constituted on 28 June 2017, following which it appointed Mr Mahender Kumar Khandelwal as the RP for Educomp on 27 July 2017. This was confirmed by the NCLT on 12 September 2017. On 18 September 2017, the E-RP took over information, documents, reports and records pertaining to Educomp from the IRP.

5. On an application of the E-RP, the NCLT by its order dated 13 November 2017 extended the period of the CIRP by 90 days, beginning from 26 November 2017 till 24 February 2018.

A.3 Invitation, submission and approval of Resolution Plan

6. In terms of Section 25(2)(h) of the IBC, the E-RP invited EOI on 18 October 2017 from prospective bidders, investors and lenders.

7. On 10 November 2017, the last date for submission of EOIs was extended to 17 November 2017. Commencing from 5 December 2017, the E-RP provided access to the Virtual Data Room of Educomp to prospective Resolution Applicants who had submitted a confidentiality undertaking and made an upfront payment of Rs 5,00,000.

8. On 5 December 2017, the final RFRP was issued in accordance with Section 25(2)(h) of the IBC. The last date for submission of the Resolution Plans was 8 January 2018. The RFRP was amended on 17 January 2018 and 20 January 2018 to extend the last date for submission to 20 January 2018. On 25 January 2018, the NCLT again extended the last date for submission of the Resolution Plans until 27 January 2018.

9. By the last date for submission, Resolutions Plans were received by the E-RP from Ebix and another entity. These were shared

with the E-CoC on 29 January 2018. Following this, both the Applicants were invited to give their presentations to the E-CoC on 2 February 2018.

10. Ebix was declared as the successful Resolution Applicant by the E-CoC on 9 February 2018. Ebix had discussions about its Resolution Plan with the E-CoC, and submitted a revised Resolution Plan on 19 February 2018, with an addendum on 21 February 2018.

11. Upon the directions of the E-RP, the E-CoC commenced e-voting on the Ebix's Resolution Plan at 7.00 pm on 21 February 2018. The voting lines were kept open till 7.00 pm on 22 February 2018. According to the results of the e-voting, in terms of the voting share percentage: (i) 74.16 per cent members of the E-CoC voted to approve the Resolution Plan; (ii) 17.29 per cent members voted to reject the Resolution Plan; and (iii) the remaining members, having cumulatively 8.55 per cent share, abstained from voting on the Resolution Plan. The Resolution Plan thus failed to achieve the minimum percentage of 75 per cent, in accordance with Section 30(4) of the IBC (as it stood then).

12. A day later on 23 February 2018, one of the members of the E-CoC (CSEB) informed the E-RP by an email that due to a technical error, they could not participate in the e-voting process. CSEB had a voting share of 1.195 per cent in the E-CoC, and wanted its affirmative vote to be recorded on the Resolution Plan. CSEB's vote would enhance the voting share in favour of Ebix's resolution plan to 75.35 per cent, thus meeting the threshold under Section 30(4).

13. The E-RP filed the CSEB Application under Section 60(5) to seek the directions of the NCLT in regard to CSEB's late vote. NCLT by its order dated 28 February 2018, directed the E-RP to file an application for approval of Ebix's Resolution Plan under Section 30(6) of the IBC, clarifying that the issue of CSEB's vote would be taken up together with the application. On 7 March 2018, the E-RP filed the Approval

Application seeking NCLT's approval to Ebix's Resolution Plan under Section 30(6).

14. On 2 July 2018, Ebix issued a letter to the E-RP to expedite the CIRP for Educomp. The relevant portions of the letter are extracted below:

> *"…we would like to submit that the resolution plan for the Company was submitted with an expectation that the resolution process shall be completed in a time bound manner, and the Resolution Applicant shall get the management control of the Company before the start of new academic session in India i.e. April 2018, subject to being selected as the successful applicant (as per the terms and conditions provided in the resolution plan), and the approval of the plan by the NCLT. This would have provided the Resolution Applicant with sufficient time to restructure the operations of the Company.*
>
> *As you are aware, the operations of the Company are already under stress and it would be safe to assume that no new contracts / customers are coming up. Further, the competitors of the Company may be trying to take undue advantage of the situation, which may further erode the business value of the Company and may make the revival process more difficult.*
>
> *The above negatively impacts the commercial consideration provided by the Resolution Applicant in the resolution plan submitted for the Company.*
>
> *As per the clause 7 of the Resolution Plan dated February 19, 2018 submitted by the Resolution Applicant, the terms of the resolution plan is valid for six months from the date of the submission of the plan i.e. August 19th, 2018.*
>
> *In light the above and fact that delay in completion of the resolution process is negatively impacting the commercial consideration offered by the Resolution Applicant in the resolution plan, we request you to ensure that the resolution process is completed in a time bound manner. Otherwise, the Resolution Applicant will be forced to re- consider or withdraw the resolution plan on expiry of the term of the plan in order to protect the interest of all its stakeholders."*

A.4 Investigations into financial transactions of Educomp

15. On 3 April 2018, an Indian online news publication, The Wire, published an article titled "How Educomp May Have Subverted the Spirit of India's Insolvency and Bankruptcy Process". Another article titled "Educomp's Insolvency Process Becomes Murkier as Ebix Buys Smartclass Educational Services" was published by The Wire on 26 April 2018.

16. The E-RP has stated before this Court that based on these reports, IFC, a financial creditor of Educomp, filed the IFC Application under Section 60(5) of the IBC seeking investigation of the affairs/transactions of Educomp. On 4 May 2018, when the IFC Application came up before the NCLT, along with the CSEB Application and the Approval Application, it directed the E-RP to file its reply and also directed IFC to serve a notice on Ebix.

17. Similar applications- Axis Application and SBI Application, under Section 60(5) of the IBC read with Section 213 of the 2013 Act were filed by other financial creditors of Educomp, Axis Bank and SBI, seeking 'appropriate directions' from the NCLT in view of the alleged irregularities in the conduct of the affairs of Educomp.

18. In the meantime, on 1 August 2018, due to allegations of financial mismanagement of Educomp between 2014-2018, the MCA directed an SFIO investigation into its affairs.

19. The NCLT, by its order dated 9 August 2018, dismissed the applications filed by IFC, Axis and SBI and directed that: (i) the E-RP shall convene a meeting of the E-CoC within three days to discuss the subject matter of the applications; and (ii) the E-RP and E-CoC could move an application before NCLT according to law, if advised to do so by E-CoC.

20. Pursuant to NCLT's order dated 9 August 2018, the E-CoC hosted its 13th meeting on 13 August 2018, and a resolution was passed with a 77.85 per cent vote to appoint an independent agency

to conduct a Special Investigation Audit into the affairs of Educomp.

The relevant terms of the resolution are as follows:

> *"**RESOLVED THAT** a special investigation audit on the affairs of the Company be conducted by an independent agency, which shall be appointed by the Committee of Creditors, for period beginning from [1st January 2014] to [30th January 2018] having following scope of work:*
>
> *(i) All the matters/issues (approximate 21 in number) raised in the Annual Audit Report of the Company for the Financial Year 2016-17 issued by Haribhakti & Co, basis which adverse opinion has been issued;*
>
> *(ii) Transactions involving alleged deliberate transfer of business between the Company and SmartClass Educational Services Private Limited ("SESPL") prior to the commencement of the insolvency process of the Company;*
>
> *(iii) Transactions regarding genuineness of receivables from Edusmart Services Private Limited including cross-verification with payables to Educomp Solutions Limited in the books of Edusmart Services Private Limited;*
>
> *(iv) Transactions involving settlement between the Company, Educomp Learning Hour Private Limited, Vidya Mandir Classes Limited and ICICI Bank Limited;*
>
> *(v) Transactions relating to impairment with respect to investment made by the Company in 4 of its subsidiaries;*
>
> *(vi) Transaction relating to advance received by the Company from Educomp Raffles Higher Education Limited;*
>
> *(vii) Distribution agreement with Digital Learning Solution SDN BHD;*
>
> *(viii) Transactions referred to in the applications filed by International Finance Corporation, Axis Bank Limited and State Bank of India with the Hon'ble National Company Law Tribunal; and*
>
> *(ix) Review of provisions against receivables done by Educomp Solutions Limited;*
>
> *(x) All other transactions/points raised in the applications filed by Axis Bank, IFC and SBI with Hon'ble NCLT;*

(xi) Any other issue, which the Committee of Creditors may deem fit

RESOLVED FURTHER THAT *the Resolution Professional, be and is hereby authorized by the Committee of Creditors and directed to file appropriate application/petition with the Hon'ble National Company Law Tribunal, inter alia, seeking consent/order of the Hon'ble NCLT on the proposed special investigation audit to be conducted by the independent agency.*

RESOLVED FURTHER THAT *given the limitations inherent in the previous audits conducted on the Company, and in order for the said investigation to be comprehensive, the Resolution Professional, while filing such application/ petition, shall also, as an additional prayer, seek consent/ order of the Hon'ble NCLT that SESPL, other group companies of the Company and the erstwhile customers of the Company, be directed to cooperate with the independent agency so appointed, or in the alternative, to refer the matter to the Central Government to appoint an Inspector under the Companies Act, 2013 to conduct said investigation.*

RESOLVED FURTHER THAT *the entire cost of the proposed investigation (special investigation audit), shall be included in CIRP Cost and accordingly be paid in terms of the provisions of the Insolvency and Bankruptcy Code, 2016 and the relevant Regulations.*

RESOLVED FURTHER THAT*, the independent agency to conduct the special investigation audit, shall be appointed by the Core Committee, comprising of SBI, IDBI Bank, Axis Bank, IFC, Yes Bank and J&K Bank"*

21. The resolution was placed before the NCLT on 20 August 2018, when it was hearing the CSEB Application and the Approval Application. The NCLT directed the E-RP to file an appropriate application. In accordance with the resolution dated 13 August 2018 and NCLT's order dated 20 August 2018, the ERP filed the Investigation Audit Application under Section 60(5) of the IBC seeking directions from NCLT to carry out the Special Investigation Audit of Educomp.

22. It is stated before us that the Investigation Audit Application was heard on 11 September 2018, 20 September 2018, 27 September 2018 and 4 October 2018. On 4 October 2018, while reserving its order in the Investigation Audit Application, the NCLT also directed the E-RP to file an affidavit in relation to the transactions carried out by Educomp under Sections 43, 45, 50 and 66 of the IBC.

23. The E-RP states that such an affidavit was filed, stating that on the basis of the books of account and other relevant material pertaining to Educomp, no transactions which needed to be avoided under Sections 43, 45, 50 and 66 of the IBC were found. The E-RP also stated that since the NLCT had not issued specific directions for the conduct of a Special Investigation Audit, no such audit was conducted.

24. This affidavit was listed before the NCLT on 7 December 2018, along with the Approval Application. On 10 January 2019, the NCLT reserved its orders on the Approval Application.

25. On 12 June 2019, Educomp made a regulatory disclosure to the BSE and NSE in relation to the ongoing investigations being conducted by agencies such as SFIO and CBI. The material parts of the disclosure read thus:

> *"This is with reference to your mail dated June 10, 2019, related to news appeared in the "Business Standard" captioned "Transactions of debt-ridden Educomp Solutions come under SFIO scanner".*
> *[…]*
> *3. It is pertinent to note that BDO India LLP carried out transaction audit in order to ascertain if there was any preferential, undervalued, extortionate or fraudulent transactions falling within the ambit of Section 43, 45, 50 and 66 of the Code. The Transaction review report was prepared by BDO India LLP in February 2018 which was further circulated and discussed with the CoC. On examination of the BDO Report and other relevant material available with the Resolution Professional during the CIRP period, no transaction was found by the Resolution Professional which was required*

to be avoided in terms of the said Sections. Further, the two land transactions as alleged in the Media Report have not been reported by BDO in their Report and hence, the Resolution Professional is not in a position to comment on the same.

As regards allegation in the Media Report that "Suspect transactions of debt-ridden Educomp Solutions have come under the lens of Serious Fraud Investigation (SFIO), which is probing the company for alleged fund-diversion and inflated land deals, we would like to clarify that SFIO Investigation into the affairs of Educomp Solutions Limited is currently ongoing wherein the Resolution Professional has been supplying the data/ information/ documents to them as and when required however, no such information has been brought to the notice of the Resolution Professional as yet. Moreover, the article appears to be based on a false, motivated, fabricated data."

A.5 Applications for withdrawal of the Resolution Plan

26. On 5 July 2019, Ebix filed the First Withdrawal Application under Section 60(5) of the IBC, for the following reliefs:

"i. Direct that the Ld. Resolution Professional supply a copy of the Special Investigation Audit to the Resolution Applicant forthwith;

ii. Direct that the Ld. Resolution Professional supply a copy of the Certificates under Sections 43, 45, SO and 66 of the Insolvency and Bankruptcy Code, 2016 to the Resolution Professional forthwith;

iii. Withhold approval of the Resolution Plan sanctioned by the Committee of Creditors of the Corporate Debtor, as filed before this Hon'ble Tribunal on 11.04.2018, pending detailed consideration of the same by the Resolution Applicant;

iv. ***Grant the Resolution Applicant sufficient time to re-evaluate its proposals contained in the Resolution Plan, and also to suitably revise/modify and/or withdraw its Resolution Plan;"***

(emphasis supplied)

Ebix contends that the application was necessitated because: (i) the Approval Application had been pending before the NCLT for 17 months, much beyond the period envisaged in the RFRP and its Resolution Plan; (ii) Educomp's CIRP had been pending for 26 months, beyond the statutory period under the IBC; (iii) the tenure of the government contracts awarded to Educomp, which was crucial to its functioning, may have ended, leading to an erosion of its substratum; and (iv) due to recent media reports, it had misgivings about the management and affairs of Educomp.

27. On 10 July 2019, the NCLT dismissed the First Withdrawal Application with the following order:

> *"**C.A. No. 1252(PB)/2019***
>
> *This is an application filed by one Ebix Singapore Ptd. Limited seeking re-valuation of the Resolution Plan submitted by it before the Resolution Professional.*
>
> *No ground for considering the prayer sought in the application is made out.*
>
> *The application is dismissed as such."*

28. Thereafter, Ebix filed the Second Withdrawal Application under Section 60(5) of the IBC, seeking the following reliefs:

> *"i. Allow the Resolution Applicant to withdraw the Resolution Plan dated 19.02.2018 (along with the Addendum/Financial Proposal dated 21.02.2019) submitted by it, and as approved by the Committee of Creditors;*
>
> *ii. Direct the Ld. Resolution Professional and/or Educomp Solutions Limited and the Committee of Creditors to refund the Earnest Money Deposit of Rs. 2,00,00,000/- furnished by the Resolution Applicant in respect of the Resolution Plan;*
>
> *iii. Withhold approval of the Resolution Plan sanctioned by the Committee of Creditors of the Corporate Debtor, as filed before this Hon'ble Tribunal on 07.03.2018 and recorded vide order dated 1.1.04.2018, pending detailed consideration of the same by the Resolution Applicant;*

While repeating the reasons mentioned in the First Withdrawal Application, it provided a reason for filing the Second Withdrawal Application in the following terms:

> *"xii. That the present Applicant had also filed an Application dated 05.07.2019 bearing PB/IA/1252/2019 under Section 60(5) of the Code, seeking revision/revaluation of the Resolution Plan. However, the same was dismissed by this Hon'ble Tribunal, and during the course of hearing in the said Application, this Hon'ble Court put it to the Resolution Applicant to withdraw the Resolution Plan by way of a separate Application. The present Application for withdrawal of the Resolution Plan is being made in pursuance of the same."*

29. On 5 September 2019, the NCLT dismissed the Second Withdrawal Application with the following order:

> *C.A. No. 1310(PB)/2019*
> *In para 'B (xii)' under the caption 'facts of the case', the following averments have been made*
>
> *[…]*
>
> *The italic portion of the aforesaid para shows that the prayer for withdrawal of the Resolution Plan has been made inter alia on the suggestion of the Court which is neither reflected in the order nor is born out from any record. Such an averments imputing to the Court something which has never been said is condemnable. The cause of action cannot be based on any such things.*
>
> *Accordingly, we dismiss this application with liberty to the applicant to file fresh one on the same cause of action, if so advised."*

30. Thereafter, Ebix filed the Third Withdrawal Application, seeking the following reliefs:

> *"i. Allow the Resolution Applicant to withdraw the Resolution Plan dated 19.02.2018 (along with the Addendum/Financial Proposal dated 21.02.2019) submitted by it, and as approved by the Committee of Creditors;*
>
> *ii. Direct the Ld. Resolution Professional and/or Educomp Solutions Limited and the Committee of Creditors to refund the*

Earnest Money Deposit of Rs. 2,00,00,000/- furnished by the Resolution Applicant in respect of the Resolution Plan;

iii. Withhold approval of the Resolution Plan sanctioned by the Committee of Creditors of the Corporate Debtor, as filed before this Hon'ble Tribunal on 07.03.2018 and recorded vid order dated 11.04.2018, pending detailed consideration of the same by the Resolution Applicant;"

The earlier applications for withdrawal were referred to:

"xiv. It may be noted that, the present Applicant had also filed an Application dated 05.07.2019 bearing PB/IA/1252/2019 under Section 60(5) of the Code, seeking revision/revaluation and/or withdrawal of the Resolution Plan. The said application was dismissed by this Hon'ble Tribunal on the basis that modification/revaluation of the Resolution Plan could not be permitted. The Applicant thereafter filed an Application bearing PB/IA/1310/2019 seeking withdrawal of the Resolution Plan simpliciter, which was dismissed by the Hon'ble Tribunal vide order dated 07.09.2019, while granting liberty to file a fresh application seeking withdrawal of the Resolution Plan."

The reasons for withdrawal were the same as those in the previous applications for withdrawal.

31. On 18 September 2019, the NCLT issued notice in the Third Withdrawal Application and directed the E-RP to place it before the E-CoC. The E-RP placed the application before the E-CoC at the 14th meeting on 26 September 2019. The E-CoC resolved not to allow the application for withdrawal.

A.6 Orders of NCLT and NCLAT

32. By its order dated 2 January 2020, NCLT allowed the Third Withdrawal Application. The NCLT held that the application for withdrawal was not barred by res judicata since in the previous proceeding relating to the First Withdrawal Application, it had not consciously adjudicated on whether the Resolution Plan could be

withdrawn. The rationale for the order is indicated in the following extract:

> *"11. No doubt there was a prayer for withdrawal of resolution plan amongst others in CA No.1252 (PB)/2019, the prayer for revaluation was specifically declined dismissal order dated 10.07.2019.* ***While dismissing CA No.1252(PB)/2019 the prayer for withdrawal of resolution plan was neither considered nor was ever dealt with. The issue of withdrawal of the resolution plan by the Applicant has never been considered consciously on merit and/or adjudicated upon in CA No.1252(PB)/2019.***
>
> *12.* ***Doctrine of Constructive Res Judicata does not apply to the issues/points, or any "lis' between parties that has not been decided previously, and despite being pleaded, has not been considered by a court/tribunal and expressly dealt with in the order so passed.***
>
> *13. Even a bare perusal of the Order dated 10.07.2019 would indicate that the issue of withdrawal of the Resolution Plan by the Resolution Applicant was not dealt with on merit and that no decision has either been passed or attained finality as regards allowing the party to withdraw the Resolution Plan.*
>
> *14. It is also pertinent to note here that the Resolution Applicant had subsequently taken up the prayer for withdrawal of the Resolution Plan in the Application bearing CA No.1310 (PB)/2019.* ***While dealing with the said Application, liberty was given to the Applicant vide order dated 01.09.2019 to re-file an application for withdrawal of the Resolution Plan. This direction further confirms that there was no conscious adjudication in CA No.1252(PB)/2019 on the issue of withdrawal of the resolution plan by the Applicant."***
>
> ***(emphasis supplied)***

The NCLT held that: (i) a Resolution Plan becomes binding after it is approved by it as the Adjudicating Authority; (ii) under Section 30(2) of the IBC, the Adjudicating Authority has the power to examine whether the Resolution Plan can be effectively enforced and implemented; and (iii) in the 'present circumstances', an unwilling successful Resolution Applicant would be unable to effectively

implement the Resolution Plan. The relevant parts of the order are extracted below:

> *"20. In the instant case the Resolution Plan is still pending before the Adjudicating Authority for approval.* ***Under the provisions of Section 31 of the Code, a Resolution Plan becomes binding only after acceptance of a plan by the Adjudicating Authority.***
>
> *[…]*
>
> *23. Section 30(2)(d) of the Code mandates the Adjudicating Authority to ensure that there are effective means of enforcement and implementation of the Resolution Plan. Similarly, the proviso to sub-section (1) of Section 31 of the Code mandates Adjudicating Authority to ensure effective implementation of the resolution plan. The object. in approval of the resolution plan is to save the corporate debtor and to put it back on its feet.* ***An unwilling and reluctant resolution applicant, who has withdrawn his resolution plan, neither can put the corporate debtor back to its feet nor the effective implementation of its resolution plan can be ensured.***
>
> *24. No doubt the withdrawal of the resolution plan at this advance stage has caused great prejudice to the creditors/stake holders and legal consequences on the withdrawal of the resolution plan shall follow as per law. The Resolution Professional and CoC are free to take action as per law consequent upon withdrawal of the resolution plan by the resolution applicant including on the issue of refund of the earnest money deposited by the applicant.*
>
> *25****. Be that as it may compelling an unwilling and reluctant resolution applicant to implement the plan may lead to uncertainty.*** *The object of the Code is to ensure that the Corporate Debtor keep working as a going concern and to safeguard the interest of all the stake holders. The provisions of the Code mandate the Adjudicating Authority to ensure that the successful resolution applicant starts running the business of the Corporate Debtor afresh. Besides Court ought not restrict a litigant's fundamental right to carry on business in its way under Article 19(1)(g) of the Constitution.* ***Once the applicant is unwilling and reluctant and itself has chosen to withdraw its resolution plan, a doubt***

arises as to whether the resolution applicant has the capability to implement the said plan. Uncertainty in the implementation of the resolution plan cannot also be ruled out."

(emphasis supplied)

The NCLT also directed that Educomp's CIRP be extended by a period of 90 days, commencing from 16 November 2019.

33. As a consequence of its order allowing the Third Withdrawal Application, the NCLT also dismissed the Approval Application on 3 January 2020 as being infructuous.

34. E-CoC filed the Withdrawal Appeal assailing NCLT's order dated 2 January 2020. On 3 February 2020, the NCLAT stayed the order dated 2 January 2020. The Approval Appeal was also filed by the E-CoC under Section 61 of the IBC, assailing NCLT's order dated 3 January 2020.

35. By its order dated 29 July 2020, NCLAT set aside the order of the NCLT allowing the withdrawal of the resolution plan. On the issue of res judicata, the NCLAT held that there being no appeal against the order of the Adjudicating Authority rejecting the First Withdrawal Application, the issue had attained finality. The NCLAT held:

"82…in view of the dismissal of said CA 1252(PB)/2019 by the Adjudicating Authority and the said order which had attained finality and more so in the absence of any 'Appeal' being filed against the said order, then the dismissal order of CA 1252 of 2019 order dated 10.7.2019 binds the 1st Respondent/'Resolution Applicant' as an 'Inter-se' party.

[…]

84….the Adjudicating Authority in the particular circumstances of the present case has no power to grant /reserve liberty to bring a fresh application and hence, the subsequent application filed by the 1st Respondent /'Resolution Applicant is barred by the principle of 'Res Judicata' notwithstanding the liberty to file fresh one."

On the merits of the application for withdrawal, the NCLAT held that: (i) once the Resolution Plan was approved by the CoC, the NCLT did not have jurisdiction to permit its withdrawal; (ii) the Adjudicating Authority could not enter upon the wisdom of the decision of the CoC to approve the Resolution Plan; (iii) the Resolution Applicant had accepted the conditions of the Resolution Plan and no change could be permitted; (iv) orders have already been reserved in the Approval Application; (v) no Special Investigation Audit had been conducted; (vi) Section 32A of the IBC grants full immunity to the Resolution Applicant from any offences committed before the commencement of the CIRP; and (vii) Ebix had participated in the process from August 2018 to January 2019 when orders had been reserved on the Approval Application, and hence it could not claim any right based on delay.

A.7 Present status of SFIO and CBI investigation

36. In an email dated 17 February 2020, the E-RP informed the E-CoC that the CBI conducted a search of the premises of Educomp on 11 February 2020 and seized numerous documents (a list was enclosed with the email). By another email dated 19 February 2020, the E-RP informed the E-CoC that CBI had resumed its search for documents at Educomp's office.

37. In the 16th meeting of the E-CoC on 30 March 2020, the E-RP provided the following updates in relation to the CBI and SFIO investigations:

(i) The CBI search at the premises of Educomp on 11 February 2020, was conducted upon a complaint by SBI on behalf of a consortium of banks;

(ii) Since the initiation of an enquiry by the MCA on 1 August 2018, the SFIO has requisitioned documents/information, which have been provided;

(iii) The last communication from the SFIO was received on 27 February 2020; and

(iv) In response to the grievance of some members of the E-CoC that the E-RP had only informed them of the investigations at a belatedly, the Chairperson of the E-CoC justified it by stating that the communication could only take place once the relevant investigation was completed. However, for future references, the Chairperson took note of the suggestion that the E-RP would add all members of the E-CoC to a WhatsApp group, where real-time updates could be shared.

At the meeting, the E-CoC also passed a resolution with 77.05 per cent majority vote directing the E-RP to invoke and forfeit the EMD of Rs 2 crores furnished by Ebix in accordance with Clause 1.9.1 of RFRP. The E-RP issued a letter to IDBI on 1 April 2020 for encashment of the EMD.

38. In the 17th meeting of the E-CoC on 8 May 2020, the E-RP provided further updates in relation to the CBI and SFIO investigations, noting that they were still ongoing and no further action was required to be taken.

39. The E-RP has informed this Court that the last communication received from the SFIO was on 4 September 2020. The investigations by the CBI and SFIO are continuing.

B Civil Appeal No 3560 of 2020 – the Kundan Care Appeal

B.1 The appeal

40. This appeal arises under Section 62 of the IBC from a judgment dated 30 September 2020 of the NCLAT. The NCLAT dismissed an appeal instituted by the appellant, Kundan Care, under Section 61 of the IBC against an order dated 3 July 2020 of the NCLT.

41. The NCLT had dismissed an application filed by Kundan Care under Section 60(5) of the IBC to withdraw its Resolution Plan submitted for the fourth respondent – Corporate Debtor, Astonfield. In appeal, the NCLAT upheld the NCLT's decision, relying on its judgment impugned in the Ebix Appeal. It held that an application filed by a Resolution Applicant to withdraw from the Resolution Plan approved by the CoC could not be allowed since: (i) there was no provision in the IBC for it; (ii) the Resolution Plan is enforceable as a contract against the Resolution Applicant; and (iii) the Resolution Applicant was estopped from withdrawing.

42. The correctness of this view of the NCLAT now comes up for determination in the present appeal. While issuing notice on 16 November 2020, this Court had directed for an ad-interim stay on the judgment of the NCLAT, which continues till date.

B.2 Initiation of CIRP

43. On 20 November 2018, Astonfield filed a petition under Section 10 of the IBC seeking to initiate voluntary CIRP. The NCLT admitted this petition on 27 November 2018 and appointed an IRP.

44. A CoC was then constituted, which consisted of the second and third respondents, EXIM Bank and PFCL. The A-CoC appointed the first respondent, Mr Amit Gupta, as the RP and his appointment was confirmed by the NCLT on 1 February 2019.

B.3 Invitation, submission and approval of Resolution Plan

45. On 20 February 2019, A-RP invited prospective resolution applicants to submit their EOIs in accordance with Regulation 36 of the CIRP Regulations and Form G was also published. Form G was amended by the A-RP, with due approval from the A-CoC, on 2 May 2019 and 17 May 2019.

46. A-RP received nine EOIs, out of which seven were found to be eligible. However, Kundan Care did not submit its EOI within the time prescribed by the ARP, and its belated submission was rejected by the A-RP.

47. Thereafter, A-RP issued the RFRP on 6 March 2019 to the prospective Resolution Applicants who had been selected. Further, the IM was issued on 13 March 2019. Based on this, two Resolution Plans were received by the A-RP on 31 May 2019, which were then discussed with the A-CoC.

48. In the interim, Kundan Care filed an application before the NCLT challenging the A-RP's rejection of its belated EOI. A-RP received the notice of this application on 30 August 2019. By order dated 6 September 2019, the NCLT allowed Kundan Care's application. Thereafter, it was provided access to the RFRP, IM and other documents pertaining to Astonfield in the data room.

49. Kundan Care submitted its Resolution Plan for consideration on 16 September 2019. The Resolution Plan was placed before the A-CoC, which requested Kundan Care to submit a revised proposal. Kundan Care then submitted an updated draft of its Resolution Plan on 29 October 2019.

50. A-RP then conducted the 17th meeting of the A-CoC on 11 November 2019, to discuss the Resolution Plans submitted by Kundan Care and one more prospective Resolution Applicant (who had also submitted a revised Resolution Plan after negotiations with the A-CoC). Thereafter, Kundan Care submitted a revised version of its Resolution Plan on 12 November 2019, along with an addendum on 13 November 2019.

51. The A-CoC voted on the Resolution Plans on 14 November 2019, where the Resolution Plan submitted by Kundan Care was approved with a majority of 99.28 per cent, with 0.72 per cent abstaining. On

15 November 2019, the A-RP issued a Letter of Award to Kundan Care. Kundan Care also deposited a PBG of Rs 5 Crores with the A-RP/A-CoC.

52. A-RP then filed an application for approval of the Resolution Plan under Section 31 of the IBC before the NCLT, along with Form H, as mandated under the CIRP Regulations. This application is currently pending adjudication before the NCLT.

B.4 Astonfield's dispute with GUVNL

53. Before proceeding further, it is important to discuss the dispute arising out of Astonfield's PPA with GUVNL. The PPA was signed on 30 April 2010, came into force in December 2012. and was valid for a period of 25 years. Crucially, this PPA was the only agreement entered into by Astonfield and formed the entirety of its business.

54. When CIRP was initiated against Astonfield, GUVNL issued a notice of default under Article 9.2.1(e) of the PPA, stating that the initiation of insolvency was an "event of default". This was challenged before the NCLT by A-RP and EXIM Bank through applications under Section 60(5) of the IBC.

55. It is important to note that Kundan Care was aware of this dispute, and made specific references to it in its Resolution Plan. Under the heading of "PPA Risk", it noted:

> *"GUVNL had served notices to terminate the Agreement since the Company is undergoing the process of Insolvency. However as per the Order of the Hon'ble NCLT dated 29 August 2019 (CA) 700/ND/2019 & CA 701/ND/2019) it is concluded that the Power Purchase Agreement (PPA) is an "instrument" for the applicability of Section 238 of the IBC, 2016 and clauses 9.2.1 e read with 9.3.1 of the PPA under reference are inconsistent within the ambit of Section 238 of/BC, 2016, provisions of/BC, 2016 and process initiated under /BC shall have an overriding effect over the PPA.*

Further, the Hon'ble NCLAT vide order dated 15 October 2019 has clearly stated that even in the event of Liquidation of the Corporate Debtor the appellant, Gujarat Urja Vikas Nigam Limited, cannot terminate the Power Purchase Agreement under the Code. Also, the Liquidator shall ensure that the Corporate Debtor remains a going concern. It is therefore very evident and clear that the Power Purchase Agreement cannot be terminated and has to continue even after the Resolution Plan has been approved by the Hon'ble NCLT."

56. On 29 August 2019, the NCLT allowed the applications and set aside the notice of default issued by GUVNL. It held that allowing the termination of the PPA would adversely affect the 'going concern' status of Astonfield. However, it held that if Astonfield was to undergo liquidation subsequently, the termination would be permitted.

57. The NCLT's judgment was challenged by GUVNL in an appeal before the NCLAT. By judgment dated 15 October 2019, the NCLAT dismissed the appeal and partly upheld the decision of the NCLT, in as much as it disallowed the termination of the PPA during the CIRP. However, it reversed the NCLT's findings and held that even if Astonfield were to undergo liquidation, the termination of the PPA would not be allowed.

58. GUVNL challenged NCLAT's judgment in the GUVNL Appeal before this Court. When the present appeal was filed by Kundan Care, the GUVNL Appeal was pending before this Court. However, it has been disposed by a judgment dated 8 March 2021, in the following terms:

"165 Given that the terms used in Section 60(5)(c) are of wide import, as recognized in a consistent line of authority, we hold that the NCLT was empowered to restrain the appellant from terminating the PPA. However, our decision is premised upon a recognition of the centrality of the PPA in the present case to the success of the CIRP, in the factual matrix of this case, since it is the sole contract for the sale of electricity which was entered into by the Corporate Debtor. In doing so,

we reiterate that the NCLT would have been empowered to set aside the termination of the PPA in this case because the termination took place solely on the ground of insolvency. The jurisdiction of the NCLT under Section 60(5)(c) of the IBC cannot be invoked in matters where a termination may take place on grounds unrelated to the insolvency of the corporate debtor. Even more crucially, it cannot even be invoked in the event of a legitimate termination of a contract based on an ipso facto clause like Article 9.2.1(e) herein, if such termination will not have the effect of making certain the death of the corporate debtor. As such, in all future cases, NCLT would have to be wary of setting aside valid contractual terminations which would merely dilute the value of the corporate debtor, and not push it to its corporate death by virtue of it being the corporate debtor's sole contract (as was the case in this matter's unique factual matrix)."

Hence, this Court held that GUVNL would not be allowed to terminate its PPA with Astonfield since: (i) the termination was solely on account of Astonfield entering into insolvency proceedings; and (ii) being its sole contract, the PPA's termination would necessarily result in the corporate death of Astonfield, which would derail the entire CIRP.

B.5 Withdrawal of the Resolution Plan

59. On 17 December 2019, Kundan Care filed an application under Section 60(5) of the IBC seeking permission of the NCLT to withdraw its Resolution Plan, which had been previously approved by the A-CoC and was pending confirmation by the NCLT under Section 31 of the IBC. In its application, it prayed for the following reliefs:

"a) Allow the present application and permit the Applicant to withdraw its Resolution Plan as submitted and approved by the CoC on 14.11.2019;

b) Direct that the Performance Bank Guarantee submitted by the Applicant be cancelled/revoked/returned/refunded to the Applicant;"

In its application, Kundan Care stated that there was no bar under the IBC on it withdrawing its Resolution Plan before it was confirmed

by the NCLT. It sought to withdraw its Resolution Plan on account of four reasons:

(i) That there was uncertainty in relation to the PPA with GUVNL, since the GUVNL Appeal was pending before this Court. It noted that the PPA was central to the CIRP, and its termination would affect its Resolution Plan. Further, it noted that GUVNL had unilaterally refused permission to Astonfield to change the solar panels which had been damaged in the floods of 2017, and had not made any payments to Astonfield for the electricity being supplied currently;

(ii) That due to heavy floods in the State of Gujarat during 2019, the solar panels and other equipment at the Project Site of Astonfield had been damaged. Further, it alleged that there was stagnant water at the Project Site, which continued to deteriorate them;

(iii) That Astonfield's insurance claim of Rs 46.40 crores in relation to floods in 2017 had been repudiated by the insurer. Further, it also noted that this may also adversely affect the claim for the floods in 2019; and

(iv) That the IM issued by A-RP represented that since Astonfield had not availed the benefit of "Accelerated Depreciation" under the PPA, hence, it was entitled to a sum of Rs 6.614 crores from GUVNL, which was a "Trade Receivable". However, it noted that Kundan Care had subsequently discovered a previous judgment of this Court upon identical facts, where it was noted that the Project Developer shall not be entitled to a higher/revised tariff in case of not availing "Accelerated Depreciation".

60. On 6 January 2020, Kundan Care filed an additional affidavit outlining the additional costs it would face on account of: (i) deterioration of the solar panels due to GUVNL unilaterally not permitting their replacement, thereby leading to additional cost of Rs

30 crores (against an initial expected cost of Rs 9 crore); (ii) Astonfield's Plant not producing electricity at its optimum level, thereby leading to a loss of revenue up to Rs 150 lacs per month; and (iii) CIRP costs on account of delay in CIRP, thereby leading to a loss of Rs 12 lacs per month (approx.). It noted:

> *"5. I say and submit that after submission of the Resolution plan, the Applicant's representatives had visited the site again and found that almost all the solar panels installed at the Project site are required to be changed/replaced at a total cost of over INR 30 crores instead of INR 9 crores ascertained by the Applicant at the time of submission of the Plan.*
>
> *[…]*
>
> *17. I say and submit that the plant is capable of generating 18133200 KWH/Units of Electricity per annum (11.5 MW * 365 days * 24 hours* 1000 (from MW to KW) * 18% CUF = 18133200 KWH/Units), when operating at the optimum capacity which would only be possible after change/replacement of solar panels, inverters etc. as contemplated in the Resolution Plan. This translates to generation revenue of roughly INR 1800 lacs per annum or roughly INR 150 lacs per month which is being incurred by the Project.*
>
> *18. I say and submit that in addition to the aforesaid generation loss, a sum of INR 12 lacs (approx.) is being incurred towards monthly CIRP cost on account of the delay in the CIR process."*

61. Thereafter, Kundan Care also filed an application for impleadment in the GUNVL Appeal pending before this Court, along with an application for directions praying, in exercise of this Court's jurisdiction under Article 142 of the Constitution of India, for the following reliefs:

> *"a) Set aside/quash the Notice dated 28.03.2019 issued by Gujarat Urja Vikas Nigam Limited to Astonfield Solar (Gujarat) Private Limited and declare that the Applicant/Corporate Debtor shall be free to change/replace the solar panels/modules and other equipment of the Project, as may be deemed fit by the Applicant/Corporate Debtor;*

b) Declare that the Power Purchase Agreement dated 30.04.2010 executed between Gujarat Urja Vikas Nigam Limited and Astonfield Solar (Gujarat) Private Limited shall stand extended by the period of moratorium declared under IBC during the CIR Process;

c) In alternate to prayers a) and b), permit the Applicant to withdraw its Resolution Plan dated 12.11.2019 and direct that the Performance Bank Guarantee submitted by the Applicant to the Committee of Creditors shall stand cancelled/revoked and/or returned/refunded to the Applicant;"

62. While the GUVNL appeal and its application remained pending, on 14 May 2020, Kundan Care requested the NCLT to take up its application for an early hearing. Following this, the application was listed on 15 June 2020.

63. On 12 June 2020, A-RP filed its reply to Kundan Care's application and additional affidavit, where it opposed the withdrawal of the Resolution Plan after its approval by the A-CoC and stated that:

(i) In relation to the ongoing dispute with GUVNL, Kundan Care was aware of the same when it submitted the Resolution Plan;

(ii) In relation to the damage to the solar panels, it pointed out that the A-RP had informed Kundan Care about the floods in 2019 and an Operation and Management Agency had been hired to clear the water at the Project Site, which had been done;

(iii) In relation to the repudiation of the insurance claim, the RFRP or IM never guaranteed that the claim would be successful. In any case, the A-RP was actively pursuing the challenge to its repudiation;

(iv) In relation to the "Accelerated Depreciation", that the same had been listed as a "doubtful debt" by the A-RP in the IM. Further, in any case, Kundan Care would have done their own due diligence surrounding it; and

(v) In relation to Astonfield's Plant not operating at full capacity, the IM issued by A-RP noted that the floods in 2017 had affected the Plant and it may not be able to operate at full capacity.

64. Kundan Care filed its rejoinder to the A-RP's reply on 29 June 2020, in which they argued that the Resolution Plan proposed by them and approved by the A-CoC, was no longer "feasible" and "viable" commercially, in accordance with Section 30(2)(d) read with proviso to Section 31(1) of the IBC, due to the intervening circumstances before its confirmation by the NCLT which had materially altered the financial projections. Hence, the NCLT should allow it to withdraw the Resolution Plan. In the alternative, Kundan Care proposed renegotiation of the Resolution Plan by stating the following:

> *"55. That Para 78 of the Reply is the Prayer Clause, which is wrong and denied. The Prayer Clause of C.A. No. 16798/2019 is reiterated and reaffirmed. Alternatively, and without prejudice to the above, it is prayed that the Applicant may be permitted to re-negotiate the financial proposal with the CoC"*

65. The A-CoC also filed its reply to Kundan Care's application on 30 June 2020, where it stated that: (i) NCLT could not adjudicate upon the application since Kundan Care had filed another application before this Court in the GUVNL Appeal; and (ii) in any case, Kundan Care knew of the risks while entering the CIRP and should not be allowed to withdraw at such a belated stage.

66. The NLCT passed an order dated 3 July 2020, by which it rejected Kundan Care's application by noting that: (i) it did not have jurisdiction to permit withdrawal; and (ii) the matter was also sub judice before this Court by the virtue of Kundan Care's application in the GUVNL Appeal. The order stated:

> *"**IA 1679/2019***
> *Counsels for the Resolution Applicant, COC and IRP are present.*

The Resolution Applicant has prayed to withdraw the resolution plan which was submitted before this Tribunal after approval of the COC. After careful consideration of the matter, we are of the view that the NCLT has no jurisdiction to permit withdrawal of the resolution plan which has been placed before the authority with due approval of the COC. Notwithstanding this fact, it has been pointed out by the Counsel for the COC that another matter is subjudiced before the Hon'ble Supreme Court in which inter-alia a similar request has been made. This has been submitted by the Cotinsel for the COC on page 31 of the reply filed by COC in response to the application.

Keeping this in view, it will not be appropriate for this Tribunal to deal with an issue which is already subjudiced before the Hon'ble Supreme Court. The Application is hereby rejected."

67. In view of the NCLT's order, Kundan Care made an oral request for withdrawal of its application to this Court when the GUVNL Appeal was listed on 20 July 2020. This request was allowed by this Court.

68. Thereafter, the appellant filed an appeal before the NCLAT, challenging the order dated 3 July 2020 passed by the NCLT. NCLAT did not issue notice in the appeal, but heard the submissions of all parties at the stage of admission and directed them to file their written submissions.

69. By the impugned judgment dated 30 September 2020, the NCLAT dismissed the appeal by Kundan Care, relying on the judgment impugned in the Ebix Appeal. It noted:

"7. Be it seen that the CIRP process undertaken involves filing of Expression of Interest by the prospective Resolution Applicants which may ultimately manifest in the form of prospective Resolution Plan after negotiations as regards improvement or revision in terms of the proposed Resolution Plan. This process is in the nature of a bidding process where, based on consideration of the provisions of a Resolution Plan with regard to financial matrix, capacity of the Resolution Applicant to generate funds, infusion of funds, upfront payment, the distribution mechanism and the period over which the claims of various stake holders are to be satisfied

besides the feasibility and viability of the Resolution Plan, a Resolution Applicant emerges as the highest bidder (Hl) eliminating the Resolution Plans of Resolution Applicants, which are ranked H2 and H3. The approval of a Resolution Plan by the Committee of Creditors with requisite majority has the effect of eliminating H2 and H3 from the arena. Though, such approved Resolution Plan would be binding on the Corporate Debtor and all stake holders only after the Adjudicating Authority passes an order under Section 31 of the I&B Code approving the Resolution Plan submitted by Resolution Professional with the approval of Committee of Creditors in terms of provisions of Section 30(6) of the I&B Code, it does not follow that the Successful Resolution Applicant would be at liberty to withdraw the Resolution Plan duly approved by the Committee of Creditors and laid before the Adjudicating Authority for approval thereby sabotaging the entire Corporate Insolvency Resolution Process, which is designed to achieve an object. A Resolution Applicant whose Resolution Plan stands approved by Committee of Creditors cannot be permitted to alter his position to the detriment of various stake holders after pushing out all potential rivals during the bidding process. This is fraught with disastrous consequences for the Corporate Debtor which may be pushed into liquidation as the CIRP period may by then be over thereby setting at naught all possibilities of insolvency resolution and protection of a Corporate Debtor, more so when it is a going concern. That apart, there is no express provision in the I&B Code allowing a Successful Resolution Applicant to stage a U-tum and frustrate the entire exercise of Corporate Insolvency Resolution Process. The argument advanced on behalf of the Appellant that there is no provision in the I&B Code compelling specific performance of Resolution Plan by the Successful Resolution Applicant has to be repelled on four major grounds:-

(i) There is no provision in the l&B Code entitling the Successful Resolution Applicant to seek withdrawal after its Resolution Plai1 stands approved by the Committee of Creditors with requisite majority;

(ii) The successful Resolution Plan incorporates contractual terms binding the Resolution Applicant but it is not a contract of personal service which may be legally unenforceable;

(iii) The Resolution Applicant in such case is estopped from wriggling out of the liabilities incurred under the approved Resolution Plan and the principle of estoppel by conduct would apply to it;

(iv) The value of the assets of the Corporate Debtor is bound to have depleted because of passage of time consumed in Corporate Insolvency Resolution Process and in the event of Successful Resolution Applicant being permitted to walk out with impunity, the Corporate Debtor's depleting value would leave all stake holders in a state of devastation."

The NCLAT held that withdrawal of a Resolution Plan by the Resolution Application after its approval by the CoC cannot be permitted since: (i) it contravenes the principles of IBC, which require the CIRP to be conducted in a time-bound manner in order to maximise the value of the assets of the Corporate Debtor; (ii) permitting Kundan Care to withdraw would sabotage the CIRP, where the A-CoC had previously rejected other prospective Resolution Applicants in favor of Kundan Care; (iii) there is no specific provision in the IBC for allowing withdrawal; (iv) the Resolution Plan incorporated contractual terms binding the Resolution Applicant, and it is not akin to a contract of personal service which is legally unenforceable; (v) by the virtue of principle of estoppel of conduct, Kundan Care is estopped from withdrawing; and (vi) the withdrawal may lead to the Astonfield's liquidation, and the value of its assets were bound to have depleted in the interim."

5. The catch points, we may notice from the conspectus of the case noticed by the Hon'ble Supreme Court (ibid) are: -

I. The CoC commenced e-voting on the Ebix's Resolution Plan on 21 February, 2021 at 7 p.m. and the voting lines were kept open till 7 p.m. of 22 February, 2018. 74.16% members of the CoC voted to approve the plan. 17.29% members voted to reject the plan and the remaining

members having 8.55% vote shares cumulatively, abstained from voting on the Resolution Plan. Thus, the Resolution Plan failed to achieve the minimum percentage of vote share, as required in terms of the provisions of Section 30(4) of IBC, 2016 [in terms of the provisions of Section 6 of the Insolvency and Bankruptcy Code (Amendment) Act, 2018 i.e., Act No.8 of 2018, came into force w.e.f. 23.11.2017, the CoC might approve a Resolution Plan by a vote of not less than 75% of voting share of the Financial Creditors. Nevertheless, in terms of the provisions of Section 23(iii)(a) of the Act No.26 of 2018, which came into force on the 6th day of June, 2018, Section 4 of the Code was further amended and for the word seventy-five, the word sixty-six was substituted. Thus, as on relevant dates i.e., 21 February, 2018 and 22 February, 2018 in order to be treated as approved by CoC, the Resolution Plan needed to muster 75% vote share].

II. A day later i.e., on 23 February, 2018, one of the members of the CoC (CSEB) informed the RP by e-mail that due to a technical error, it could not participate in the e-voting process and wanted its affirmative vote to be recorded on the Resolution Plan. The CSEB's vote could enhance the voting share in favour of Ebix's Resolution Plan to 75.35% i.e., the vote percentage required for approval of the plan. Thus, the RP filed CA No. 160 (PB) of 2018 under Section 60(5) of IBC, 2016 to seek the direction from this Tribunal in respect of CSEB's late vote. Nevertheless, in terms of the order dated 28th February, 2018, this Tribunal directed RP to file an application under Section 30(6) of IBC, 2016 for approval of Ebix's

Resolution Plan and made it clear that the issue of CSEB's vote would be taken up along with the application for approval of Resolution Plan.

III. On 3 April, 2018 an Indian online news publication, the *Wire* published an article titled "How Educomp May Have Subverted the Spirit of India's Insolvency and Bankruptcy Process". Another article titled "Educomp's Insolvency Process Becomes Murkier as Ebix Buys Smartclass Educational Services" was published by the *Wire* on 26 April, 2018. Based on these reports, IFC a Financial Creditor of Educomp filed C.A. No.358 of 2018 before this Adjudicating Authority seeking investigation qua the affairs of the CD. Nevertheless on 01.08.2018 the MCA directed an investigation qua the affairs of CD by SFIO.

IV. In the meantime, on 2 July, 2018 the Ebix wrote a letter to RP to expedite the CIRP qua Educomp.

V. On 10 January, 2019, this Adjudicating Authority reserved its order qua the application filed for approval of Resolution Plan.

VI. On 5 July, 2019, Ebix filed C.A. No. 1252 (PB) of 2019 in CP(IB) No. 101 (PB) of 2017 for withdrawal of the plan for Resolution of Insolvency of CD, submitted by it. The application was dismissed on 10.07.2019.

VII. The 2nd application viz. C.A. No. 1310 (PB) of 2019, filed by the Ebix for withdrawal of Resolution Plan was also dismissed by this Adjudicating Authority on 5 September, 2019.

VIII. On 18 September, 2019, this Adjudicating Authority issued notice in the third withdrawal application and directed the RP to place it before the CoC. The RP placed the application before the CoC in its 14th meeting

held on 26 September, 2019. The CoC resolved not to allow the application for withdrawal.

IX. In terms of the order dated 2 January, 2020, this Adjudicating Authority allowed the third withdrawal application filed by the SRA (Ebix) for withdrawal of its Resolution Plan, with the view:- (i) An unwilling Successful Resolution Applicant would be unable to implement the Resolution Plan effectively; (ii) Under the provisions of Section 31 of the Code, a Resolution Plan becomes binding only after acceptance of a plan by the Adjudicating Authority; (iii) An unwilling and reluctant Resolution Applicant who had withdrawn his Resolution Plan can neither put the Corporate Debtor back to its feet nor effective implementation of its Resolution Plan can be ensured; (iv) Compelling an unwilling and reluctant Resolution Applicant to implement the plan may lead to uncertainty; (v) Once the Applicant is unwilling and reluctant and itself has chosen to withdraw its Resolution Plan, a doubt arises as to whether the Resolution Applicant has the capability to implement the said plan. Uncertainty in the implementation of the Resolution Plan cannot also be ruled out.

X. As a consequence of its order allowing the third withdrawal application, this Tribunal also dismissed the approval application on 3 January, 2020 being infructuous.

XI. The CoC filed Company Appeal assailing the order dated 2nd January, 2020. On 3 February, 2020 the NCLAT stayed the order dated 2 January, 2020 passed by this Adjudicating Authority. The CoC also filed a separate

Appeal viz. Company Appeal (AT) (Insolvency) No. 587 of 2020 assailing the order dated 3rd January, 2020 passed by this Adjudicating Authority.

XII. By its order dated 29 July, 2020 the NCLAT could set aside the order passed by this Adjudicating Authority, allowing the withdrawal of Resolution Plan, submitted by Ebix/SRA. Dealing with the plea of res judicata the NCLAT held that there being no appeal against the order of this Adjudicating Authority, rejecting the first withdrawal application, the issue had attained finality. The finding and conclusion arrived at by the Hon'ble NCLAT qua other issues could be noted in last part of para 34 of the judgment of Hon'ble Supreme Court (ibid).

XIII. It is also mentioned in para 37 of the judgment passed by Hon'ble Supreme Court that the CoC passed a resolution with 77.05% vote share, providing that the EMD of Rs.2 crore furnished by Ebix/SRA in terms of the clause 1.9.1 of RFRP was required to be forfeited. In the wake, the RP issued a letter to IBBI on 1 April, 2020 for encashment of the EMD.

6. The order passed by Hon'ble NCLAT could be assailed by the SRA i.e., Ebix Singapore Pte. Ltd. (hereinafter referred to as "Ebix") /SRA before Hon'ble Supreme Court, by filing Civil Appeal No. 3224 of 2020 (Supra). The contentions advanced on behalf of the Appellant in support of the Appeal, before Hon'ble Supreme Court, as noted in judgment dated 13th September, 2021 passed by Hon'ble Supreme Court reads thus: -

"D Submissions of counsel in the Ebix Appeal

D.1 Submissions for the appellant

82 Mr K V Vishwanathan, learned Senior Counsel appearing on behalf of Ebix submitted that a successful Resolution Applicant may

be permitted to withdraw the resolution plan (pending approval of the Adjudicating Authority), on account of: (a) subsequent developments in relation to Educomp (which in this case relate to investigations of fraud and mismanagement during the pre-CIRP period); and (b) due to an inordinate lapse of time, which has resulted in the complete erosion of the fundamental commercial substratum underlying the Resolution Plan.

Further, he argues that the NCLAT did not correctly apply the doctrine of constructive res judicata. He has made the following submissions:

(i) Ebix is not bound by the Resolution Plan prior to the approval of the Adjudicating Authority, in terms of the CIRP documents read with the scheme of IBC. In this regard, our attention was drawn to:

(a) Section 31(1) of the IBC, which provides that the Resolution Plan is "binding…on all stakeholders" only upon approval by the Adjudicating Authority;

(b) Section 74(3) of the IBC, which provides that a person can be prosecuted or punished for contravening the Resolution Plan only after its approval by the Adjudicating Authority;

(c) The documents underlying the CIRP, i.e., invitation of EOI, the RFRP, sanction letter and Resolution Plan take effect of a binding contract only upon the approval of the Adjudicating Authority and the execution of definitive agreements thereafter;

(d) Clause 1.1.6 of the RFRP provides that the Plan submitted by Ebix will have to be approved by the Adjudicating Authority and will be binding on all the stakeholders in relation to the Corporate Debtor and Ebix, only after it has been approved by the Adjudicating Authority;

(e) Clause 1.10(1) of the RFRP provides that Ebix shall be responsible for the implementation and supervision of the Resolution Plan from the date of approval by the Adjudicating Authority; and

(f) Clause 2.2.9 of the RFRP provides that Ebix shall, pursuant to approval by the Adjudicating Authority, execute definitive agreements;

(ii) The Resolution Plan constitutes an offer qualified by time and cannot be enforced against the parties after such a long period of time has elapsed. In this regard, the following terms of the documents underlying the CIRP were highlighted:

(a) Clause 1.1.5 of the RFRP, which invites Resolution Plans from prospective Resolution Applicants. Further, Clause 1 of the covering letter for submission of the Resolution Plan provides that Ebix is setting out the offer in relation to the insolvency resolution of Educomp;

(b) The Resolution Plan was valid only for six months, since Clause 1.8.3 of the RFRP invites resolution plans/offers with a validity of six months;

(c) In accordance with the RFRP, Clause 7 of the Resolution Plan provides that it is valid for a period of six months from the date of submission. The appellant is a liberty to withdraw the resolution plan if there is delay of several months beyond the period of six months. It was emphasized that the Resolution Plan is a qualified offer which is not open to acceptance for an indefinite period. Reliance was placed on the decision of this Court in ***Riya Travel & Tours (India) (P) Ltd.*** *v.* ***C.U. Chengappa*** *to support this proposition;*

(d) The CSEB Application for the approval of the resolution plan continues to be pending before the Adjudicating Authority, while the Approval Appeal is pending before the Appellate Authority. A period of eighteen months has passed from the date of submission of the resolution plan (i.e., 19 February 2018) and twenty-seven months from the CIRP commencement date. Such severe and inordinate delay is impermissible under Section 12 of the IBC and justifies the withdrawal of the Plan;

(e) The delay in the approval was on account of the actions of members of the E-CoC, who had sought a special audit of Educomp due to the concerns relating to mismanagement of its affairs. Several members had filed applications (IFC, Axis Bank and SBI) before the Adjudicating Authority in this regard. The Adjudicating Authority by orders dated 13 August 2018, 20 August 2018 and 31 August 2018 took cognizance of these applications and directed them to be placed before the E-CoC. The E-CoC approved the Investigation Audit Application filed on its behalf before the Adjudicating Authority for conducting a special audit by 77.85 per cent votes;

(f) SFIO initiated investigation against Educomp. Ebix became aware of the investigation only through disclosures made to NSE/BSE and regulators on 12 June 2019;

(g) Ebix had sent a notice dated 2 July 2018 to the E-CoC/E-RP stating that the severe delays in the CIRP have prejudiced the commercial considerations underlying the Resolution Plan and, in any case, the Resolution Plan was valid only for six months. It urged the E-CoC/E-RP to expedite the process for obtaining the Adjudicating Authority's approval. Thereafter, Ebix filed the First Withdrawal Application for seeking information relating to the financial position and other commercial aspects of Educomp. After the dismissal of the First Withdrawal Application, the appellant filed the Second and Third Withdrawal Applications for withdrawal of its Resolution Plan; and

(h) The above sequence of events shows that Ebix had no role to play in the delays plaguing the CIRP of Educomp. Section 12 of the IBC stipulates that the insolvency resolution process should be completed in 270 days with an outer limit of 330 days. This Court in ***CoC of Essar Steel India Ltd.*** *v.* ***Satish Kumar Gupta & Ors.*** *has held that "[i]t 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";

(iii) The events that have taken place subsequent to the submission of Resolution Plan justify its withdrawal. In this regard, it was urged on behalf of Ebix that:

(a) The Resolution Plan was based on certain considerations that were fundamental to the Ebix's bid for the business of Educomp, and were crucial for keeping the business of Educomp as a going concern. These were the government contracts and IP driven solutions in the education and health industries. However, due to the inordinate delay in the completion of the CIRP, many of the government contracts may have ended. Further, various technology driven solutions and intellectual property owned and operated by Educomp, which Ebix had sought to acquire, were no longer valid;

(b) The E-CoC passed a resolution with 77.85 per cent votes to conduct a special audit into the affairs of Educomp, which shows that evidence is available to conclude that the affairs of the company were mismanaged, which materially affect the economic considerations underlying the Resolution Plan;

(c) The affairs of Educomp are also being investigated by the SFIO and CBI, which provides further evidence that the affairs of Educomp were severally mismanaged and are susceptible to criminal investigations;

(d) There has been a lapse of over three years resulting in an erosion of vital business prospects of Educomp; and

(e) The implementation and viability of a Resolution Plan is to be assessed at the time of consideration of such plan by the competent Court/Tribunal, and not at the time of submission

of the Plan. The subsequent events that have transpired after the submission of the Resolution Plan are relevant for evaluating the commercial viability and the capability to implement the plan. In the present case, the substratum forming the basis of the resolution plan has been eroded by the occurrence of the abovementioned events. Thus, the successful Resolution Applicant has the right to withdraw the Resolution Plan in such circumstances;

(iv) Material information relating to the financial position and affairs of Ebix was not provided to Ebix after the submission of the Resolution Plan, as a consequence of which, there is an impairment of a fair process in the conduct of a commercial transaction. In this context:

(a) Section 29(2) of the IBC, provides that all relevant information should be provided to the Resolution Applicant;

(b) Regulation 36 of the CIRP Regulations provides that the IM prepared under Section 29 of the IBC should contain information relating to, inter alia: (1) "assets and liabilities…"; (2) "the latest annual financial statement"; and (3) details of "…ongoing investigations or proceedings initiated by Government and statutory authorities". While this information is relevant for the preparation of the Resolution Plan, there is a continuing obligation to disclose such information if there is a substantial delay in the CIRP (beyond the period prescribed under Section 12 of the IBC) qua the Corporate Debtor;

(c) The Resolution Applicant's right to complete and accurate information relating to the Corporate Debtor has been recognized under the UNCITRAL Guide. The principle of "equality of information" to all stakeholders, including the resolution applicant, has been underlined in the BLRC Report; and

(d) The E-CoC/E-RP withheld information relating to mismanagement of affairs of Educomp between 2014-2018, and also in relation to the investigation into the affairs of Educomp by governmental authorities;

(v) The Adjudicating Authority has the power to permit the withdrawal of the Resolution Plan. Under Section 31 of the IBC, it has the power to independently satisfy itself that the "Resolution Plan as approved by the CoC… meets the requirements as referred to in sub-section (2) of Section 30". Section 30(2)(d) of the IBC provides that the Adjudicating Authority can assess whether adequate provisions have been made for the "implementation and supervision of the resolution plan". This Court in ***K Sashidhar*** *v.* ***IOC*** *has emphasized that the Adjudicating Authority has the discretion to reject the Resolution Plan if it does not conform to the stated requirements of Section 30(2)(d). The proviso to Section 31(1) of the IBC expressly prohibits the Adjudicating Authority from approving a plan that is incapable of being effectively implemented. The NCLAT, in the impugned judgement, has not considered whether the exercise of the jurisdiction by the Adjudicating Authority under Section 31(1) read with Section 30(2)(d) was valid. In the present circumstances, the Resolution Plan is no longer capable of being implemented due to the erosion of the commercial basis of the Resolution Plan and an inordinate lapse of time;*

(vi) The NCLT had good and valid reasons allowing for the withdrawal of the resolution plan since:

(a) There was no approval by the E-CoC with the requisite majority of 75 per cent. When the voting took place on the resolution plan submitted by the Appellant on 22 February 2018, there was a shortage in the votes required to achieve the statutory requirement of 75 per cent of votes in the E-CoC. On 23 February 2018, one of the financial creditors who was not present at the meeting of the E-CoC intimated its

agreement with the resolution plan and accordingly the Approval Application was filed on 7 March 2018. Orders have been reserved on the Approval Application on 10 January 2018; and

(b) Fulfilment of the Plan cannot be foisted on an unwilling Applicant. This view of the NCLT is consistent with the legal position which vests it with the power to permit a withdrawal from a resolution plan for good and substantial reasons; and

(vii) The doctrine of res judicata does not bar the relief that Ebix had sought in its Third Withdrawal Application of its Resolution Plan. The First Withdrawal Application arose from a different cause of action, namely seeking information and re-evaluation of the financial position of Educomp due to a lapse of time. The order dated 10 July 2019 passed by the Adjudicating Authority in the First Withdrawal Application had only adjudicated the issue relating to the non-disclosure of information and material sought by Ebix, and had not considered the relief of withdrawal of Resolution Plan. This was also confirmed in the express finding of the Adjudicating Authority in its order dated 2 January 2020, which was appealed before the NCLAT."

7. The CoC opposed the appeal. The submissions advanced on behalf of CoC, as noted by Hon'ble Supreme Court reads thus: -

"D.2 Submissions for the first respondent

83 Mr Shyam Divan, learned Senior Counsel appearing on behalf of E-CoC, has urged the following submissions:

(i) Ebix submitted its Resolution Plan on 27 January 2018, after month-long negotiations. Meetings between the E-CoC and Ebix were conducted on 17 February 2018, 19 February 2018 and 21 February 2018. Addendums were submitted on 21 February 2018. The mutually approved and negotiated plan was put to

vote, and approved by 75.36 per cent of the E-CoC. This constituted a binding contract between Ebix and the E-CoC;

(ii) The IBC is a complete code as held by this Court in ***M/s Embassy Property Developments Pvt. Ltd.*** *v.* ***State of Karnataka & Ors. and M/s Innoventive Industries Ltd.*** *v.* ***ICICI Bank & Anr.****. It does not envisage withdrawals of Resolution Plans after mutual negotiations between the Resolution Applicant and the CoC, which culminates into a binding agreement. The Adjudicating Authority cannot contravene the text to invoke the spirit/object of the IBC without a conscious statutory prescription, as held by this Court in* ***Gujarat Urja Vikas Nigam Limited*** *v.* ***Amit Gupta****;*

(iii) The basic tenets of any insolvency law are to ensure the sanctity of the prescribed processes and timelines. Maximization of the value of assets and resolution of the Corporate Debtor are the core objectives of the IBC, as held by this Court in ***Swiss Ribbons (P) Ltd*** *v.* ***Union of India****. Enabling withdrawals, especially at the tail end of the process, would push financially distressed Corporate Debtors into liquidation;*

(iv) The Specific Relief (Amendment) Act 2018, as is evinced from the speech of the Union Minister of Law & Justice before the Rajya Sabha while introducing the amendments, shifted the paradigm on contract enforcement in India where specific performance is now the norm, rather than the exception;

(v) The resolution process involves significant public money, resources and time. Enabling withdrawals would undermine the goals of predictability and finality, which the legislature had recognized as the need of the hour in the Rajya Sabha debates on the IBC;

(vi) Non-implementation of Resolution Plans after approval from the Adjudicatory Authority under Section 31 of the IBC, pertinently

on a narrow scope of judicial review, is liable to criminal prosecution under Section 74(3) of the IBC. This Court should not allow a successful Resolution Applicant to withdraw from a duly concluded contract;

(vii) The consequences of permitting a withdrawal by Ebix would push Educomp towards liquidation, which would risk thousands of crores of public monies owed to public sector banks during the economic crisis caused by the COVID-19 pandemic;

(viii) Permitting withdrawal of an approved Resolution Plan would tread on the exclusive domain of the CoC, which has the power to determine the feasibility and viability of a Resolution Plan. The mandate of Section 30(2)(d) of the IBC, which envisages 'implementation and supervision of the resolution plan', would be breached if the Court would allow withdrawals by holding that an unwilling Resolution Applicant would make a Resolution Plan itself un-implementable;

(ix) The scope of judicial review with the Adjudicatory Authority, under Section 31 of the IBC, is confined to parameters delineated in Section 30(2), which does not envisage the withdrawal or unwillingness of the Resolution Applicant to continue with a CoC-approved Resolution Plan. The Adjudicating Authority, as a creature of the statute, cannot exercise jurisdiction beyond the scope of the IBC or second-guess the commercial wisdom of the CoC, as held by this Court in ***Essar Steel*** *(supra), after noting the observations of this Court in* ***K Sashidhar*** *(supra);*

(x) The Supreme Court, in ***Essar Steel*** *(supra) and* ***K Sashidhar*** *(supra), has held that the Adjudicating Authority cannot trespass upon the majority decision of the CoC, except on the grounds enumerated under Section 30(2)(a) to (e) of the IBC;*

(xi)The provisions of the RFRP were designed to ensure predictability and finality. The provisions which elucidated this aim were:

(a) Clause 1.13.5, which did not envisage any change or supplemental information to the Resolution Plan, after the submission date;

(b) Clause 1.8.4, which stated that a submitted Resolution Plan shall be irrevocable; and

(c) Clause 1.10(l), which stipulated that the Resolution Applicant will not be permitted to withdraw the Resolution Plan;

(xii) The RFRP did not envisage six months to be the validity of the Resolution Plan. Clause 1.8.3, which stipulated a minimum six-month validity of the Resolution Plan, is relatable to the acceptance of the plan by the E-CoC and not the Adjudicating Authority. This is evident from the clauses of the RFRP which stipulate that the submitted plan is irrevocable;

(xiii) The resolution process belies the claim that withdrawals were permissible after the six-month period. The process was delineated in the following terms:

(a) Clause 1.3.1 and 1.3.2 empowers the E-RP to issue an invitation to prospective resolution applicants, subject to, inter alia, non-disclosure agreements and participation fees;

(b) Clause 1.3.6, read with Clause 1.9.1, enables a party to submit a Resolution Plan upon payment of an earnest money deposit of Rs 2 crore. Along with the Resolution Plan, the Resolution Applicant was required to submit an undertaking accepting the terms of the RFRP, including the <u>minimum</u> six-month period of Resolution Plan validity;

(c) Clause 1.9.3, read with Clause 1.9.5, ensures that a CoC approved Resolution Plan becomes a binding contract between the E-CoC and Ebix, since the earnest money deposit needs to be replaced with a performance guarantee, which is 10 per cent of the Resolution Plan value. Any

violation of the concluded contract, which would be the approved Resolution Plan in this case, would give the E-CoC the right to invoke the performance guarantee;

(d) The above clauses, in addition to clause 1.8.3, read with 1.9.5, evince that the six-month validity is with respect of the EMD alone, and is hence only related to a period until acceptance by the E-CoC;

(e) The consequence of approval by the Adjudicating Authority under Section 31 of the IBC is that the parties enter into definitive binding agreements, the implementation of the Resolution Plan commences and the performance guarantee is returned. A Section 31-approval binds all stakeholders to a concluded contract between the Ebix and the E-CoC;

(f) The CoC or the RP do not have the authority to impose a time limit on the Adjudicating Authority. Therefore, it would not be plausible to construe Clause 1.8.3 to impose a maximum validity period on a Resolution Plan; and

(g) In any event, Ebix had waived the term of validity of the plan being six months by pursuing the plan after six months, i.e., from August 2018 till reserving of orders by the Adjudicating Authority in January 2019, and not raising any claims till July 2019. Therefore, Ebix is estopped from raising the plea, after the purported expiry of the validity period;

(xiv) Clause 1.1.6 of the RFRP, which reiterated Section 31 of the IBC and states that the Resolution Plan will be binding on all stakeholders only after the approval of the Adjudicating Authority, does not militate against E-CoC's proposition that the CoC-approved Resolution Plan is a concluded contract. This is because:

(a) Section 30(4) of the IBC does not contemplate any statutory exit after the approval of the Resolution Plan by the CoC, which determines its feasibility and viability;

(b) Clause 1.1.6 paraphrases Section 31(1) of the IBC, which merely makes the Resolution Plan binding on all other stakeholders. The Adjudicating Authority's approval under Section 31(1) amounts to a 'super-added imprimatur' to the concluded terms between the CoC and the Successful Resolution Applicant; and

(c) A conjoint reading of Clause 1.1.6, along with Clause 1.8.4, which declares a submitted Resolution Plan to be irrevocable, and Clause 1.10(l), which prohibits withdrawal of a submitted Resolution Plan, belies the claim that the Resolution Plan is binding on the Successful Resolution Applicant only after approval of the Adjudicating Authority;

(xv) The delay in the resolution process is not attributable to the E-CoC. It cannot be cited to allow Ebix to withdraw from a legally binding plan;

(a) The E-CoC approved the submitted Resolution Plan within 270 days, and it was promptly filed before the Adjudicating Authority in March 2018. The orders on the plan approval were reserved in January 2019 and pronounced only in January 2020. The delay cannot be attributable to the E-CoC or used to withdraw from a plan which provided a 90 per cent haircut; and

(b) actus curiae neminem gravabit, i.e., the act of Court shall harm no man, is a settled principle in law;

(xvi) Ebix's argument that the substratum or commercial viability has eroded due to the subsequent circumstances is facetious since:

(a) Ebix had conducted its own due diligence, in accordance with the RFRP. Section 29 of the IBC also enabled the appellant to access to an IM on Educomp, which would include all relevant information, including financial position and pending disputes. Clause 1.13.7 of the RFRP also stipulates that failure to conduct adequate due diligence is not a ground to relieve the Resolution Applicant from its obligations under a submitted Resolution Plan;

(b) Ebix continued to be interested in Educomp as late as 1 June 2020, when it addressed a letter stating that the software licenses for online education, issued by Educomp, have become even more relevant in the circumstances of the pandemic;

(c) The Investigation Audit Application for investigations into the affairs of Educomp was filed in May 2018 and disposed of by August 2018, which was prior to the Adjudicating Authority reserving its orders on the Resolution Plan. In any event, no such audit by the Special Investigation Team was undertaken;

(d) According to the information available with the E-CoC, the E-RP had provided all the information available with Educomp regarding the CBI and SFIO investigations, on a best effort basis. Additionally, Ebix was also appearing before the NCLT when the E-CoC sought an investigation into the affairs of Educomp, as recorded in the order of the NCLT dated 9 August 2018;

(e) Ebix had evaluated the business and business conduct of Educomp, before submitting a Resolution Plan worth Rs 314 crores, against an admitted financial debt worth Rs 3003 crores. This 90 per cent haircut indicates that the appellant was aware of the conditions of Educomp; and

(f) In any event, Section 32A of the IBC grants immunity to a Resolution Applicant from any offences committed by the Corporate Debtor, prior to the commencement of the CIRP, and provides certainty that the assets of the Corporate Debtor, as represented, would be available in the same manner as at the time of submission of a Resolution Plan. Section 25(2)(j) of the IBC empowers and obligates the RP to file applications for avoidance of certain transactions, to protect the interests of the Resolution Applicant; and

(xvii) The Third Withdrawal Application is barred by res judicata since the grounds raised by Ebix were rejected by the NCLT in the First Withdrawal Application on 10 July 2019. The liberty granted by the NCLT to file a fresh application on 5 September 2019 was with respect to filing a proper pleading without defects, and not on merits. This conditional liberty cannot be construed as a waiver of the objection of res judicata. In any event, the issue of limited validity of the approved Resolution Plan and delay of seventeen months, is barred by the principles of constructive res judicata."

8. The RP supported the stand taken by the CoC and the submissions advanced on its behalf, as noted by Hon'ble Supreme Court, reads thus:

"D.3 Submissions for the second respondent

85 Supporting the submissions of the E-CoC, Mr Nakul Dewan, learned Senior Counsel, has appeared on behalf of the E-RP. He has submitted that:

(i) Upon the approval of a Resolution Plan by the CoC, a concluded contract comes into existence between the Resolution Applicant and CoC. Any withdrawal of the Resolution Plan would violate the concluded contract;

(ii) In the present case, Clauses 1.9.3 and 1.9.5, give the right to the E-CoC to invoke the PBG submitted by Ebix if it attempts to renege from its contractual obligation to implement the Resolution Plan;

(iii) The withdrawal would also be in violation of the objective of the IBC, as noted by this Court in ***Swiss Ribbons*** *(supra), which is to ensure the revival and continuation of the Corporate Debtor. The withdrawal of the Resolution Plan at a belated stage, would lead to the Corporate Debtor going into liquidation;*

(iv) The withdrawal of a Resolution Plan after its approval by the CoC is not contemplated by:

(a) The UNCITRAL Guide, according to which the role of judicial authorities is limited to approving the Resolution Plan after ensuring that it was approved by the CoC properly. It does not envisage that the role of the judicial authorities would extend to questioning the commercial wisdom of the CoC, much less allow for the withdrawal of the Resolution Plan at the behest of the Resolution Applicant;

(b) The BLRC Report: (1) notes that the UNCITRAL Guide was used as a benchmark by Parliament while enacting the IBC; (2) opined that the CoC should be the driving force behind the resolution of the Corporate Debtor; and (3) does not discuss the withdrawal of a Resolution Plan;

(c) The UK Act does not allow for the withdrawal of a Resolution Plan and limits the grounds of challenge. In Singapore, the Singapore Act allows challenges to the Resolution Plan, without envisaging withdrawal;

(d) The Resolution Plan is a contract executed under the aegis of the IBC and hence the statute must be interpreted so as to further its objectives. Reliance for this proposition is placed on the following English decisions: (1) ***Allied Domecq (Holdings) Ltd*** *v.* ***Allied Domecq First Pension Trust Ltd****; (2)* ***Reinwood Ltd***

v. ***L Brown & Sons Ltd****; (3)* ***Doleman*** *v.* ***Shaw****; and (4)* ***Standard Life Assurance Ltd*** *v.* ***Oak Dedicated Ltd****; and*

(e) If the Parliament while enacting the IBC intended to permit the withdrawal of the Resolution Plan after its approval by the CoC or NCLT, it would have provided for such an eventuality. Section 12A was inserted by amendment for situations involving a withdrawal from the CIRP. On the contrary, Section 74 provides for penalties in case the Resolution Applicant does not comply with the Resolution Plan;

(v) Ebix's argument, that the RFRP which provides that the Resolution Plan must be approved within six months would also include its approval by the Adjudicating Authority, is contrary to the IBC since the parties, through an agreement, cannot impose a restriction/condition on a judicial authority;

(vi) In any case, Ebix has actively pursued the Resolution Plan even after the period of six months by communicating with the E-CoC/E-RP, arguing in its favor in the Approval Application and by extending the EMD. The First Withdrawal Application was filed only on 5 July 2019, after the expiry of nearly one year from the expiry of the period of six months on 19 August 2018;

(vii) The investigations by the SFIO and CBI were initiated after the filing of the Approval Application before the NCLT. Since the E-RP was not aware of any discrepancies or illegalities committed by the former management of Educomp, information about such activities could not have been provided to intending Resolution Applicants under Section 29 of the IBC. Section 29 only envisages that the RP will provide information to prospective Resolution Applicants on a best-effort basis;

(viii) Ebix is a professional corporate entity, and through the express provisions of its own Resolution Plan, has stated that it has significant previous experience in the revival of stressed assets. Before submitting its Resolution Plan for Educomp, Ebix was

provided access to the Virtual Data Room by the E-RP and conducted its due diligence. Hence, it should not be allowed to seek a withdrawal, by arguing that certain facts were not within its knowledge; and

(ix) In view of the decision of this court in ***Nagabhushanammal*** *v.* ***C Chandikeswaralingam****, the Third Withdrawal Application was barred by the principles of res judicata since it sought the same prayer which was raised in the First Withdrawal Application, and rejected by the NCLT in its order dated 10 July 2019."*

9. In para 93 to 98 of the judgment dated 13.09.2021 (supra), Hon'ble Supreme Court analysed the purpose of Insolvency and viewed that an examination of *raison d'etre* (reason for being) of the IBC must necessarily precede its analytical interpretation. Referring to the UNCITRAL (United Nations Commission on International Trade Law) guide, Hon'ble Supreme Court noted that each jurisdiction evolves its own insolvency regime based on its political and economic goals, thus the UNCITRAL guide also refrain from prescribing mandates for the specific choices (procedural or substantive) that an insolvency law should provide. Hon'ble Supreme Court also made a reference to the BLRC (Bankruptcy Legislative Reforms Committee) Report to espouse that a good realisation can generally be obtained if the firm is sold as a going concern, thus the delay, which induces liquidation, causes value destruction. In the wake, it could be deciphered that achieving a high recovery rate is primarily about identifying and combating the sources of delay.

10. Hon'ble Supreme Court also noted the concluded statement in the executive summary of BLRC Report which acknowledged that the failure of business plans is integral to the process of market economy. When business

failure takes place, the best outcome for society is to have a rapid re-negotiation between the financers to finance the going concern using a new arrangement of liabilities and a new management team. If this cannot be done, the best outcome for society is a rapid liquidation. In para 97 of the judgment, Hon'ble Supreme Court could observe that the CIRP invariably has an impact on the conduct of the Resolution Applicant, who participates in the process and consents to be bound by the RFRP and broader insolvency framework. It is the view taken by Hon'ble Supreme Court that the interpretive task of this Adjudicating Authority, Appellate Authority and even of Hon'ble Supreme Court must be cognizant of the objective of the CIRP. In terms of the view taken by Hon'ble Supreme Court, any claim seeking an exercise of the Adjudicating Authority's residuary powers under Section 60(5)(c) of the IBC, the NCLT's inherent powers under Rule 11 of the NCLT Rule 2016 or even the powers of Hon'ble Supreme Court under Article 142 of the Constitution must be closely scrutinised for broader compliance with the insolvency framework and its underlying objective. It is also the view taken by the Hon'ble Supreme Court in the judgment dated 13 September, 2021 that any judicial creation of a procedural or substantive remedy that is not envisaged by the statute would not only violate the principle of separation of powers but would also run the risk of altering the delicate coordination that is designed by the IBC framework and have grave implications on the outcome of the CIRP, the economy of the country and the lives of the workers and other relied parties who are statutorily bound by the impact of a resolution or liquidation of Corporate Debtor.

11. In para 104 of the judgment, Hon'ble Supreme Court noted the argument put forth on behalf of the Appellant/Ebix that the Resolution Plan is in the nature of an offer which becomes binding as concluded contract only once the Adjudicating Authority approves it. Nevertheless, having taken note of the rival submissions put forth on behalf of the counsels for the parties, Hon'ble Supreme Court observed that the scope of the commercial bargain with the Resolution Applicant evinces a sense of a negotiated agreement that is arrived at between the parties which resembles an exercise of contractual freedom by the CoC and the Resolution Applicant. Hon'ble Supreme Court also viewed that if it is held that the CoC-approved Resolution Plans are indeed contracts, their provisions would still have to conform to the statutory provisions of the IBC. However, such an interpretation would entail that CoC-approved Resolution Plans are at the intersection of the IBC and the Contract Act. This would mean that certain principles of contract law, for example those relating to discharge, penalties, remedies, and damages would become applicable to CoC-approved Resolution Plans. The text of the IBC does not specify whether Resolution Plans at the second stage of the process i.e., in the intervening period of submission to and approval by the Adjudicating Authority are pure contracts. As noted previously, by specifications such as eligibility for Resolution Applicants, the contents of the IM and duties of the RP to prospective Resolution Applicant and statutory provisions on timelines and voting strictly govern the insolvency process even prior to the submission of the plan to the Adjudicating Authority. The CoC which according to the Ebix is like a free contracting party governed by the binding principles of the statute with regard to the contents and nature of the statutory plan that it approves under Section 30(4) and even its own

composition. While dealing with the contention regarding the Resolution Plan being contract, Hon'ble Supreme Court recorded that in fact a commentator had noted that the purpose of bankruptcy law is to actually solve a specific 'contacting failure' that a company's financial distress. Such a 'contacting failure' arises because 'financial distress involves too many parties with strategic bargaining incentives and too many contingencies for the firm and its creditors to define a set of rules of every scenario'. Thus, insolvency law recognises that parties can take benefits of such incomplete contact to hold each other up for their individual gain. Finally, Hon'ble Supreme Court viewed that the contractual principles and common law remedies, which do not find a tether in the wording or the intent of the IBC cannot be imported in the intervening period between the acceptance of the CoC and the approval by the Adjudicating Authority. Principles of contractual constructions and interpretations may serve as interpreting aids, in the event of ambiguity over the terms of the Resolution Plan. However, remedies that are specific to the Contract Act cannot be implied de hors the over-riding principles of the IBC. Para 104 to 125 of the judgment of Hon'ble Supreme Court, which deals with the contentions of the parties as to, "whether the Resolution Plan is a kind of contract or not" reads thus: -

> *"104 To summarize the arguments of the parties, the appellants have argued that Resolution Plans are in the nature of an offer, which becomes binding as a concluded contract only once the Adjudicating Authority has approved the Resolution Plan. Section 7 of the Contract Act requires the acceptance of offer to be absolute, unconditional and unqualified. Since the approval by the CoC is effectively conditional upon the confirmation of the Plan by the Adjudicating Authority, it cannot be said that there is absolute acceptance of the Resolution*

Plan. Alternatively, it has been argued that Resolution Plans approved by the CoC are contingent contracts, whose enforceability is conditional upon the approval of the Adjudicating Authority in accordance with Section 32 of the Contract Act. The Respondents (RPs and the CoCs) have argued that a concluded contract comes into being when the Resolution Plan is approved by the CoC and a successful Resolution Applicant cannot renege from their contractual obligation to implement the Resolution Plan. In furtherance of this argument, Mr Shyam Divan appearing for the E-CoC made a reference to the Specific Relief (Amendment) Act 2018, which has brought a change to the regime on contract enforcement in India by making specific performance the norm rather than the exception.

105 The determination of the nature of the Resolution Plan would help us establish the source of the legal force of the Resolution Plan – whether it is the statute, i.e., the IBC or the law of contract. The insolvency process, as governed by the IBC, does not merely structure the conduct of all the participants in the process after finalization and approval of a Resolution Plan by a CoC, but also the conduct stemming from the very first steps of inviting prospective Resolution Applicants. The RP, with the approval of the CoC, invites prospective Resolution Applicants through an RFRP. Once an unconditional EOI has been received from prospective Resolution Applicants who are otherwise eligible under Section 29A, the RP prepares an IM as per the provisions of Section 29 which furnishes all relevant information of the Corporate Debtor to enable prospective Resolution Applicants to make an informed decision, before proposing a Resolution Plan. As a consequence of the IBC and its regulations, prospective Resolution Applicants, who are not disqualified under Section 29A, propose drafts of their Resolution Plans. The RP examines the Resolution Plan against the contours of Section 30(2) and submits only the eligible plans to the CoC. Prior to the IBBI (CIRP) (Fourth Amendment) Regulations 2020, which now requires the CoC to vote on all Plans

simultaneously after recording its deliberations on the feasibility and viability of each Plan, Regulation 39(3) earlier enabled the CoC to approve a Resolution Plan with "such modifications as it deems fit". This meant that the prospective Resolution Applicants and the CoC would indulge in several rounds of negotiations, within a strict time-frame, to arrive at a mutually agreeable Resolution Plan which was then subject to voting by the CoC. Subsequent to the voting, the RP would submit the plan to the Adjudicating Authority along with receipt of the PBG and a compliance certificate in the form of Form H. Each of the stages detailed above correspond to several rights and obligations on all parties that are specifically created by the statute.

106 Since the interpretation of the IBBI (CIRP)(Fourth Amendment) Regulations 2020 and the impact on the Resolution Applicants and the CoC to negotiate the terms of the Resolution Plan is not before this Court and the present appeal essentially seeks to determine the nature of the Resolution Plan after its approval by the CoC and prior to its approval by the Adjudicating Authority, this Court will proceed to determine of the nature of such a Plan, on the assumption of the law as it stood then, i.e., Regulation 39(3) which directed that "[t]he 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" 64. This power of the CoC to suggest modifications invariably entailed an element of negotiation with the Resolution Applicants, who would make suitable revisions and re-submit their Resolution Plans. The scope of a commercial bargain with the Resolution Applicants evinces a sense of a negotiated agreement that is arrived between the parties, which resembles an exercise of contractual freedom by the CoC and the Resolution Applicant.

107 If this court were to hold that CoC-approved Resolution Plans are indeed contracts, their provisions would still have to conform to the statutory provisions of the IBC. However, such an interpretation

would entail that CoC-approved Resolution Plans are at the intersection of the IBC and the Contract Act. This would mean that certain principles of contract law, for example those relating to discharge, penalties, remedies and damages would become applicable to CoC-approved Resolution Plans. For instance, in the United States, plans confirmed by courts have been characterized as contracts, whose breach can even give rise to contractual remedies. In ***In re Hoffinger Indus, Inc****, a bankruptcy court in Arkansas has held that "a confirmed plan should be enforceable and amenable to damages between contractually bound parties." Indeed, it has been argued before us that Resolution Plans should be enforced through the contractual remedy of specific performance. Further, a determination that Resolution Plans are contracts in the period between approval by the CoC and the approval of the Adjudicating Authority would require us to analyse whether all elements of contract formation have been satisfied, including the question of whether the acceptance of the Resolution Plan by the CoC fulfils the criteria laid down under Section 7 of the Contract Act or whether the conditionality of seeking approval from the Adjudicating Authority makes the Resolution Plan a contingent contract. Our intent of laying down the consequences of our determination of Resolution Plans as contracts is to highlight the importance of ascertaining the nature of a CoC-approved Resolution Plan, prior to its approval by the Adjudicating Authority.*

108 The text of the IBC does not specify whether Resolution Plans at the second stage of the process, i.e., in the intervening period of submission to and approval by the Adjudicating Authority, are pure contracts. As noted previously, by specifications such as eligibility for resolution applicants, the contents of the IM and duties of the RP to prospective Resolution Applicants and statutory procedures on timelines and voting, strictly govern the insolvency process even prior to the submission of the Plan to the Adjudicating Authority. The CoC,

who the appellants allege is in the nature of a free contracting party, is governed by the binding principles of the statute with regard to the contents and nature of the statutory plan that it approves under Section 30(4) and even its own composition.

109 Section 30(4) provides that the consent of all the members of the CoC, though a unanimous vote is not required and a sixty-six per cent vote is sufficient for approval of a resolution plan. The constitution of the CoC is based on specific scenarios envisaged in the statute and accounts for varying compositions, based on factors such as the nature and quantum of debt owed. For example, if it comprises of operational creditors alone, the percentage of debt owed between the operational and financial creditors and other such variables impact voting thresholds inter se members of the CoC. A sixty-six per cent vote of the CoC is required to approve a Resolution Plan. The dissenting creditors are deemed to have given their approval and are bound by the decision of the majority of the CoC. The dissenting creditors are bound as a result of the statutory provision and not because they have actually consented to be parties to such an arrangement. Other elements governing the Resolution Plan indicate that the entire process from initiation and leading up to its acceptance by the CoC takes place within the framework of the IBC. In addition, the IBC provides penalties for non-compliance with the Resolution Plan after its approval under Section 31 and forfeiture of the PBG for failing to implement the Resolution Plan or contributing to the failure of its implementation. The violation of the terms of the Resolution Plan does not give rise to a claim of damages, rather it leads to prosecution and imposition of punishment under Section 74 of the IBC. On the contrary, a CoC's withdrawal of the CIRP under Section 12A is coupled with a requirement of payment of CIRP costs, but no damages are statutorily payable to the Resolution Applicant, irrespective of the stage of the withdrawal.

110 The CoC even with the requisite majority, while approving the Resolution Plan must consider the feasibility and viability of the Plan and 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 of the IBC. The CoC cannot approve a Resolution Plan proposed by an applicant barred under Section 29A of the IBC. Regulation 37 and 38 of the CIRP Regulations govern the contents of a Resolution Plan. Furthermore, a Resolution Plan, if in compliance with the mandate of the IBC, cannot be rejected by the Adjudicating Authority and becomes binding on its approval upon all stakeholders – including the Central and State Government, local authorities to whom statutory dues are owed, operational creditors who were not a part of the CoC and the workforce of the Corporate Debtor who would now be governed by a new management. Such features of a Resolution Plan, where a statute extensively governs the form, mode, manner and effect of approval distinguishes it from a traditional contract, specifically in its ability to bind those who have not consented to it. In the pure contractual realm, an agreement binds parties who are privy to the contract. In the context of a resolution Plan governed by the IBC, the element of privity becomes inapplicable once the Adjudicating Authority confirms the Resolution Plan under Section 31(1) and declares it to be binding on all stakeholders, who are not a part of the negotiation stage or parties to the Resolution Plan. In fact, a commentator has noted that the purpose of bankruptcy law is to actually solve a specific 'contracting failure' that accompanies financial distress. Such a contracting failure arises because "financial distress involves too many parties with strategic bargaining incentives and too many contingencies for the firm and its creditors to define a set of rules of every scenario." Thus, insolvency law recognizes that parties can take benefit of such 'incomplete contract' to hold each other up for their individual gain. In an attempt to solve the issue of incompleteness and the hold-up threat, the insolvency law provides procedural protections i.e., "the law puts in place guardrails

that give the parties room to bargain while keeping them from taking position that veer toward extreme hold up".

111 It may be useful to refer to how this Court has analyzed instruments that are analogous to a Resolution Plan. ***In SK Gupta*** *v.* ***KP Jain****, this Court while discussing the nature of compromise or arrangements entered between a company and its creditors or members observed that such a compromise or arrangement once sanctioned by the court is not merely an agreement between parties because it binds even dissenting creditors or members through statutory force. This Court made the following observations:*

> *"12…The scheme when sanctioned* ***does not merely operate as an agreement between the parties*** *but has statutory force and is binding not only on the company but even dissenting creditors or members, as the case may be. The effect of the sanctioned scheme is "to supply by recourse to the procedure thereby prescribed the absence of that individual agreement by every member of the class to be bound by the scheme which would otherwise be necessary to give it validity" [see J.K. (Bombay) Pvt. Ltd. v. New Kaiser-i-Hind Spg. & Wvg. Co. Ltd. [AIR 1970 SC 1041 : (1969) 2 SCR 866, 891 : (1970) 40 Com Cas 689]].."*
>
> ***(emphasis supplied)***

112 While the above observations were made in the context of a scheme that has been sanctioned by the Court, the Resolution Plan even prior to the approval of the Adjudicating Authority is binding inter se the CoC and the successful Resolution Applicant. The Resolution Plan cannot be construed purely as a 'contract' governed by the Contract Act, in the period intervening its acceptance by the CoC and the approval of the Adjudicating Authority. Even at that stage, its binding effects are produced by the IBC framework. The BLRC Report mentions that "[w]hen 75% of the creditors agree on a revival plan, this plan would be binding on all the remaining creditors". The BLRC Report also mentions that, "the RP submits a binding agreement to the Adjudicator before the default maximum date". We have further

discussed the statutory scheme of the IBC in Sections I and J of this judgement to establish that a Resolution Plan is binding inter se the CoC and the successful Resolution Applicant. Thus, the ability of the Resolution Plan to bind those who have not consented to it, by way a statutory procedure, indicates that it is not a typical contract.

113 The BLRC Report, which furnished the first draft of the IBC and elaborated on the aims behind the overhaul of the insolvency regime, refers to a CoC-approved Resolution Plan as a 'binding contract' in one instance and refers to it as a 'binding agreement' in other instances. The report also refers to a CoC-approved Resolution Plan as a 'financial arrangement', 'revival plan' or a 'solution'. The interchangeability of the terms – 'agreement', 'contract', 'financial arrangement', 'revival plan' and 'solution' indicates that there is no clear intention of the BLRC in characterizing the nature of the Resolution Plan as a contract. The binding effect of the Resolution Plan has the consequence of preventing the CoC or the Resolution Applicant to renege from its terms after the plan has been approved by the CoC through a voting mechanism. The fleeting mention of a 'binding contract' on one occasion in the BLRC Report (which was a pre-legislative text that underwent subsequent modifications by the Legislature) to indicate the binding nature of the Resolution Plan and the finality of negotiations once it is approved by the CoC, does not establish the legal nature of the document, especially when it is not complemented by the text and design of the IBC.

114 Certain stages of the CIRP resemble the stages involved in the formation of a contract. Echoes of the process involved in the formation of a contract resonate in the steps antecedent to the approval of a Resolution Plan such as: (i) the issuance of an RFRP may be equated to an invitation to offer; (ii) a Resolution Plan can be considered as a proposal or offer; and (iii) the approval by the CoC may be similar to an acceptance of offer. The terms of the Resolution Plan contain a commercial bargain between the CoC and Resolution Applicant. There

is also an intention to create legal relations with binding effect. However, it is the structure of the IBC which confers legal force on the CoC-approved Resolution Plan. The validity of the Resolution Plan is not premised upon the agreement or consent of those bound (although as a procedural step the IBC requires sixty-six percent votes of creditors), but upon its compliance with the procedure stipulated under the IBC.

115 It was argued for the E-RP that a Resolution Plan is a contract executed in furtherance of a statutory regime under the IBC. A question arises whether a Resolution Plan can be classified as a 'statutory contract'. This Court has defined a statutory contract in ***India Thermal Power Ltd.*** *v.* ***State of MP*** *in the following terms:*

> *"11. Section 43 empowers the Electricity Board to enter into an arrangement for purchase of electricity on such terms as may be agreed.* ***Section 43-A(1) provides that a generating company may enter into a contract for the sale of electricity generated by it with the Electricity Board.*** *As regards the determination of tariff for the sale of electricity by a generating company to the Board, Section 43(1)(2) provides that the tariff shall be determined in accordance with the norms regarding operation and plant-load factor as may be laid down by the authority and in accordance with the rates of depreciation and reasonable return and such other factors as may be determined from time to time by the Central Government by a notification in the Official Gazette. These provisions clearly indicate that the agreement can be on such terms as may be agreed by the parties except that the tariff is to be determined in accordance with the provision contained in Section 43-A(2) and notifications issued thereunder.* ***Merely because a contract is entered into in exercise of an enabling power conferred by a statute that by itself cannot render the contract a statutory contract. If entering into a contract containing the prescribed terms and conditions is a must under the statute then that contract becomes a statutory contract. If a contract incorporates certain terms and conditions in it which are statutory then the said contract to that extent is statutory. A contract may contain certain other terms***

and conditions which may not be of a statutory character and which have been incorporated therein as a result of mutual agreement between the parties. *Therefore, the PPAs can be regarded as statutory only to the extent that they contain provisions regarding determination of tariff and other statutory requirements of Section 43-A(2)…"*

(emphasis supplied)

116 The above observations were in the context of a PPA entered into under the provisions of Electricity Supply Act 1948. Section 43-A(1) of the Act stipulated that the generating company may enter into a contract with the Electricity Board. Thus, the judgement pre-supposes the existence of a subsisting contract. The controversy in the case was whether the PPA could be characterized as a statutory contract. To say that a Resolution Plan is a statutory contract, we must first consider whether the IBC envisages the CoC-approved Resolution Plan as a contract. There is no provision under the IBC referring to a Resolution Plan as a contract, unlike Section 43-A(1) of the Electricity Supply Act 1948 which mentions that a contract may be entered into between the concerned parties. The legal force of a Resolution Plan arises due to the framework provided under the IBC. The mechanisms of the IBC provide sufficient guidance on the conduct of all participants in the process and the binding effect of the CoC-approved Resolution Plan is evidenced by the execution of a PBG furnished by the successful Resolution Applicant, in compliance with the CIRP Regulations. This PBG is returnable once the Adjudicating Authority approves the Resolution Plan under Section 31 and makes it binding on all stakeholders. Therefore, the IBC and its regulations institute sufficient safeguards to ensure the binding effect of a CoC-approved Resolution Plan. In our discussion in Sections I and J below, we further elaborate on the nature of a CoC-approved Resolution Plan and the code of conduct that is permissible by the statutory framework.

117 While insolvency regimes are specific to each jurisdiction, it may be useful to analyze how Resolution Plans or similar instruments are characterized in foreign jurisdictions.

118 Certain precedents from other jurisdictions have been cited by Mr Nakul Devan for the E-RP, to argue that contracts entered into, in furtherance of a statutory regime have to be interpreted in accordance with the objective and intent of the concerned statute. It has been submitted that the Resolution Plan is one variety of such a statutory contract. However, since we have arrived at the decision that Resolution Plans are not statutory contracts, it is not required for us to analyze whether terms of the Resolution Plan can be given effect to, as terms of a contract, as long as they further the statutory objective. It is also important to note that India adopts a unique insolvency framework where third-parties have the right to participate in an insolvency regime and acquire the Corporate Debtor as a going concern. In several jurisdictions, the insolvency arrangements are between the debtor and the creditors, which has a closer resemblance to 'repayment plans' by corporate debtors, as envisaged by the IBC under Section 105 and broadly prescribed under Chapter III as opposed to 'resolution plans' that are not proposed by debtors. In any event, an analysis of such arrangements is detailed below.

119 In the United Kingdom, the UK Act allows the directors, administrator or liquidator of a company to propose a company voluntary arrangement or a 'CVA (similar to Section 10 of the IBC), which has to be approved by creditors having seventy-five per cent of the vote share. Section 5(2)(b) of the UK Act provides that once the CVA is approved, the company and the creditors are bound by it. Professor Roy Goode in his authoritative treatise Principles of Corporate Insolvency Law observes that, "[t]he wording of s.5(2)(b), discussed below, has led the courts to characterise the relationship between the parties to a CVA as essentially contractual in nature and its scope and effect are determined by its terms, which fall to be interpreted by

application of the ordinary principles of contractual interpretation." In some judgements of the Court of Appeal, English Courts have held that a CVA creates a contractual obligation, is a statutory contract, or has a contractual effect and is subject to ordinary principles of interpretation applying to contracts. However, the position on this issue is not completely settled. In a recent decision of the High Court of Justice, it was held that the CVA is not a contract. Crucially the court made the following observations:

> *"83. Further, and as noted by Mr Pymont QC in SHB Realisations Ltd, a voluntary arrangement is not formed or analysed as a contract.* ***Certain legal principles applicable to contracts, for example their interpretation, are applied to voluntary arrangements; that is no less true of other instruments which are not contracts. Other principles of contract law, for example those relating to penalties, are not applicable to voluntary arrangements.*** *Mr Pymont QC concluded that a voluntary arrangement is not a contract. Characterising a CVA as a hypothetical agreement or by reference to a statutory hypothesis neatly and accurately makes clear that a CVA is different from, and is not in fact, a contract."*

(emphasis supplied)

120 In Singapore, under Section 210 (3AA and 3AB) of the Singapore Act, a compromise or arrangement between the company and its creditors becomes binding when the requisite majority of creditors agree to it and it is approved by the court. The Singapore Court of Appeal has referred to such a scheme of arrangement as a 'contractual scheme'. Subsequently, a controversy arose before the Singapore Court of Appeal on whether a scheme can be substantially amended after it has been approved by the court. The court observed that the answer to this question depends upon the nature of schemes of arrangement; whether the schemes derived their efficacy from the order of the court or the statute. The court observed that under the English approach, a scheme approved by the majority of the creditors derives its efficacy from the statute and is a statutory contract. Thus,

the court has a limited jurisdiction and cannot make substantial alterations to such a scheme. However, the court noted that in Australia, the scheme operates as an order of the court. The court held that its previous decision which referred to a scheme of arrangement as a 'contractual scheme' does not mean that in Singapore such schemes are considered as statutory contracts. The court chose to follow the Australian approach holding that a scheme takes effect as an order of the court and like any other court order, it can be altered, in certain circumstances. The court observed:

> *"66. …. We would also add, in respect of the latter concern, that a court order is in no way less binding than a statutory contract on the parties to a scheme of arrangement, and it is trite law as well as common sense that a court order cannot be altered at will by the parties who are subject to the order…."*

121 In Australia, as noted above, the scheme of arrangement operates as a court order. The Supreme Court of New South Wales, rejecting the English approach of characterizing schemes (different from CVAs) as statutory contracts, observed:

> *"46 .....*
>
> *[….]*
>
> *(b) In Australia, [the] authorities [namely, Hill v Anderson Meat Industries Ltd [1971] 1 NSWLR 868, Caratti and Bond Corp Holdings Ltd v Western Australia (1992) 7 ACSR 472] establish that an approved scheme does indeed derive its force from the court order, [and] not from the antecedent resolutions of members and creditors."*

122 Under the United States Bankruptcy Code, a restructuring plan becomes binding once it is confirmed by the court in terms of Section 1141. There are decisions of the bankruptcy courts in the United States which indicate that such restructuring plans are characterized as contracts. It has been held that a confirmed plan is binding on the debtor and the plan proponent and has the same effect as contract.

However, commentators have noted that the United States Bankruptcy Code's, "embrace of a contractual paradigm is somewhat inconsistent…Both bankruptcy courts and the Code itself are far more sympathetic to ex post than to ex ante contracting". It has been further observed that, "there are a few provisions in the Bankruptcy Code inviting parties to "otherwise agree" by contract and in some contexts the Code explicitly overrides ex ante contracts", these include provisions of the Code overriding ipso facto clauses in pre-bankruptcy contracts which stipulate that a necessary condition of default is filing of an insolvency or bankruptcy petition.

123 The above discussion indicates the law in other jurisdictions, irrespective of differing frameworks, is not completely settled on whether instruments akin to Resolution Plans are pure contracts. To recapitulate, in the United Kingdom, while schemes of arrangement are characterized as statutory contracts, the law on CVAs, which are similar to the insolvency process initiated under Section 10 of the IBC, is not clear with the High Court of Justice noting that it is not a contract, even though principles of interpretation applicable to contracts may be used for constructing the language of such CVAs. In Singapore, the English approach of denoting schemes as statutory contracts was rejected and it was held that the schemes operate as orders of court. A similar position was taken under the Australian law. The Singapore and Australian courts specifically indicate that schemes are more than mere contracts with a "super-added imprimatur" by a court, rather they envisage an active role to be played by court in supervising the schemes to the extent of making substantial alterations to it, if required. In the United States, restructuring plans have been equated to contracts, but as noted above there has been some inconsistency in relation to upholding the contractual bargain.

124 The lack of an apparent international consensus on the issue of whether instruments like CoC-approved Resolution Plans are

contracts, prior to the Court's sanction, is also attributable to the peculiarity of the insolvency regime in each jurisdiction. This Court will have to be wary of transplanting international doctrines that are evolved as responses to the specific features of a jurisdiction's insolvency regime, without identifying an analogous framework in our insolvency regime.

125 The absence of any specific provision in the IBC or the regulations referring to a CoC-approved Resolution Plan as a contract and the lack of clarity in the BLRC report regarding the nature of such a Resolution Plan, constrains us from arriving at the conclusion that CoC-approved Resolution Plans will be governed by the Contract Act and common law principles governing contracts, save and except for the specific prohibitions and deeming fictions under the IBC. Regulation 39(3) of CIRP regulations, as it stood before the IBBI (CIRP) (Fourth Amendment) Regulations 2020 and applicable to the three appellants before us, enabled a framework where a draft Resolution Plan would involve several rounds of negotiations and revisions between the Resolution Applicant and the CoC, before it is approved by the latter and submitted to the Adjudicating Authority. However, this statutorily-enabled room for commercial negotiation is not enough to over-power the other elements of regulation that detract from the view that CoC-approved Resolution Plans are contracts. CoC-approved Resolution Plans, before the approval of the Adjudicating Authority under Section 31, are a function and product of the IBC's mechanisms. Their validity, nature, legal force and content is regulated by the procedure laid down under the IBC, and not the Contract Act. The voting by the CoC also occurs only after the RP has verified the contents of the Resolution Plan and confirmed that it meets the conditions of the IBC and the regulations therein. The amended Regulation 39(3) further regulates the conduct of the CoC on voting on Resolution Plans and has introduced the requirement of simultaneous voting. The IBBI's Discussion Paper issued on 27 August 2021 has

invited comments on regulating the process on revisions that can be made to resolution plans submitted to the CoC. These developments bolster the conclusion that the mechanism prior to submission of a CoC-approved resolution plan is subject to continuous procedural scrutiny by the IBC and cannot be considered as a simple contractual negotiation between two parties. Section J below details how a common law remedies of withdrawal or modification on account of frustration or force majeure are not applicable to CoC-approved Resolution Plans owing to the nature of the IBC. Similarly, the whole host of remedies such as liquidated and unliquidated damages, restitution, novation and frustration, unless specifically provided by the IBC, are not available to a successful Resolution Applicant whose Plan has been approved by the CoC and is awaiting the approval of the Adjudicating Authority. The Insolvency Law Committee Report of February 2020 has recommended the CIRP process to mandate Resolution Plans to provide for the apportionment of the profit or loss accrued by the Corporate Debtor during the CIRP. These reports are periodically commissioned by the parliament to review the functioning of the Code and suggest amendments. However, if the intention was to view a CoC-approved Resolution Plan as a contract, the principles of unjust enrichment would have been sufficient to address the issue and an amendment may not be considered necessary. A Resolution Applicant, as a third party partaking in the insolvency regime, seeks to acquire the business of the Corporate Debtor without the entirety of its debts, statutory liabilities and avoiding certain transactions with third parties. These benefits are a function of the coercive mechanisms of the IBC which enable a third party to acquire the assets of a Corporate Debtor without its liabilities, for a negotiated amount of the debt that is owed by the Corporate Debtor. Typically, resolution amounts envisage payment of a fraction of debt that is owed to the creditors and the business is acquired as a going concern with its employees. The Resolution Plan is drafted in a way that it is implementable in the future and brings about a quietus to the CIRP.

Enabling Resolution Applicants to seek remedies that are not specified by the IBC, by seeking recourse to the Contract Act would be antithetical to the IBC's insolvency regime. The elements of contractual interpretation can be relied upon to construe the language of the terms of the Resolution Plan, in the event of a dispute, but not to re-fashion and distort the mechanism of the IBC altogether. This Court in ***Laxmi Pat Surana*** *v.* ***Union Bank of India*** *has held that the IBC is a self-contained Code. Thus, importing principles of any other law or a statute like the Contract Act into the IBC regime would introduce unnecessary complexity into the working of the IBC and may lead to protracted litigation on considerations that are alien to the IBC. To give an example, the CoC can forfeit the PBG furnished by the successful Resolution Applicant under certain circumstances in terms of the RFRP and Resolution Plan including, inter alia, on the ground that the Resolution Applicant has failed to implement the resolution or has contributed to its failure. Regulation 36B (4A) of CIRP regulations provides for the furnishing of such performance security once the plan is approved by creditors. The Regulations do not provide that the performance security has to be a reasonable estimate of loss as is expected of penalty clauses under contract law, rather the explanation provides that the performance security should be of "such nature, value, duration and source, as may be specified in the request for resolution plans with the approval of the committee, having regard to the nature of resolution plan and business of the corporate debtor". Further, in the event that the CoC enters into a settlement with the Corporate Debtor and withdraws from the CIRP under Section 12A, Regulation 30A provides for only payment of insolvency costs and not compensation or damages to Resolution Applicant for investing time and money in the process. The parties may resort to invoking principles of frustration or force majeure to evade implementation of the Resolution Plan leading to unnecessary litigation. This Court in* ***Amtek Auto*** *(supra), had curbed a similar attempt by a successful Resolution Applicant who had relied on a force majeure clause in its*

Resolution Plan to seek a direction compelling the CoC to negotiate a modification to its Resolution Plan. The Court held that there was no scope for negotiations between the parties once the Resolution Plan has been approved by the CoC. Thus, contractual principles and common law remedies, which do not find a tether in the wording or the intent of the IBC, cannot be imported in the intervening period between the acceptance of the CoC and the approval by the Adjudicating Authority. Principles of contractual construction and interpretation may serve as interpretive aids, in the event of ambiguity over the terms of a Resolution Plan. However, remedies that are specific to the Contract Act cannot be applied, de hors the over-riding principles of the IBC."

12. While commenting upon the statutory framework, governing the CIRP, the Hon'ble Supreme Court noted Section 23(1) of IBC, which provides that the RP is responsible for conducting the entire CIRP and managing the operation of the Corporate Debtor during the CIRP period. In para 132 of the judgment of Hon'ble Supreme Court observed that the intent of Section 23(1) is to ensure that the Corporate Debtor remains a going concern until the Resolution Plan is approved by the Adjudicating Authority. In para 139 of the judgment of Hon'ble Supreme Court takes note of the consequences of contravention of a Resolution Plan. Having analysed the statutory framework governing the CIRP, in para 141 of the judgment, Hon'ble Supreme Court viewed that the process is the one driven by the Creditors. Hon'ble Supreme Court also noted that the aim of the process in preferential order is to first, to enable resolution of the debt by maintaining the Corporate Debtor as a going concern, in order to preserve the business and the employment of the personnel; second, maximise the value of the assets of the Corporate Debtor and enable a higher pay back to its Creditors

than under liquidation; third, enable smoother and faster transition to liquidation in the event that a time bound CIRP fails in a bid to avert further. Hon'ble Supreme Court also analysed the procedure regarding the withdrawal of CIRP and analysed the scope of Section 12A of IBC, 2016 as also that of Regulation 13A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 inserted by way of second amendment w.e.f. 25.07.2019. Nevertheless, as it may, there is distinction between withdrawal of CIRP and the withdrawal of Resolution Plan. In para 144 of the judgment, Hon'ble Supreme Court ruled that the Adjudicating Authority can only direct the CoC to reconsider the Resolution Plan to ensure compliance under Section 30(2) of IBC before exercising its powers of approval or rejection, as the case may be, under Section 31 of IBC, 2016.

13. While commenting upon the judicial intervention or exercise of its power and function by the Court, Hon'ble Supreme Court ruled that it should be wary of transgressing into the domain of the legislature especially in matters relating to economic and regulatory legislation. Hon'ble Supreme Court ruled that the judicial restraint must not only be exercised while adjudicating upon the constitutionality of the statute relating to the economic policy but also in matters of interpretation of the economic statute, where the interpretive manoeuvres of the court have an effect of transgressing into the law-making power of the legislature and disturbing the delicate balance of separation of powers between the legislature and judiciary. In para 146 of the judgment, the Hon'ble Supreme Court specifically ruled that a court may be inept in laying down a detailed procedure for exercise of power of withdrawal of modification

by a Successful Resolution Applicant without impacting the other procedural steps and the timelines under the IBC which are sacrosanct. If the Resolution Applicants are permitted to seek modification after subsequent negotiation or a withdrawal after submission of a Resolution Plan as a matter of law it would dictate the commercial wisdom and bargaining strategy of all Prospective Resolution Applicants who sought to participate in the process and the Successful Resolution Applicant who may wish to negotiate a better deal owing to myriad factors that are peculiar to their own case. The IBC is silent on whether a successful Resolution Applicant can withdraw its Resolution Plan. However, the statutory framework laid down under the IBC and CIRP Regulations provide a step-by-step procedure which is to be followed from the initiation of CIRP till the approval of the Resolution Plan by the Adjudicating Authority. Regulation 40A describes a model-timeline for the CIRP that accounts for every eventuality that may arise between the commencement of CIRP and approval of the Resolution Plan by the Adjudicating Authority, including the different stages for pressing a withdrawal of the CIRP under Section 12A. Even a modification to the RFRP is envisaged by the CIRP Rules and is subject to a timeline. As has been provided in Regulation 36B(5) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, any modification in RFRP or the evaluation matrix issued under sub-regulation 1 of Regulation 36B shall be deemed to be fresh issue and shall be subject to timeline under sub-regulation 3. The modification in RFRP cannot be made more than once. The absence of any exit routes being stipulated under the statute for a successful Resolution Applicant is indicative of proscription of any withdrawal at its behest. The rule of casus omissus is an established rule of

interpretation which provides that an omission in a statute cannot be supplied by judicial construction. In Para 147 of the judgment, Hon'ble Supreme Court could notice the situation arising out of economic slowdown that impacted every business of the country and viewed that no legislative relief for enabling withdrawals or re-negotiations have been provided qua the Resolution Plan, while certain other amendments in the wake of covid were carried in the Code. With reference to the UNCITRAL guidelines, their Lordships could express that even the guidelines do not contain any provisions for withdrawal of a submitted plan. Presently, we need to examine as to, "whether the Resolution Applicant can oppose its own Resolution Plan". While dealing with the application for approval of the Resolution Plan and dealing with the contentions put forth by counsels for the parties, we may not avoid the reproduction of Paras 126 to 148 of the judgment passed by Hon'ble Supreme Court, which reads thus: -

> ***"I Statutory framework governing the CIRP***
>
> *126 The CIRP is a time bound process with a specific aim of maximizing the value of assets. IBC and the regulations made under it lay down strict timelines which need to be adhered to by all the parties, at all stages of the CIRP. The CIRP is expected to be completed within 180 days under Section 12(1) of the IBC. In terms of sub-Section (2) and (3) of Section 12, an extension can be sought from the Adjudicating Authority for extending this period up to 90 days. The first proviso to Section 12(3) clarifies that such an extension can only be granted once. In* ***Arcelor Mittal (India) (P) Ltd.*** *v.* ***Satish Kumar Gupta****, this Court had held that the time taken in legal proceedings in relation to the CIRP must be excluded from the timeline mentioned in Section 12. Since this could extend the CIRP indefinitely, the Insolvency and Bankruptcy Code (Amendment) Act 2019, inserted a second proviso to Section 12(3) with effect from 16 August 2019 to*

state that the CIRP in its entirety must be mandatorily completed within 330 days from the insolvency commencement date, including the time taken in legal proceedings. A legislative amendment that takes away the basis of a judicial finding is indicative of the strong emphasis of the IBC on its timelines and its attempt to thwart the prospect of stakeholders engaging in multiple litigations, solely with the intent of causing undue delay. Delays are also a cause of concern because the liquidation value depletes rapidly, irrespective of the imposition of a moratorium, and a delayed liquidation is harmful to the value of the Corporate Debtor, the recovery rate of the CoC and consequentially, the economy at large. In ***Essar Steel*** *(supra) a three judge Bench of this Court, emphasized the rationale of the Insolvency and Bankruptcy Code (Amendment) Act 2019, which introduced the second proviso to Section 12(3). The court adverted to the BLRC report which underscored delays in legal proceedings as the cause of the failure of the previous insolvency regime under the SICA and the recovery mechanism in SARFAESI. It also extracted a Speech of the Union Minister in the Rajya Sabha to explain the proposal for the amendment in 2019, which was to avoid the same pitfalls in the IBC. The Court, speaking through Justice R F Nariman, noted:*

> *"119. 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 30-6-2019. 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 12-A, 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 1292, 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."

[…]

123. 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."

127 The decision in ***Essar Steel*** *(supra) while reiterating the rationale of the IBC for ensuring timely resolution of stressed assets as a key factor, had to defer to the principles of actus curiae neminem gravabit, i.e., no person should suffer because of the fault of the court or the delay in the procedure. In spite of this Court's precedents which otherwise strike down provisions which interfere with a litigant's fundamental right to non-arbitrary treatment under Article 14 by mandatory conclusion of proceedings without providing for any exceptions, this Court refused to strike down the second proviso to Section 12(3) in its entirety. It noted that the previous statutory experiments for insolvency had failed because of delay as a result of extended legal proceedings and chose to only strike down the word 'mandatorily', keeping the rest of the provision intact. Therefore, the law as it stands, mandates the conclusion of the CIRP – including time taken in legal proceedings, within 330 days with a short extension to be granted only in exceptional cases. However, the Court has warned that this discretion must be exercised sparingly and only in the following situations:*

"127…Thus, while leaving the provision otherwise intact, we strike down the word "mandatorily" as being manifestly

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

128 The evolution of the IBC framework, through an interplay of legislative amendments, regulations and judicial interpretation, consistently emphasizes the predictability and timeliness of the IBC. The legislature and the IBBI have been proactive to introduce amendments to the procedural framework, that respond to changes in the economy. For instance, Regulation 40(c), which came into effect on 20 April 2020, was inserted in the CIRP Regulations to take into

account the delay that may be caused to the CIRP on account of the lockdown being imposed by the Central Government due to the COVID-19 pandemic. Regulation 40(c) provides that the delay in completing any activity related to the CIRP because of imposition of lockdown will not be counted for the purposes of the timeline that has been stipulated under the statutory framework. If the CIRP is not completed within the prescribed timeline, the Corporator Debtor is sent into liquidation. This understanding of the evolution of the law is critical to our task of judicial interpretation. We cannot afford to be swayed by abstract conceptions of equity and 'contractual freedom' of the parties to freely negotiate terms of the Resolution Plan with unfettered discretion, that are not grounded in the intent of the IBC.

129 The IBC and the regulations provide a detailed procedure for the completion of CIRP. An application for initiation of CIRP is filed either by the financial creditor, operational creditor or the Corporate Debtor itself under Sections 7, 9 and 10 of the IBC, respectively. Once the application is admitted by the Adjudicating Authority, it passes the following orders under Section 13(1) of the IBC: (i) declaration of a moratorium for the purposes referred to in Section 14 of the IBC; (ii) causing a public announcement to be made for the initiation of CIRP and issuing a call for submissions of claims as may be specified under Section 15 of the IBC; and (iii) appointing an IRP in accordance with Section 16 of the IBC.

130 Section 13(2) provides that the public announcement is to be made immediately after the appointment of an IRP. The word 'immediately' here means not later than three days from the date of appointment as provided in the explanation to Regulation 6(1) of the CIRP Regulations. Section 15 of the IBC lists down the information that should be included in the public announcement of CIRP. It should specify the last date up to which the claims, i.e., a right of payment or right to remedy as defined under Section 3(6) of the IBC, can be made by creditors, workmen and employees. Regulation 6(2)(c) provides

that the last date of submission of claims shall be fourteen days from the date of appointment of the IRP. The public announcement also specifies the date on which the CIRP shall close, which is the one hundred and eightieth day from the date of the admission of the application under Sections 7, 9 or 10, as may be applicable. Regulation 6 of the CIRP Regulations stipulates additional requirements relating to how the public announcement is to made.

131 On receipt of claims from the operational creditors, financial creditors, workmen and employees, the IRP prepares a list of creditors after verifying the claims. Regulation 13(1) provides that the verification of all the claims is to be done within seven days from the last date of receipt of the claims. Thereafter, the IRP constitutes a CoC in accordance with Section 21(1) of the IBC. Regulation 17 of the CIRP Regulations stipulates that the IRP must submit a report certifying the constitution of the CoC within two days of the claims being verified. The IRP is required to hold the first meeting of the CoC within seven days of filing of the report under the said regulation. If the appointment of the RP by the CoC is delayed, the IRP is to perform the functions of the RP from the fortieth day of the insolvency commencement date till the RP is appointed under Section 22 of the IBC.

132 The CoC, in its first meeting, appoints the RP in terms of Section 22(2) of the IBC. Section 23(1) provides that the RP is responsible for conducting the entire CIRP and managing the operations of the Corporate Debtor during the CIRP period. The RP continues to manage the operations of the Corporate Debtor after the expiry of CIRP period until an order approving the resolution is passed by the Adjudicating Authority under Section 31(1) of the IBC or a liquidator is appointed under Section 34 of the IBC. The intent of this Section is to ensure that the Corporate Debtor remains a going concern until the Resolution Plan is approved by the Adjudicating Authority. The powers and duties of the RP are listed under Section 23(2) of the IBC.

133 The significant, if not the most important, duty of the RP is to solicit Resolution Plans. The RP is empowered to invite prospective Resolution Applicants who fulfil the criteria as laid down by the RP and approved by the CoC, considering the complexity and the scale of the business operations of the Corporate Debtor and other such conditions specified by the IBBI, to submit a Resolution Plan or Plans under Section 25(2)(h) of the IBC. Further, a person should not be ineligible to be a Resolution Applicant under Section 29A of the IBC. Section 5(25) defines a Resolution Applicant in the following terms:

> *"resolution applicant" means a person, who individually or jointly with any other person, submits a resolution plan to the resolution professional pursuant to the invitation made under clause (h) of sub-section (2) of section 25; or pursuant to section 54K, as the case may be."*

134 The first step in the process of soliciting a Resolution Plan is the preparation of an IM containing relevant information as specified by the IBBI for formulating a Resolution Plan in accordance with Section 29(1) of the IBC. The contents of the IM are specified under Regulation 36(2) of the CIRP Regulations. Regulation 36(1) of the CIRP Regulations specifies the timelines within which the RP must submit the IM to members of the CoC, which is within two weeks of his appointment but not later than the fifty-fourth day from the insolvency commencement date, whichever is earlier. Thereafter, the RP issues an invitation of EOI not later than the seventy-fifth day from the insolvency commencement date to seek expressions of interest from eligible prospective Resolution Applicants in terms of Regulation 36A of the CIRP Regulations. A prospective Resolution Applicant is required to submit an unconditional EOI within the time stipulated under the invitation, which shall not be less than fifteen days from the date of the issue of invitation. The RP conducts a due diligence of the Resolution Applicant based on material available on record in terms of Regulation 36A(8) of the CIRP Regulations. Thereafter, the RP issues a provisional list of eligible prospective Resolution Applicants

within ten days of the last date for submission of EOIs to the CoC and to all the prospective Resolution Applicants who had submitted the EOI. Regulation 36A also specifies the timeline within which any objection can be made against the inclusion or exclusion of a prospective Resolution Applicant on the list, which is five days from the issue of the list. The RP is required to publish a final list of prospective Resolution Applicants within ten days of the last date for the receipt of objections by the CoC.

135 Under Regulation 36B of the CIRP Regulations, the RP has to issue the IM, evaluation matrix for consideration of the Resolution Plan and an RFRP within five days of the date of issue of the provisional list of Resolution Applicants to every prospective Resolution Applicant on the list and any other prospective Resolution Applicants who have contested their non-inclusion in the list. Regulation 36B stipulates that the RFRP shall contain detailed steps of each process and the manner and purposes of interaction between the RP and the prospective resolution applicant along with the corresponding timelines. A minimum of thirty days is given to the prospective Resolution Applicant to submit a Resolution Plan. A Resolution Plan is defined under Section 5(26) of the IBC:

> *"resolution plan" means a plan proposed by resolution applicant for insolvency resolution of the corporate debtor as a going concern in accordance with Part II;*
> *Explanation.--For the removal of doubts, it is hereby clarified that a resolution plan may include provisions for the restructuring of the corporate debtor, including by way of merger, amalgamation and demerger;"*

136 The timeline for the submission of Resolution Plans can be extended by an RP with the approval of the CoC. The RFRP must require the resolution applicant to furnish a performance security in case their Resolution Plan is approved by the CoC under Regulation 36B(4A). The performance security shall stand forfeited if, after the approval of the Resolution Plan by the Adjudicating Authority, the

Resolution Applicant fails to implement or contributes to the failure of implementation of the plan. Under the regulation, a performance security is defined as "security of such nature, value, duration and source, as may be specified in the request for resolution plans with the approval of the committee, having regard to the nature of resolution plan and business of the corporate debtor". Regulations 37 and 38 list down the mandatory contents of the Resolution Plan.

137 The RP is required to review the Resolution Plan submitted in terms of Section 30(2) of the IBC, which provides that:

> *"Section 30 - Submission of resolution plan*
> *[…]*
> *(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan—*
>
> *(a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor;*
>
> *(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;

(c) provides for the management of the affairs of the Corporate debtor after approval of the resolution plan;

(d) the implementation and supervision of the resolution plan;

(e) does not contravene any of the provisions of the law for the time being in force;

(f) conforms to such other requirements as may be specified by the Board.

Explanation.-- For the purposes of clause (e), if any approval of shareholders is required under the Companies Act, 2013 (18 of 2013) or any other law for the time being in force for the implementation of actions under the resolution plan, such approval shall be deemed to have been given and it shall not be a contravention of that Act or law."

(emphasis supplied)

Sub-Section (3) of Section 30 of the IBC provides that the RP shall present Resolution Plans which conform to the above requirements before the CoC for approval. Sub-Section (4) of Section 30 stipulates that the CoC may approve a Resolution Plan by a vote of not less than sixty-six per cent after considering the feasibility and viability of the plan and any such requirements specified by the IBBI.

138 The CoC has been given wide powers under the IBC. It can direct the Corporate Debtor into liquidation any time before the approval by the Adjudicating Authority, under Section 33(2) of the IBC.

Further, under Section 12A of the IBC the Adjudicating Authority may allow withdrawal of the application submitted under Sections 7, 9 or 10 of the IBC for initiation of the CIRP (i.e., initiation of the CIRP by the financial creditor, operational creditor and the corporate applicant, respectively) if the withdrawal is approved by ninety per cent of the voting share of the CoC. Dealing with the question whether a successful Resolution Applicant can retreat through the route provided under Section 12A of the IBC, a three-judge Bench of this Court in ***Maharashtra Seamless*** *v.* ***Padmanabhan Venkatesh*** *observed that, "[t]he exit route prescribed in Section 12A is not applicable to a Resolution Applicant. The procedure envisaged in the said provision only applies to applicants invoking Sections 7, 9 and 10 of the code". However, this Court left the question whether a successful Resolution Applicant "altogether forfeits their right to withdraw from such process [CIRP] or not", open for subsequent judicial determination.*

139 In terms of Regulation 39(4), the RP shall endeavour to submit the Resolution Plan approved by the CoC before the Adjudicating Authority for its approval under Section 31 of the IBC, at least fifteen days before the maximum period for completion of CIRP. Section 31(1) provides that the Adjudicating Authority shall approve the Resolution Plan if it is satisfied that it complies with the requirements set out under Section 30(2) of the IBC. Essentially, the Adjudicating Authority functions as a check on the role of the RP to ensure compliance with Section 30(2) of the IBC and satisfies itself that the plan approved by the CoC can be effectively implemented as provided under the proviso to Section 31(1) of the IBC. Once the Resolution Plan is approved by the Adjudicating Authority, it becomes binding on the Corporate Debtor and its employees, members, creditors, guarantors and other stakeholders involved in the Resolution Plan. Section 31(1) of the IBC is extracted below:

"Section 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, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan.

Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this subsection, ***satisfy that the resolution plan has provisions for its effective implementation****."*

(emphasis supplied)

A contravention of a Resolution Plan binding under Section 31 is punishable under Section 74 (3) of the IBC. Section 74 (3) of the IBC provides thus:

"Section 74 - Punishment for contravention of moratorium or the resolution plan
[….]
(3) Where the corporate debtor, any of its officers or creditors or any person on whom the approved resolution plan is binding under section 31, knowingly and wilfully contravenes any of the terms of such resolution plan or abets such contravention, such corporate debtor, officer, creditor or person shall be punishable with imprisonment of not less than one year, but may extend to five years, or with fine which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both."

140 If the Resolution Plan is rejected by the Adjudicating Authority, the Corporate Debtor goes into liquidation in accordance with Section 33(1) of the IBC. The order of the Adjudicating Authority rejecting a Resolution Plan and directing liquidation under Section 33 of the IBC can be appealed only on the grounds of material irregularity or fraud, as stipulated under Section 61(4) of the IBC. The order of the Adjudicating Authority approving a Resolution Plan can be appealed

before the NCLAT under Section 61(3) of the IBC only on the grounds specified in that section. The grounds of appeal are as follows:

> *"Section 61 - Appeals and Appellate Authority*
> *[….]*
> *(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.*
>
> *(4) An appeal against a liquidation order passed under section 33, or sub-section (4) of section 54L, or sub-section (4) of section 54N, may be filed on grounds of material irregularity or fraud committed in relation to such a liquidation order."*

141 Under Regulation 39(5) of the CIRP Regulations, the RP is required to send a copy of the order of the Adjudicating Authority accepting or rejecting the Resolution Plan on a 'forthwith basis'. Regulation 39(5A) specifies that within fifteen days of the date of the order of Adjudicating Authority approving the Resolution Plan, the RP must inform each claimant about the principle or formulae for the payment of debts under the Resolution Plan.

142 As noted above, Section 12 of the IBC stipulates the timeline within which the CIRP is to be completed. The RP on the instructions of the CoC may make an application for extension of the CIRP. Regulation 40A of the CIRP Regulations provides a detailed model

timeline for CIRP which accounts for all the procedural eventualities that are permitted by the statute and the regulations. Regulation 40A is extracted below:

> *"40-A. Model time-line for corporate insolvency resolution process.—The following Table presents a model timeline of corporate insolvency resolution process on the assumption that the interim resolution professional is appointed on the date of commencement of the process and the time available is hundred and eighty days:*

Section/Regulation	Description of Activity	Norm	Latest Timeline
Section 16(1)	Commencement of CIRP and appointment of IRP	....	T
Regulation 6(1)	Public announcement inviting claims	Within 3 Days of Appointment of IRP	T+3
Section 15(1)(*c*)/Regulations 6(2)(*c*) and 12 (1)	Submission of claims	For 14 Days from Appointment of IRP	T+14
Regulation 12(2)	Submission of claims	Up to 90th day of commencement	T+90
Regulation 13(1)	Verification of claims received under Regulation 12(1)	Within 7 days from the receipt of the claim	T+21
	Verification of claims received under Regulation 12(2)		T+97
Section 21(6A)(*b*)/Regulation 16-A	Application for appointment of AR	Within 2 days from verification of claims received under Regulation 12(1)	T+23
Regulation 17(1)	Report certifying constitution of CoC		T+23
Section 22/Regulation 19(2)	1st meeting of the CoC	Within 7 days of filing of the report certifying constitution of the CoC, but with five days' notice.	T+30]

Section 22(2)	Resolution to appoint RP by the CoC	In the first meeting of the CoC	T+30
Section 16(5)	Appointment of RP	On approval by the AA	.....
Regulation 17(3)	IRP performs the functions of RP till the RP is appointed.	If RP is not appointed by 40th day of commencement	T+40
Regulation 27	Appointment of valuer	Within 7 days of appointment of RP, but not later than 47th day of commencement	T+47]
Section 12(A)/Regulation 30-A	Submission of application for withdrawal of application admitted	Before issue of EoI	W
	CoC to dispose of the application	Within 7 days of its receipt or 7 days of constitution of CoC, whichever is later.	W+7
	Filing application of withdrawal, if approved by CoC with 90% majority voting, by RP to AA	Within 3 days of approval by CoC	W+10
Regulation 35-A	RP to form an opinion on preferential and other transactions	Within 75 days of the commencement	T+75
	RP to make a determination on preferential and other transactions	Within 115 days of commencement	T+115
Regulation 36-A	Publish Form G	Within 75 days of commencement	T+75
	Invitation of EoI		
	Submission of EoI	At least 15 days from issue of EoI (Assume 15 days)	T+90
	Provisional List of RAs by RP	Within 10 days from the last	T+100

		day of receipt of EoI	
	Submission of objections to provisional list	For 5 days from the date of provisional list	T+105
	Final List of RAs by RP	Within 10 days of the receipt of objections	T+115
Regulation 36-B	Issue of RFRP, including Evaluation Matrix and IM	Within 5 days of the issue of the provisional list	T+105
	Receipt of Resolution Plans	At least 30 days from issue of RFRP (Assume 30 days)	T+135
Regulation 39(4)	Submission of CoC approved Resolution Plan to AA	As soon as approved by the CoC	T+165
Section 31(1)	Approval of resolution plan by AA		T=180

AA: Adjudicating Authority; AR: Authorised Representative; CIRP: Corporate Insolvency Resolution Process; CoC: Committee of Creditors; EoI: Expression of Interest; IM: Information Memorandum; IRP: Interim Resolution Professional; RA: Resolution Applicant; RP: Resolution Professional; RFRP: Request for Resolution Plan."

143 The statutory framework governing the CIRP seeks to create a mechanism for resolving insolvency in an efficient, comprehensive and timely manner. The IBC provides a detailed linear process for undertaking CIRP of the Corporate Debtor to minimize any delays, uncertainty in procedure and disputes. The roles and responsibilities of the important actors in the CIRP are clearly defined under the IBC and its regulations. In ***Innoventive Industries Ltd*** *v.* ***ICICI Bank*** *a three judge Bench of this Court observed that "one of the important*

objectives of the Code is to bring the insolvency law in India under a single unified umbrella with the object of speeding up of the insolvency process". Recently, in ***Gujarat Urja*** *(supra) a three judge Bench of this Court observed that a "delay in completion of the insolvency proceedings would diminish the value of the debtor's assets and hamper the prospects of a successful reorganization or liquidation. For the success of an insolvency regime, it is necessary that insolvency proceedings are dealt with in a timely, effective and efficient manner". The stipulation of timelines and a detailed procedure under the IBC ensures a timely completion of CIRP and introduces transparency, certainty and predictability in the insolvency resolution process. The UNCITRAL Guide also states that the insolvency law of a jurisdiction should be transparent and predictable. It notes the value of such predictability in the following terms:*

> *"11. An insolvency law should be transparent and predictable. This will enable potential lenders and creditors to understand how insolvency proceedings operate and to assess the risk associated with their position as a creditor in the event of insolvency. This will promote stability in commercial relations and foster lending and investment at lower risk premiums. Transparency and predictability will also enable creditors to clarify priorities, prevent disputes by providing a backdrop against which relative rights and risks can be assessed and help define the limits of any discretion. Unpredictable application of the insolvency law has the potential to undermine not only the confidence of all participants in insolvency proceedings, but also their willingness to make credit and other investment decisions prior to insolvency. As far as possible, an insolvency law should clearly indicate all provisions of other laws that may affect the conduct of the insolvency proceedings (e.g. labour law; commercial and contract law; tax law; laws affecting foreign exchange, netting and set-off and debt for equity swaps; and even family and matrimonial law)."*

This Court should proceed with caution in introducing any element in the insolvency process that may lead to unpredictability, delay and complexity not contemplated by the legislature. With this birds'-eye

view of the framework of insolvency through the CIRP, we proceed to answer the question of law raised in this judgement - whether a Resolution Applicant is entitled to withdraw or modify its Resolution Plan, once it has been submitted by the Resolution Professional to the Adjudicating Authority and before it is approved by the latter under Section 31(1) of the IBC.

J Withdrawal of the Resolution Plan by a successful Resolution Applicant under the IBC

J.1 The absence of a legislative hook or a regulatory tether to enable a withdrawal

144 The analysis of the statutory framework governing the CIRP and periodic reports of the Insolvency Law Committee indicates that it is a creditor-driven process. The aim of the process, in preferential order, is to: first, enable resolution of the debt by maintaining the corporate debtor as a going concern, in order to preserve the business and employment of the personnel; second, maximize the value of the assets of the corporate debtor and enable a higher pay-back to its creditors than under liquidation; and third, enable a smoother and faster transition to liquidation in the event that a time bound CIRP fails, in a bid to avert further deterioration of value.

145 Since the aim of the statute is to preserve the interests of the corporate debtor and the CoC, it was recognized that settlements between the corporate debtor and the CoC may be in the best interests of all stakeholders since insolvency is averted. Two decisions of two judge Benches of this Court, in ***Lokhandwala Kataria Construction (P) Ltd*** *v.* ***Nisus Finance and Investment Managers LLP*** *and* ***Uttara Foods and Feeds (P) Ltd*** *v.* ***Mona Pharmachem****, (prior to the insertion of Section 12A which enabled withdrawal of the CIRP on account of settlement between the parties), had refused to effectuate this remedy by exercising inherent powers of the*

Adjudicating Authority under Rule 11 of the NCLT Rules 2016 or the power of parties to make applications to the Adjudicating Authority under Rule 8 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016. In ***Uttara Foods*** *(supra) this Court had granted a one-time relief under Article 142 of the Constitution since all the parties were present before it and had presented it with signed consent terms. This course of action, in refraining from the exercise of inherent powers to effect procedures and remedies that were not specifically envisaged by the statute, was explicitly affirmed by the Insolvency Law Committee Report dated March 2018 which proceeded to suggest amendments to the IBC and recommended a ninety per cent voting threshold by the CoC for withdrawals of a CIRP and a specific amendment to Rule 8 of the then existing CIRP Rules to enable parties to file such applications. This report led to the insertion of Section 12A which vested the CoC with the power to withdraw the CIRP or vote on such withdrawal, if sought by the Corporate Debtor. This provision was introduced with retrospective effect on 6 June 2018. Significantly, no such exit routes have been contemplated for the Resolution Applicant. It is relevant to note that the newly inserted and then unamended Regulation 30A (w.e.f. 4 July 2018) of the CIRP Regulations stipulated that withdrawal under Section 12A can be allowed through submitting an application to the IRP or RP (as the case maybe) before the invitation for EOI is issued to the public. The CoC was to consider the application within seven days of its constitution and an approval for such application required approval of the ninety per cent of the voting share of the CoC. However, on 14 December 2018, a two judge Bench of this Court, held in* ***Brilliant Alloys (P) Ltd*** *v.* ***S Rajagopal*** *that Regulation 30A is directory, and not mandatory in nature since Section 12A of the IBC does not stipulate a deadline by which a withdrawal from the CIRP can be made. Thus, in exceptional cases withdrawals from the CIRP under Section 12A of IBC could be permitted even after the invitation of EOI has been issued. Regulation*

30A of the CIRP Regulations was then amended by the IBBI (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations 2019, w.e.f. 25 July 2019 to reiterate the decision of this Court. The newly amended provision allows for withdrawals even after the invitation for expression of interest has been issued, provided that the applicant states the reasons justifying such withdrawal. Similarly, on 25 January 2019, a two judge Bench of this Court in ***Swiss Ribbons*** *(supra) interpreted the true import of Section 12A and clarified that if the CoC is not yet constituted, a party can approach the Adjudicating Authority, which may in exercise of its inherent powers under Rule 11 of the NCLT Rules 2016, allow or reject an application for withdrawal or settlement. On 25 July 2019, the IBBI (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2019 amended Regulation 30A in terms of this decision in interpreting Section 12A and now specifically provides the procedure under the IBC that relates to affecting a withdrawal under Section 12A before the constitution of the CoC. The applicant submits an application for withdrawal through the IRP, directly before the Adjudicating Authority, since the CoC is not yet constituted to consider such an application. To ensure that the process for withdrawal is timely and efficient, the present Regulation 30A provides that the IRP shall submit an application for withdrawal of the CIRP prior to the constitution of the CoC to the Adjudicating Authority on behalf of the applicant within three days of the receipt. Alternatively, if the application for withdrawal is made after the constitution of the CoC, such application will be considered by the CoC within seven days of its receipt. If the CoC approves such an application with ninety per cent voting share, it is to be submitted to the Adjudicating Authority within three days of approval. Further, the application for withdrawal has to be accompanied by a bank guarantee towards estimated expenses relating to costs of the IRP (in case of a withdrawal prior to constitution of the CoC) or insolvency resolution process costs (where withdrawal is after constitution of the*

CoC). It is clear that withdrawal of the CIRP is allowed only if it upholds the interests of the CoC, is time-bound, and takes into consideration how the expenses relating to the insolvency process up to withdrawal shall be borne. Thus, even the exit under Section 12A of the CoC, which is not available to the Resolution Applicant, is regulated by procedural provisions indicating that the legislature has applied its mind to the timelines and costs involved in the CIRP. Pertinently, the regulations do not provide for any costs that are payable to the prospective Resolution Applicants or a successful Resolution Applicant, who must have incurred a significant expense in participating in the process. This Court, in ***Maharashtra Seamless*** *(supra) had denied relief to a Resolution Applicant who had sought to invoke Section 12A to resile from its Resolution Plan. The nature of the statute indicates the clarity of its purpose – primacy of the interests of the creditors who are seeking to cut their losses through a CIRP. Traditional models and understandings of equity or fairness that seek reliefs which are misaligned with the goals of the statute and upset the economic coordination envisaged between the parties, cannot be read into the statute through judicial interpretation. While parties have the freedom to negotiate certain commercial terms of the Resolution Plan to gain wide support, their ability to negotiate is circumscribed by the governing statute. A court cannot interpret the negotiated arrangements that are represented in the Resolution Plan in a manner that hampers the objectives of the IBC which is a speedy, predictable and timely resolution. The Resolution Applicant is deemed to be aware of the IBC and its mechanisms before it steps into the fray and consents to be bound by its underlying objectives. A Resolution Applicant, after obtaining the financial information of the Corporate Debtor through the informational utilities and perusing the IM, is assumed to have analyzed the risks in the business of the Corporate Debtor and submitted a considered proposal. It cannot demand vesting of certain powers and rights which have been conspicuously omitted by the legislature under the statute, in furtherance of the*

policy objectives of the IBC. A court may not be able to lay down such detailed guidance on how a mechanism for withdrawal, if any, may be provided to a successful Resolution Applicant without disturbing the statutory timelines and adequately evaluating the interests of creditors and other stakeholders, which is ultimately a matter of legislative policy. In ***Essar Steel*** *(supra), a three judge Bench of this Court, affirmed a two judge Bench decision in* ***K Sashidhar*** *(supra), prohibiting the Adjudicating Authority from second-guessing the commercial wisdom of the parties or directing unilateral modification to the Resolution Plans. These are binding precedents. Absent a clear legislative provision, this court will not, by a process of interpretation, confer on the Adjudicating Authority a power to direct an unwilling CoC to re-negotiate a submitted Resolution Plan or agree to its withdrawal, at the behest of the Resolution Applicant. The Adjudicating Authority can only direct the CoC to re-consider certain elements of the Resolution Plan to ensure compliance under Section 30(2) of the IBC, before exercising its powers of approval or rejection, as the case may be, under Section 31. In* ***Government of Andhra Pradesh*** *v.* ***P Laxmi Devi****, while determining the constitutionality of a statute, this Court observed that it should be wary of transgressing into the domain of the legislature, especially in matters relating to economic and regulatory legislation. This Court observed:*

> *"80. As regards economic and other regulatory legislation judicial restraint must be observed by the court and greater latitude must be given to the legislature while adjudging the constitutionality of the statute because the court does not consist of economic or administrative experts.* ***It has no expertise in these matters, and in this age of specialisation when policies have to be laid down with great care after consulting the specialists in the field, it will be wholly unwise for the court to encroach into the domain of the executive or legislative (sic legislature) and try to enforce its own views and perceptions****."*
>
> ***(emphasis supplied)***

146 Judicial restraint must not only be exercised while adjudicating upon the constitutionality of the statute relating to economic policy but also in matters of interpretation of economic statutes, where the interpretative maneuvers of the Court have an effect of transgressing into the law-making power of the legislature and disturbing the delicate balance of separation of powers between the legislature and the judiciary. Judicial restraint must be exercised in such cases as a matter of prudence, since the court neither has the necessary expertise nor the power to hold consultations with stakeholders or experts to decide the direction of economic policy. A court may be inept in laying down a detailed procedure for exercise of the power of withdrawal or modification by a successful Resolution Applicant without impacting the other procedural steps and the timelines under the IBC which are sacrosanct. Thus, judicial restraint must be exercised while intervening in a law governing substantive outcomes through procedure, such as the IBC. In this case, if Resolution Applicants are permitted to seek modifications after subsequent negotiations or a withdrawal after a submission of a Resolution Plan to the Adjudicating Authority as a matter of law, it would dictate the commercial wisdom and bargaining strategies of all prospective Resolution Applicants who are seeking to participate in the process and the successful Resolution Applicants who may wish to negotiate a better deal, owing to myriad factors that are peculiar to their own case. The broader legitimacy of this course of action can be decided by the legislature alone, since any other course of action would result in a flurry of litigation which would cause the delay that the IBC seeks to disavow.

147 The IBC is silent on whether a successful Resolution Applicant can withdraw its Resolution Plan. However, the statutory framework laid down under the IBC and the CIRP Regulations provide a step-by-step procedure which is to be followed from the initiation of CIRP to the approval by the Adjudicating Authority. Regulation 40A describes

a model-timeline for the CIRP that accounts for every eventuality that may arise between the commencement of the CIRP and approval of the Resolution Plan by the Adjudicating Authority, including the different stages for pressing a withdrawal of the CIRP under Section 12A. Even a modification to the RFRP is envisaged by the CIRP Rules and is subject to a timeline. The absence of any exit routes being stipulated under the statute for a successful Resolution Applicant is indicative of the IBC's proscription of any attempts at withdrawal at its behest. The rule of casus omissus is an established rule of interpretation, which provides that an omission in a statute cannot be supplied by judicial construction. Justice GP Singh in his authoritative treatise, Principles of Statutory Interpretation, defines the rule of casus omissus as:

> *"**It is an application of the same principle that a matter which should have been, but has not been provided for in a statute cannot be supplied by courts, as to do so will be legislation and not construction.** But there is no presumption that a casus omissus exists and language permitting the court should avoid creating a casus omissus where there is none."*
>
> ***(emphasis supplied)***

The treatise further discusses that a departure from this rule is only allowed in cases where words have been accidently omitted or the omission has an effect of making any part of the statute meaningless. Further, only such words can be supplied to the statute which would have certainly been inserted by the Parliament, had the omission come to its notice. The relevant paragraph is extracted below:

> *"As already noticed it is not allowable to read words in a statute which are not there, but "where the alternative lies between either supplying by implication words which appear to have been accidentally omitted, or adopting a construction which deprives certain existing words of all meaning, it is permissible to supply the words". A departure from the rule of literal construction may be legitimate so as to avoid any part of the statute becoming meaningless. Words may also be read to give effect to the intention of the Legislature which is*

apparent from the Act read as a whole. Application of the mischief rule or purposive construction may also enable reading of words by implication when there is no doubt about the purpose which the Parliament intended to achieve. But before any words are read to repair an omission in the Act, it should be possible to state with certainty that these or similar words would have been inserted by the draftsman and approved by Parliament had their attention been drawn to the omission before the Bill passed into law."

In the wake of the COVID-19 pandemic, several Resolution Plans remained pending before Adjudicating Authorities due to the lockdown and significant barriers to securing a hearing. An Ordinance was swiftly promulgated on 5 June 2020 which imposed a temporary suspension of initiation of CIRP under Sections 7, 9 and 10 of the IBC for defaults arising for six months from 25 March 2020 (extendable by one year). This was followed by an amendment through the IBC (Second Amendment) Act 2020 on 23 September 2020 which provided for a carve-out for the purpose of defaults arising during the suspended period. The delays on account of the lockdown were also mitigated by the IBBI (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations 2020, which inserted Regulation 40C on 20 April 2020, with effect from 29 March 2020, and excluded such delays for the purposes of adherence to the otherwise strict timeline. Recently, the IBC (Amendment) Ordinance 2021 was promulgated with effect from 04 April 2021 providing certain directions to preserve businesses of MSMEs and a fast-track insolvency process. There has been a clamor on behalf of successful Resolution Applicants who no longer wish to abide by the terms of their submitted Resolution Plans that are pending approval under Section 31, on account of the economic slowdown that impacted every business in the country. However, no legislative relief for enabling withdrawals or renegotiations has been provided, in the last eighteen months. In the absence of any provision under the IBC allowing for withdrawal of the Resolution Plan by a successful Resolution

Applicant, vesting the Resolution Applicant with such a relief through a process of judicial interpretation would be impermissible. Such a judicial exercise would bring in the evils which the IBC sought to obviate through the back-door.

148 It is pertinent to note that even the UNCITRAL Guide does not contain any provisions for withdrawal of a submitted Plan. It only discusses the possibilities of amending a Resolution Plan. The UNCITRAL Guide indicates that it contemplates that the Legislature should choose if it wants to allow any amendments to a submitted Resolution Plan. In the event, it does, it should lay down the detailed steps of proposing amendments to a submitted resolution plan. In fact, even the scope of negotiations between the Resolution Applicant and the CoC has to be specifically envisaged by the statute. Further, the UNCITRAL Guide envisages that amendments can be made to the Resolution Plan after it is approved by the creditors only in limited circumstances. It mentions that, "[a]n insolvency law may include limited provision for a plan to be modified after it has been approved by creditors (and both before and after confirmation) if its implementation breaks down or it is found to be incapable of performance, whether in whole or in part, and the specific problem can be remedied". If permitted by the statute, the recommendations strongly urge the establishment of a mechanism for amendment after approval by creditors which details requirements of, inter alia, approval by creditors of the modification and consequences of failure to secure approval to the amendments. The BLRC Report has relied on the UNCITRAL Guide while designing the IBC and it is a critical tool for ascertaining legislative choice and intent. Parliament has not introduced an explicit provision under the IBC for allowing any amendment of the Resolution Plan after approval of creditors, let alone a power to withdraw the Resolution Plan at that stage. At the same time, the Corporate Debtor and the CoC have been empowered to withdraw from the CIRP. If it intended to permit parties to amend the

Resolution Plan after submission to the Adjudicating Authority, based on its specific terms of the Resolution Plan, it would have adopted the critical safeguards highlighted by the UNCITRAL."

14. The contention put forth on behalf of the Appellants including the SRA (Ebix) viz. a Resolution Plan becomes binding, when it is approved by the Adjudicating Authority under Section 31(1) of IBC, could be noted by the Hon'ble Supreme Court in para 149 of the judgment. It was the contention of the Appellants before the Hon'ble Supreme Court that as Section 74(3) of IBC, provides for punishment for contravening the Resolution Plan only after its approval by the Adjudicating Authority, the SRA was entitled to withdraw the same on the terms of its contractual provisions, as long as it is not made binding under Section 31(1) of IBC. While dealing with the submission, Hon'ble Supreme Court ruled that the Resolution Plan is a creature of the IBC and cannot be construed as a pure contract between two consenting parties, prior to its approval under Section 31 of the IBC. While dealing with the contention of the Appellants that the terms of Resolution Plan can reserve the right to modify or withdraw its contents after submission to the Adjudicating Authority, the Hon'ble Supreme Court observed that the approval of Adjudicating Authority under Section 31(1) of IBC has the effect of making the Resolution Plan binding on all the stakeholders which includes the employees of the CD and the Central and State Government, who may not be direct participants in CoC, but are effected by the plan, once the same is approved. The language of Section 31(1) cannot be construed to mean that a Resolution Plan is indeterminate or open to withdrawal or modification until it is approved by the Adjudicating Authority or that it is not binding between the CoC and the

Successful Resolution Applicant. In para 152 of the judgment, Hon'ble Supreme Court viewed that the binding nature, as between the CoC and the Successful Resolution Applicant of the Resolution Plan submitted for approval by the Adjudicating Authority is further evidenced from the fact that the CoC issued a LOI to the Successful Resolution Applicant stating that it has been selected as the Successful Resolution Applicant and its plan would be submitted to the Adjudicating Authority for its approval. The Successful Resolution Applicant is typically required to accept the LOI unconditionally and submit a Performance Bank Guarantee (PBG). Sequentially, the issuance of LOI is followed by its unconditional acceptance by the Successful Resolution Applicant. Referring to its earlier judgment in Amtek Auto, Hon'ble Supreme Court ruled that the SRA can't even seek a direction to compel the CoC to negotiate modification in the Resolution Plan. In para 153 of the judgment Hon'ble Supreme Court ruled that the IBC does not envisage dichotomy in the binding character of the Resolution Plan in relation to the RA between the stage of approval by the Coc and approval of the Adjudicating Authority. The binding nature of a Resolution Plan on a Resolution Applicant, who is a proponent of the plan which has been accepted by the CoC cannot remain indeterminate at the discretion of the Resolution Applicant. The negotiation between the Resolution Applicant and the CoC are brought to an end after the CoC's approval. The only step left out after approval of a plan by the CoC is the approval by the Adjudicating Authority, which has a limited jurisdiction to confirm or to deny the legal validity of the Resolution Plan in terms of Section 30(2) of the IBC. If the requirements of Section 30(2) are satisfied, the Adjudicating Authority shall confirm the plan, approved by

the CoC under Section 31(1) of the IBC. Para 152-153 of the judgment of Hon'ble Supreme Court reads thus: -

> *"152 The binding nature, as between the CoC and the successful Resolution Applicant, of the Resolution Plan submitted for approval by the Adjudicating Authority is further evidenced from the fact that the CoC issues a LOI to a successful Resolution Applicant stating that it has been selected as the successful Resolution Applicant and its Plan would be submitted to the Adjudicating Authority for its approval. The successful Resolution Applicant is typically required to accept the LOI unconditionally and submit a PBG. Sequentially, the issuance of an LOI is followed by its unconditional acceptance by the successful Resolution Applicant. In* ***Amtek Auto*** *(supra), this court thwarted a similar attempt by a successful Resolution Applicant who had relied on certain open-ended clauses in its Resolution Plan to seek a direction compelling the CoC to negotiate a modification to its Resolution Plan. The Resolution Plan had been approved by the Adjudicating Authority and the Resolution Applicant's IA was not entertained. The Resolution Applicant had then sought to challenge the approval of the Resolution Plan under Section 61(3) of the IBC by seeking the same relief. This Court rejected the claim and observed that, "[t]o assert that there was any scope for negotiations and discussions after the approval of the resolution plan by the CoC would be plainly contrary to the terms of the IBC".*
>
> *153 Regulation 38(3) mandates that a Resolution Plan be feasible, viable and implementable with specific timelines. A Resolution Plan whose implementation can be withdrawn at the behest of the successful Resolution Applicant, is inherently unviable, since open-ended clauses on modifications/withdrawal would mean that the Plan could fail at an undefined stage, be uncertain, including after approval by the Adjudicating Authority. It is inconsistent to postulate, on the one hand, that no withdrawal or modification is permitted after the approval by the Adjudicating Authority under Section 31, irrespective*

of the terms of the Resolution Plan; and on the other hand, to argue that the terms of the Resolution Plan relating to withdrawal or modification must be respected, in spite of the CoC's approval, but prior to the approval by the Adjudicating Authority. The former position follows from the intent, object and purpose of the IBC and from Section 31, and the latter is disavowed by the IBC's structure and objective. The IBC does not envisage a dichotomy in the binding character of the Resolution Plan in relation to a Resolution Applicant between the stage of approval by the CoC and the approval of the Adjudicating Authority. The binding nature of a Resolution Plan on a Resolution Applicant, who is the proponent of the Plan which has been accepted by the CoC cannot remain indeterminate at the discretion of the Resolution Applicant. The negotiations between the Resolution Applicant and the CoC are brought to an end after the CoC's approval. The only conditionality that remains is the approval of the Adjudicating Authority, which has a limited jurisdiction to confirm or deny the legal validity of the Resolution Plan in terms of Section 30 (2) of the IBC. If the requirements of Section 30(2) are satisfied, the Adjudicating Authority shall confirm the Plan approved by the CoC under Section 31(1) of the IBC."

15. With reference to the plea espoused on behalf the Appellants before Hon'ble Supreme Court that the plan could be withdrawn in terms of the contents of the certificate furnished by RP in Form-H of the IBBI (Insolvency Resolution for Corporate Persons) Regulations, 2016, Hon'ble Supreme Court ruled that the conditionalities contemplated in Form-H could be those which do not strike at the root of IBC. In terms of the view taken by their lordships, the Form-H is subservient to the statute and the conditions for withdrawal or re-negotiations of the Resolution Plan cannot pass the test of viability and implementability as they would make the Resolution process indeterminate and unpredictable. Referring to its judgment in K. Shashidhar, Hon'ble Supreme

Court observed that the Resolution Plan should be an overall credible plan capable of achieving timelines specified in the Code generally, assuring successful revival of the Corporate Debtor and disavowing endless speculation. Their lordships viewed that in the absence of a specific statutory language allowing for withdrawal or even modifications by the Successful Resolution Applicant, it would be difficult to imply the existence of such an option based on the terms of Resolution Plan, irrespective and especially when they do not form a part of Clause 12 in Form-H. Referring to the BLC Report released in March 2018, Hon'ble Supreme Court ruled that the conditionalities in the plan is not the intent of IBC. In the report of BLC reproduced in para 155 of the judgment of Hon'ble Supreme Court, it could be viewed that there is no provision in the Code on the requirement to obtain an indication on the stance of the concerned regulators or authorities, if required, on the Resolution Plan prior to the Resolution Plan being approved by the NCLT. Hon'ble Supreme Court also made a reference to the report of BLC dated February 2020, to emphasise the view that the current practise of obtaining government approval after the approval of Resolution Plan has created an uncertainty about implementation of the Resolution Plan. The committee suggested that the uncertainty can be mitigated if amendments are made to the IBC to provide that once the Resolution Plan is approved by the CoC, it will be shared with the governmental and regulatory authorities for approval that are necessary for running the business of the Corporate Debtor. If no objections are raised it would be deemed that they have granted an approval. If objections are raised or conditional approvals are granted, the Resolution Applicant should attempt to clear the objection or meet the conditions before placing the plan before the

Adjudicating Authority. Thereafter, the same is placed before the Adjudicating Authority for its approval. In para 156 of the judgment, Hon'ble Supreme Court ruled that it should be left with the legislature, based on the experience gained from the working of the enactment to decide whether the option or modification or withdrawal at the behest of the Resolution Applicant should be permitted after submission to the Adjudicating Authority and if so the conditions and safeguards subject to which it can be allowed and the statutory provisions to be adopted for its exercise.

16. In terms of the view taken by the lordships in para 157 of the judgment, based on the plain terms of the statute, the Adjudicating Authority lacks the authority to allow the withdrawal or modification of the Resolution Plan by a Successful Resolution Applicant or to give effect to any clauses in the Resolution Plan by a Successful Resolution Applicant or to give effect to any such clauses in the Resolution Plan. Unlike, Section 18(3)(b) of the erstwhile SICA which vested the Board for Industrial and Financial Reconstruction with the power to make modifications to a draft scheme for sick industrial companies, the Adjudicating Authority under Section 31(2) of the IBC can only examine the validity of the plan only on the anvil of the grounds stipulated in Section 30(2) and either approve or reject the plan. The Adjudicating Authority cannot compel a CoC to negotiate further with a Successful Resolution Applicant. It is the view taken by Hon'ble Supreme Court in para 158 of the judgment that the NCLT's residuary jurisdiction under Section 60(5)(c) though wide, is defined by the text of the IBC and the NCLT cannot do what the IBC consciously did not provide it the power to do. The NCLT's residuary jurisdiction

need to be interpreted in the manner that it comports with the broader goals of the IBC. Their lordships specifically viewed that allowing the Adjudicating Authority to permit the withdrawal of Resolution Plans that are submitted to it would be conferring upon it the power that is not envisaged by the IBC and would defeat the objectives of the statute which seeks a timely and predictable insolvency resolution of the Corporate Debtors.

17. As could be viewed in para 160 of the judgment, Section 60(5)(c) of IBC, 2016, cannot be used to whittle down Section 31(1) of the IBC, 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 by the Adjudicating Authority. Para 154 to 161 of the judgment reads thus: -

> *"154 If the appellants' claim were to succeed, a clause enabling a Resolution Applicant to withdraw/seek modification for reasons such as a 'Material Adverse Event' could also be set up by a Resolution Applicant when it is being prosecuted under Section 74 (3). It was contended before us that Form H, which is a compliance certificate that is to be submitted by the RP to the Adjudicating Authority along with the Resolution Plan, mentions that the RP can enter details as to whether the Resolution Plan is subject to any conditionalities under Clause 12. Thus, the argument goes that this permits the Resolution Applicant to stipulate in the Resolution Plan certain contingencies under which it can withdraw the Plan, for instance if there is an occurrence of an 'Material Adverse Event'. A form is subservient to the statute. The conditionalities contemplated in Form H could be those which do not strike at the root of the IBC. They can include commercial conditions and business arrangements with the CoC. However, conditions for withdrawal or re-negotiation of the Resolution Plan*

cannot pass the test of 'viability' and 'implementability' as they would make the resolution process indeterminate and unpredictable. A two judge Bench of this Court in ***K Sashidhar*** *(supra), while discussing the jurisdiction of the Adjudicating Authority under Section 31 to evaluate a Resolution Plan, has observed that the Resolution Plan should "be an overall credible plan, capable of achieving timelines specified in the Code generally, assuring successful revival of the corporate debtor and disavowing endless speculation". Section 30(2)(d) of the IBC and Regulation 38 of the CIRP Regulations also provide that the Resolution Plan should be implementable. In the absence of specific statutory language allowing for withdrawals or even modifications by the successful Resolution Applicant, it would be difficult to imply the existence of such an option based on the terms of the Resolution Plan, irrespective of, and especially when they do not form a part of Clause 12 in Form H, as is the case in all the three Resolution Plans that are in dispute in this present appeal.*

155 The Insolvency and Bankruptcy Law Committee in its report released in March 2018 noted that many conditional Resolution Plans were being approved by the Adjudicating Authority on account of the uncertainty on statutory clearances, such as by the Competition Commission of India, and the approval by the Adjudicating Authority was being regarded as a "single window approval". This was in contravention of the intent of the IBC. The relevant extracts of the report are reproduced below:

> *"16.1 Regulation 37(l) of the CIRP Regulations states that a resolution plan shall provide for obtaining necessary approvals from the Central and State Governments and other authorities. However, the timeline within which such approvals are required to be obtained, once a resolution plan has been approved by the NCLT, has not been provided in the Code or the CIRP Regulations. The Committee deliberated that as the onus to obtain the final approval would be on the successful resolution applicant as per the resolution plan itself, the Code should specify that the timeline will be as specified in the relevant law, and if the timeline for approval*

under the relevant law is less than one year from the approval of the resolution plan, then a maximum of one year will be provided for obtaining the relevant approvals, and section 31 shall be amended to reflect this.

16.2 ***Further, the Committee noted that there is no provision in the Code on the requirement to obtain an indication on the stance of the concerned regulators or authorities, if required, on the resolution plan prior to the resolution plan being approved by the NCLT. It was brought to the attention of the Committee that this was resulting in several conditional resolution plans being approved by the NCLT, and that the approval by the NCLT was being regarded as a 'single window approval.' This not being the intent of the Code, the Committee deliberated on introduction of a mechanism for obtaining preliminary observations from the concerned regulators and authorities in relation to a resolution plan approved by the CoC and submitted to the NCLT for its approval, but prior to the NCLT's approval."***

(emphasis supplied)

The Insolvency and Bankruptcy Law Committee in its report dated February 2020 stated that the current practice of obtaining governmental approvals after the approval of the Resolution Plan has created an uncertainty about the implementation of the Resolution Plan. The committee suggested that this uncertainty can be mitigated if amendments are made to the IBC to provide that once the Resolution Plan is approved by the CoC, it will be shared with the governmental and regulatory authorities, for approvals that are necessary for running the business of the Corporate Debtor. If no objections are raised within forty-five days, it would be deemed that they have granted an approval. If objections are raised or conditional approvals are granted, the Resolution Applicant should attempt to clear the objections or meet the conditions before placing the Resolution Plan before the Adjudicating Authority. This Plan would thereafter be placed before the Adjudicating Authority for its approval. The committee further suggested that this timeline of forty-five days should be excluded from calculating the

timelines under Section 12 of the IBC. The relevant extract is reproduced below:

> *"14.8. To enable approvals or no-objections to be taken within the scheme of the Code, the Committee decided that amendments should be made to the Code such that* ***once a resolution plan is approved by the CoC, it should be sent to all concerned government and regulatory authorities whose approvals are core to the continued running of the business of the corporate debtor, for their approvals or objections. If they do not raise their objections within forty-five days, they will be deemed to have no objections. This plan would then be placed before the Adjudicating Authority for its approval. If the government and regulatory agencies raise any objections or grant conditional approvals, the resolution applicant can attempt to clear the objections or meet the conditions for approval before placing the plan for the approval of the Adjudicating Authority, where this can be done within the time limit provided under Section 12.*** *However, where this is not possible, the plan may still be placed before the Adjudicating Authority for its approval, and the successful resolution applicant should clear the objections or comply with the conditions for approval within a period of one year from the approval of the resolution plan.*
>
> *14.9.* ***To ensure that this aligns with the time-line for resolution provided in the Code, the Committee recommended that the window of forty-five days given to government and regulatory agencies should be excluded from the computation of the time limit under Section 12 of the Code.*** *Although some members of the Committee were of the view that this time-line should ideally run concurrently with the CIRP period, the Committee felt that this exclusion would be justified since it would streamline the process of gaining government approvals considerably, which would lead to more value maximising resolutions, offsetting value lost, if any, in this forty-five day period in which the corporate debtor will be run as a going concern."*
>
> ***(emphasis supplied)***

The aim to tighten timelines for receiving regulatory approvals through the provision of in-principal approvals, prior to the approval of the Adjudicating Authority, indicates that the statutory framework under the IBC has consistently attempted to avoid situations which may introduce unpredictability in the insolvency resolution process and has sought to make the process as linear as it can be. Further, the recommendations made in the Insolvency Law Committee Report of February 2020 discussed above indicate that the aim is to ensure that the Resolution Plan placed before the Adjudicating Authority should reach a certain finality, even in the context of governmental approvals. A conditionality which allows for further negotiations, modification or withdrawal, once the Resolution Plan is approved by the CoC would only derail the time-bound process envisaged under the IBC.

156 Regulation 40A envisages a model-time line for the CIRP. Any deviation from this timeline needs to be specifically explained by the RP in Clause 10 of Form H. Regulation 40B imposes a time-limit on the RP for filing the requisite forms at different stages of the CIRP, including forms seeking extensions on account of delays at any stage. The failure to fill these forms within the stipulated deadline results in disciplinary action against the RP by the IBBI. Further, as discussed in Section I of the judgement, various mandatory timelines have been imposed for undertaking specific actions under the CIRP. If the legislature intended to allow withdrawals or subsequent negotiations by successful Resolution Applicants, it would have prescribed specific timelines for the exercise of such an option. The recognition of a power of withdrawal or modification after submission of a CoC-approved Resolution Plan, by judicial interpretation, will have the effect of disturbing the statutory timelines and delaying the CIRP, leading to a depletion in the value of the assets of a Corporate Debtor in the event of a potential liquidation. Hence, it is best left to the wisdom of the legislature, based on the experiences gained from the working of the enactment, to decide whether the option of modification or withdrawal at the behest of the

Resolution Applicant should be permitted after submission to the Adjudicating Authority; if so, the conditions and the safeguards subject in which it can be allowed and the statutory procedure to be adopted for its exercise.

157 Based on the plain terms of the statute, the Adjudicating Authority lacks the authority to allow the withdrawal or modification of the Resolution Plan by a successful Resolution Applicant or to give effect to any such clauses in the Resolution Plan. Unlike Section 18(3)(b) of the erstwhile SICA which vested the Board for Industrial and Financial Reconstruction with the power to make modifications to a draft scheme for sick industrial companies, the Adjudicating Authority under Section 31(2) of the IBC can only examine the validity of the plan on the anvil of the grounds stipulated in Section 30(2) and either approve or reject the plan. The Adjudicating Authority cannot compel a CoC to negotiate further with a successful Resolution Applicant. A rejection by the Adjudicating Authority is followed by a direction of mandatory liquidation under Section 33. Section 30(2) does not envisage setting aside of the Resolution Plan because the Resolution Applicant is unwilling to execute it, based on terms of its own Resolution Plan.

158 Further, no such power can be vested with the Adjudicating Authority under its residuary jurisdiction in terms of Section 60 (5)(c). In a decision of a three judge Bench of this Court in ***Gujarat Urja*** *(supra), it was held that, "the NCLT's residuary jurisdiction [under Section 60(5)(c)] though wide, is nonetheless defined by the text of the IBC. Specifically, the NCLT cannot do what the IBC consciously did not provide it the power to do". Further, the court observed that "this Court must adopt an interpretation of the NCLT's residuary jurisdiction which comports with the broader goals of the IBC". The effect of allowing the Adjudicating Authority to permit withdrawals of resolution plans that are submitted to it, would be to confer it with a power that is not envisaged by the IBC and defeat the objectives of the statute, which*

seeks a timely and predictable insolvency resolution of Corporate Debtors.

159 After the amendment to Section 12 in 2019 which mandate a 330 days outer-limit for conclusion of the CIRP (which can be breached only under exceptional circumstances as held in ***Essar Steel*** *(supra)), it would be antithetical to the purpose of the IBC to allow the Adjudicating Authority to use its plenary powers under Section 60(5)(c) to potentially extend these timelines to enable the CoC to either issue a fresh RFRP if the Resolution Plan is withdrawn by a successful Resolution Applicant or direct further negotiations with the Resolution Applicant who is seeking a modification of the plan, whose failure could result in withdrawal as well. The likely consequence of a withdrawal by a successful Resolution Applicant after going through the stages of the CIRP for nearly 180 days (provided all statutory timelines have been strictly followed) would inevitably be a delayed liquidation after the value of the assets has further depreciated. In the event of intervening delays on account of litigation or otherwise, the delay would be even more severe. If a CoC, could be compelled by the Adjudicating Authority to negotiate with the successful Resolution Applicant, it would have to resign itself to a commercial bargain at a much lower value. If Parliament intended to permit such withdrawals/modifications sought by successful Resolution Applicants as being beneficial to the economic policy, which it has sought to pursue while enacting the IBC, it would have prescribed timelines for setting the clock-back or directing immediate liquidation if the withdrawals occur after a certain period. For instance, under Regulation 36B (5) any modification to the RFRP or the evaluation matrix is deemed as a fresh issue of the RFRP and the timeline for submission of Resolution Plan starts afresh. Parliament has not legislated to provide for the eventuality argued by the appellants.*

160 Permitting the Adjudicating Authority to exercise its residuary powers under Section 60(5) to allow for further modifications or withdrawals at the behest of the successful Resolution Applicant, would

*be in the teeth of the decision of this Court in **Essar Steel** (supra) which held that "[s]ection 60(5)(c) cannot be used to whittle down Section 31(1) of the IBC, 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".*

18. Having analysed the factual position involved in the appeal filed by the SRA (Ebix) and having dealt with the duties of the RP, the Hon'ble Supreme Court concluded that a Resolution Plan is binding and irrevocable as between the CoC and the Successful Resolution Applicant in terms of the provisions of the IBC and CIRP Regulations. Having compared the relief sought by the Appellant/SRA in first, second and third withdrawal applications, the Hon'ble Supreme Court found that the third application filed by the Appellant/Ebix was not barred by the res judicata. The factual and legal position in this regard was analysed in paras 165 to 174 of the judgment. In para 175 of the judgment, their lordships summarised the steps taken qua the Resolution Plan and viewed that the application filed by CSEB before this Adjudicating Authority was mere formality and there was no controversy raised in relation to that application. Hon'ble Supreme Court also noted that no objections were raised against the application filed for approval of Resolution Plan on the ground that the threshold of 75% of vote was not met. The arguments advanced on behalf of the Appellant (Ebix) were summarised in para 177 of the judgment and were nixed. With reference to clause 1.10(I) of the RFRP, Hon'ble Supreme Court viewed that the Appellant i.e., SRA was not permitted to withdraw the Resolution Plan. The plea raised by the Appellant (Ebix) regarding financial conduct of Educomp

could be nixed with the view that the SRA/Appellant/Ebix was responsible for conducting its own due diligence of Educomp and could not have made the financial conduct of the CD as a ground to withdraw the Resolution Plan. To nix the plea raised by the Ebix/SRA qua the financial conduct of the CD, hon'ble Supreme Court also made a reference to Section 32(A) of IBC, 2016. In para 182 of the judgment, Hon'ble Supreme Court clearly ruled that the Ebix did not have any right under their own Resolution Plan to revise or withdraw it. In para 191 of the judgment, Hon'ble Supreme Court specifically ruled that the RP did not falter in its duty to provide relevant information to Ebix. Paragraphs 161 to 191 and 201 to 204 of the judgment passed by Hon'ble Supreme Court reads thus: -

> ***"K Factual Analysis***
>
> *161 We have held in Section H of this judgement that Resolution Plans are not in a nature of a traditional contract per se, and the process leading up to their formulation and acceptance by the CoC is comprehensively regulated by the insolvency framework. In Section J, we have further held that the IBC framework, does not enable withdrawals or modifications of Resolution Plans, once they have been submitted by the RP to the Adjudicating Authority after their approval by the CoC. In any event, and without affecting the legal position formulated above, we will also deal with the submissions of the parties that the contractual terms of their respective Resolution Plans enabled withdrawal or re-negotiation of terms. We will be undertaking an analysis on whether the individual Resolution Applicants before us had specifically negotiated with the respective CoCs for a right of modification or withdrawal and are contractually entitled to the same in the present case.*

K.1 The Ebix Appeal

162 Before we begin our analysis on the factual matrix pertaining to Ebix's Appeal, we must deal with the preliminary issue alleged by the respondents during the course of the Ebix Appeal- whether the Third Withdrawal Application by Ebix was barred by res judicata; while this will not have a bearing on the final outcome of the appeal, we shall analyze it briefly.

K.1.1 Res Judicata

163 To begin our inquiry, it is important to first consider the contours of the principle of res judicata. In Indian law, the principle has been recognized in Section 11 of the Code of Civil Procedure 1908. Section 11, in so far as is relevant, reads as follows:

> *"11. Res judicata. —No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.*
>
> *[…]*
>
> *Explanation IV. —Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.*
>
> *Explanation V.—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.*
>
> *[…]"*

164 In ***Satyadhyan Ghosal*** *v.* ***Deorajin Debi****, a three judge Bench of this Court, speaking through Justice KC Das Gupta, explained the doctrine of res judicata in the following terms:*

"7. The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter — whether on a question of fact or a question of law — has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata is embodied in relation to suits in Section 11 of the Code of Civil Procedure; but even where Section 11 does not apply, the principle of res judicata has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct."

From the above extract, it is clear that while res judicata may have been codified in Section 11, that does not bar its application to other judicial proceedings, such as the one in the present case.

165 Before proceeding further, it is important to compare the reliefs sought by Ebix in the First, Second and Third Withdrawal Applications. They have been tabulated below, for an easy comparison:

First Withdrawal Application	Second Withdrawal Application	Third Withdrawal Application
i. Direct that the Ld. Resolution Professional supply a copy of the Special Investigation Audit to the Resolution Applicant forthwith; ii. Direct that the Ld. Resolution Professional supply a copy of the Certificates under Sections 43, 45, SO and 66 of the Insolvency and Bankruptcy Code, 2016 to the Resolution Professional forthwith; iii. Withhold approval of the Resolution Plan sanctioned by the Committee of Creditors of the Corporate Debtor, as filed before this Hon'ble Tribunal on 11.04.2018, pending detailed	i. Allow the Resolution Applicant to withdraw the Resolution Plan dated 19.02.2018 (along with the Addendum/Financial Proposal dated 21.02.2019) submitted by it, and as approved by the Committee of Creditors; ii. Direct the Ld. Resolution Professional and/or Educomp Solutions Limited and the Committee of Creditors to refund the Earnest Money Deposit of Rs. 2,00,00,000/- furnished by the Resolution Applicant in respect of the Resolution Plan; iii. Withhold approval of the Resolution Plan sanctioned by the Committee of Creditors	i. Allow the Resolution Applicant to withdraw the Resolution Plan dated 19.02.2018 (along with the Addendum/Financial Proposal dated 21.02.2019) submitted by it, and as approved by the Committee of Creditors; ii. Direct the Ld. Resolution Professional and/or Educomp Solutions Limited and the Committee of Creditors to refund the Earnest Money Deposit of Rs. 2,00,00,000/- furnished by the Resolution Applicant in respect of the Resolution Plan; iii. Withhold approval of the Resolution Plan sanctioned by the Committee of Creditors

consideration of the same by the Resolution Applicant; iv. Grant the Resolution Applicant sufficient time to re-evaluate its proposals contained in the Resolution Plan, and also to suitably revise/modify and/or withdraw its Resolution Plan;	of the Corporate Debtor, as filed before this Hon'ble Tribunal on 07.03.2018 and recorded vide order dated 1.1.04.2018, pending detailed consideration of the same by the Resolution Applicant;	of the Corporate Debtor, as filed before this Hon'ble Tribunal on 07.03.2018 and recorded vid order dated 11.04.2018, pending detailed consideration of the same by the Resolution Applicant;

From the above table, it is clear that the prayers in the Second and Third Withdrawal Applications were identical. Further, prayer (iii) of both corresponds to prayer (iii) of the First Withdrawal Application, in almost identical terms, while prayer (ii) was not present in the First Withdrawal Application at all. At the same time, prayers (i) and (ii) in the First Withdrawal Application have not been repeated in the Second and Third Withdrawal Applications. However, what is at issue is prayer (iv) of the First Withdrawal Application and prayer (i) of the Second and Third Withdrawal Applications. Through the former, Ebix sought permission to re-evaluate its Resolution Plan and to suitably "revise/modify and/or withdraw" it, while through the latter, Ebix sought permission to withdraw its Resolution Plan. Now we must analyse whether this would attract the principle of res judicata.

166 In a judgment of this Court in ***Sheodan Singh*** *v.* ***Daryao Kunwar****, a four judge Bench of this Court elaborated on the various conditions which must be satisfied before the doctrine of res judicata can apply in a given case. Justice KN Wanchoo, speaking for the Court, held:*

> *"9. A plain reading of Section 11 shows that to constitute a matter res judicata, the following conditions must be satisfied, namely—*
>
> *(i)* ***The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue in the former suit;***
>
> *(ii)* ***The former suit must have been a suit between the same parties or between parties under whom they or any of them claim;***

(iii) The parties must have litigated under the same title in the former suit;

(iv) The court which decided the former suit must be a court competent to try the subsequent suit or the suit in which such issue is subsequently raised; and

(v) ***The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the first suit...”***

(emphasis supplied)

167 In the present case, conditions (i) is not in dispute since the parties were the same. As regards (ii), in the First Withdrawal Application, the prayer was to enable Ebix to re-evaluate its proposals and to revise/modify and also withdraw its Resolution Plan. A prayer for withdrawal of the Resolution Plan was raised in the Second and Third Withdrawal Applications. Conditions (iii) and (iv) are also not in issue. What remains to be assessed is compliance with condition (v), i.e., whether Ebix's prayer in the First Withdrawal was in fact “heard and decided finally”. While dismissing the First Withdrawal Application, the NCLT had held:

“This is an application filed by one Ebix Singapore Ptd. Limited seeking re-valuation of the Resolution Plan submitted by it before the Resolution Professional.

No ground for considering the prayer sought in the application is made out.

The application is dismissed as such.”

NCLT dismissed the First Withdrawal Application in a summary manner. Further, the order does not make mention of the prayer to “revise/modify and/or withdraw” of the Resolution Plan, but only refers to its re-evaluation.

168 The meaning of the phrase “heard and finally decided” was considered by a judgment of a two judge Bench of this Court in ***Krishan Lal*** *v.* ***State of J&K****, where it was held that the matter must*

have been heard on merits to have been "heard and finally decided". Justice BL Hansaria, speaking for the Court, held:

> *"12.* ***Insofar as the second ground given by the High Court — the same being bar of res judicata — it is clear from what has been noted above, that there was no decision on merits as regards the grievance of the appellant; and so, the principle of res judicata had no application.*** *The mere fact that the learned Single Judge while disposing of the Writ Petition No. 23 of 78 had observed that:*
>
> *"This syndrome of errors, omissions and oddities, cannot be explained on any hypothesis other than the one that there is something fishy in the petitioner's version…."*
>
> *which observations have been relied upon by the High Court in holding that the suit was barred by res judicata do not at all make out a case of applicability of the principle of res judicata.* ***The conclusion of the High Court on this score is indeed baffling to us, because, for res judicata to operate the involved issue must have been "heard and finally decided". There was no decision at all on the merit of the grievance of the petitioner in the aforesaid writ petition and, therefore, to take a view that the decision in earlier proceeding operated as res judicata was absolutely erroneous, not to speak of its being uncharitable."***
>
> ***(emphasis supplied)***

169 In ***Daryao*** *v.* ***State of U.P.****, a Constitution Bench of this Court held that orders dismissing writ petitions in limine will not constitute res judicata. It was noted that while a summary dismissal may be considered as a dismissal on merits, it would be difficult to determine what weighed with the Court without a speaking order. Justice PB Gajendragadkar, speaking for the Court, held:*

> *"26...If the petition is dismissed in limine without passing a speaking order then such dismissal cannot be treated as creating a bar of res judicata. It is true that, prima facie, dismissal in limine even without passing a speaking order in that behalf may strongly suggest that the Court took the view*

that there was no substance in the petition at all; but in the absence of a speaking order it would not be easy to decide what factors weighed in the mind of the Court and that makes it difficult and unsafe to hold that such a summary dismissal is a dismissal on merits and as such constitutes a bar of res judicata against a similar petition filed under Article 32…"

170 Another two judge Bench of this Court, in its judgment in ***Erach Boman Khavar*** *v.* ***Tukaram Shridhar Bhat****, has held that the doctrine of res judicata can only apply when there has been a conscious adjudication of the issue on merits. Justice Dipak Misra, speaking for the Court, held:*

"39. From the aforesaid authorities it is clear as crystal ***that to attract the doctrine of res judicata it must be manifest that there has been a conscious adjudication of an issue. A plea of res judicata cannot be taken aid of unless there is an expression of an opinion on the merits.*** *It is well settled in law that principle of res judicata is applicable between the two stages of the same litigation but the question or issue involved must have been decided at earlier stage of the same litigation."*

(emphasis supplied)

171 Res judicata cannot apply solely because the issue has previously come up before the court. The doctrine will apply where the issue has been "heard and finally decided" on merits through a conscious adjudication by the court. In the present case, the NLCT's order dismissing the First Withdrawal Application makes it clear that it had only considered only that part of prayer (iv) which related to re-evaluation of the Resolution Plan, possibly because Ebix had hoped to re-evaluate the Resolution Plan on the basis of the information received as a consequence of prayers (i) and (ii) and those prayers were rejected since such information was not available.

172 In the impugned judgment, the NCLAT has relied upon Explanation (V) to Section 11 to state that since withdrawal was also prayed for as a relief in prayer (iv) of the First Withdrawal Application,

it would have also been assumed to have been rejected. Mulla's The Code of Civil Procedure states that Explanation V can only apply upon the fulfilment of two conditions: (i) the relief claimed must have been substantial, and not merely auxiliary; and (ii) the relief claimed must have been one which the Court is bound to grant, and not one which it is discretionary for the Court to grant.

173 In ***Jaswant Singh*** *v.* ***Custodian of Evacuee Property****, a two judge Bench of this Court held that res judicata will only apply if the cause of action the same and that the party also had an earlier opportunity to apply for the relief it is now seeking. Justice ES Venkataramiah held:*

> *"14…It is well-settled that in order to decide the question whether a subsequent proceeding is barred by res judicata it is necessary to examine the question with reference to the (i) forum or the competence of the Court, (ii) parties and their representatives, (iii) matters in issue, (iv) matters which ought to have been made ground for defence or attack in the former suit, and (v) the final decision…A cause of action for a proceeding has no relation whatever to the defence which may be set up, nor does it depend upon the character of the relief prayed for by the plaintiff or the applicant. It refers entirely to the grounds set forth in the plaint or the application as the case may be as the cause of action or in other words to the media upon which the plaintiff or the applicant asks the court to arrive at a conclusion in his favour.* ***In order that a defence of res judicata may succeed it is necessary to show that not only the cause of action was the same but also that the plaintiff had an opportunity of getting the relief which he is now seeking in the former proceedings.*** *The test is whether the claim in the subsequent suit or proceedings is in fact founded upon the same cause of action which was the foundation of the former suit or proceedings…"*
>
> ***(emphasis supplied)***

174 The prayer for withdrawal of the Resolution Plan in the First Withdrawal Application was not substantial and one that the Court was bound to grant, since it was contingent upon a re-evaluation,

which in itself was contingent upon receiving the information sought in prayers (i) and (ii). Since the latter two contingencies never arose, the NCLT did not apply its mind to the prayer for withdrawal independently. When it filed the Second Withdrawal Application, it was dismissed on a technical ground and not on its merits. When a revised Third Withdrawal Application was filed, the NCLT then adjudicated it on its merits and allowed it. Hence, since the NCLT did not adjudicate Ebix's prayer for withdrawal of their Resolution Plan on its merits while dismissing the First Withdrawal Application, the opportunity to seek the relief was not available to Ebix in a real sense. Therefore, we reverse the finding of the NCLAT on this issue and hold that Ebix's Third Withdrawal Application was not barred by res judicata.

K.1.2 Analysis of the Resolution Plan of Ebix

175 To briefly recount the relevant facts for determination of the dispute over the terms of the resolution plan – the CIRP of Educomp commenced on 30 May 2017. After consultation with the E-CoC, the E-RP invited EOIs on 18 October 2017. The RFRP was issued on 5 December 2017, and was revised on 17 January 2018 and 20 January 2018. Ebix submitted its draft Resolution Plan after the last date of 27 January 2018, and after securing an extension from the Adjudicating Authority, on 29 January 2018. Ebix took the benefit of an extension of time which was granted to it to submit its Resolution Plan. In the absence of an extension of time, it would not have been permitted to enter the fray. After multiple rounds of negotiations, on 9 February 2018, Ebix was declared the successful Resolution Applicant and a LOI was issued by the E-CoC. On 17 February 2018, Ebix's Resolution Plan was approved by a 74.16 per cent voting share of the E-CoC, which was subsequently upgraded to 75.35 per cent by CSEB's vote being added belatedly on 23 February 2018. While it is true that the votes of CSEB were received in favour of the Resolution Plan on a later date, all the parties including Ebix proceeded on the notion that the Resolution Plan has been approved by the requisite majority of seventy-five per

cent of the voting share of the E-CoC as was required then (now the requisite percentage has been reduced to sixty-six per cent pursuant to an amendment). Thus, the CSEB Application filed before the NCLT seeking a clearance of its delayed vote was a mere formality and there was no controversy raised in relation to that application at that stage. In fact, the Approval Application for the approval of the Resolution Plan was filed before the NCLT on the basis that the Plan has been duly approved by the requisite majority of the CoC. No objections were raised against the Approval Application on the ground that the threshold of seventy-five per cent of votes was not met. The Resolution Plan dated 19 February 2018 and the addendum dated 21 February 2018 for a total bid amount of Rs 400 crores were then submitted by the E-RP to the Adjudicating Authority for approval on 7 March 2018.

176 Owing to the intervening applications for investigation into the accounts of Educomp (pertinently, no internal special audit has been conducted till date), Ebix filed the First Withdrawal Application on 5 July 2019, on account of a delay in approval of seventeen months. Thereafter, it filed the Second and Third Withdrawal Applications.

177 Ebix has alleged before this Court that it is entitled to withdraw its Resolution Plan by relying on: (i) the terms of the RFRP, which indicates that the Resolution Plan is binding on the Resolution Applicant only after approval by the Adjudicating Authority under Section 31; (ii) the terms of the Resolution Plan which indicate that the Plan was valid for six months; and (iii) the principles of contract law to urge frustration on account of fraud and an erosion of the commercial substratum.

178 Clause 1.8.3 of the RFRP, produced below, invited Resolution Plans with a validity of not less than six months:

> *"1.8.3 A Resolution Plan once made/submitted must be valid for a period not less than 6 (six) months from the Resolution Plan Submission Date including any revisions to such*

Resolution plan Submission Date ("Resolution Plan Validity Period"). In case of extension of the Resolution Plan Submission Date by the Resolution Professional, the validity period of the Resolution Plan shall also be deemed to be valid for a period of 6 (six) months from such revised Resolution Plan Submission date.

If any Resolution Plan as approved by the CoC and submitted to the Adjudicating Authority is rejected by the Adjudicating Authority, then the Resolution Professional and the CoC shall act in accordance with the instructions/directions issued by the Adjudicating Authority."

Ebix urges that in compliance with the above clause of the RFRP, Clause 7 of its Resolution Plan specified that it shall be valid for a term of six months from the date of submission:

"7. Term of the Resolution Plan

This Resolution Plan proposed by the Resolution Applicant is valid for a term of six months from the date of submission of this plan"

Ebix urges that these matching terms of the offer (the RFRP) and the acceptance (the Resolution Plan) are binding on the E-CoC and the Resolution Plan is voidable and revocable at the instance of Ebix, upon the failure to seek timely approval under Section 31.

179 This submission of Ebix cannot be accepted since the terms of the RFRP or the Resolution Plan relate to the validity of the Resolution Plan for the period of negotiation with the E-CoC and not for a period after the Resolution Plan is submitted for the approval of the Adjudicating Authority. The time which may be taken before the Adjudicating Authority is an imponderable which none of the parties can predict. In fact, this is emphasized by Clause 1.3.7 of the RFPF which contains a schedule of the Resolution Plan submission process. As regards the approval of the Adjudicating Authority, it provides clearly that there is no time-line:

"1.3.7 Schedule of Resolution Plan Submission Process […]

11. Approval of NCLT regarding the Resolution Plan of Successful Resolution Applicant – As per NCLT."

Parties cannot indirectly impose a condition on a judicial authority to accept or reject its Plan within a specified time period, failing which the CIRP process will inevitably come to an end. In this case, the draft Resolution Plan of Ebix was submitted on 29 January 2018 and remained valid for the term of the multiple rounds of negotiations with the E-CoC, until its submission to the Adjudicating Authority on 7 March 2018, which was within the six-month period envisaged in the Plan.

180 Even if it were to be assumed, for the sake of argument, that the term in the submitted Resolution Plan was in the nature of a qualified offer which would expire after six months of its submission, failing the imprimatur of the Adjudicating Authority under Section 31 which would make it binding on all parties, the surrounding terms of the RFRP and the subsequent legal materials including the LOI and the Compliance Certificate (Form H) under CIRP Regulations make it clear that there was no scope to resile from the implementation of the Resolution Plan, once it had been submitted to the Adjudicating Authority, except in the event of a rejection. Clause 1.9.3 of the RFRP required Ebix to replace its EMD with a PBG equivalent to ten per cent of the Resolution Plan value, if it were to be declared as the 'successful Resolution Applicant'. This PBG can be invoked under Clause 1.9.5 of the RFRP if the Resolution Applicant fails to implement the Resolution Plan. Further, Clause 1.8.4 of the RFRP states that "[a] Resolution Plan submitted by a Resolution Respondent shall be irrevocable". Clause 1.10(l) of the RFRP also provides that a successful Resolution Applicant is not permitted to withdraw an approved Resolution Plan:

"Clause 1.10 of the RFRP

"By procuring this RFRP and obtaining access to the Data room and Information Memorandum, in accordance with the terms of this RFRP, the Resolution Respondent is deemed to have made the following acknowledgements and representations:

[…]

(l) ***The Resolution Respondent upon declaration as Successful Resolution Respondent shall remain responsible for the implementation and supervision of the Resolution Plan from the date of approval by the Adjudicating Authority, and will not be permitted to withdraw the Resolution Plan*** *and the Resolution Professional, PwC or the CoC assume no responsibility or liability in this respect."*

(emphasis supplied)

Ebix's submission that Clause 1.10(l) is applicable only upon approval of the Adjudicating Authority is not plausible since the Resolution Plan becomes binding on all stakeholders as a consequence of the approval under Section 31. The E-RP's argument holds much weight when it is argued that Clause 1.10(l) cannot be construed to infer that the Adjudicating Authority would declare Ebix as the 'Successful Resolution Applicant' once again, which would then impose the obligation of barring withdrawals for the first time. Mr Nakul Dewan, learned Senior Counsel for the E-RP, has also submitted before us that the validity of the Resolution Plan being six months was not mentioned as a specific conditionality in Form H that was submitted by the E-RP along with the Resolution Plan to the Adjudicating Authority, which evinces that the six-month validity was only vis-à-vis the acceptance by the E-CoC.

181 Ebix has also tried to argue that its position has changed manifestly because of new allegations which have come up in relation to the financial conduct of Educomp. However, in this regard, it is pertinent to note Clause 1.3.2 of the RFRP which directs prospective Resolution Applicants to conduct their own due diligence. In so far as is relevant, it reads:

"1.3.2 The Resolution Applicant(s) shall be provided access to the electronic as well as physical data room ("Data Room") established and maintained by the Company acting through the Resolution Professional and coordinated by PwC in order

to conduct a due diligence of the business and operations of the Company"

Similarly, Clause 1.13.6 also requires prospective Resolution Applicants to conduct independent investigations:

> *"1.13.6 This RFRP does not purport to contain all the information required by the Resolution Applicant. The Resolution Applicant should conduct independent investigations and analysis and should check the accuracy, reliability and completeness of the information in this RFRP and obtain independent advice from appropriate sources, prior to making an assessment of the Company."*

Ebix was responsible for conducting their own due diligence of Educomp and could not use that as a reason to revise/modify their approved Resolution Plan. In any event, Section 32A of the IBC grants immunity to the Corporate Debtor for offences committed prior to the commencement of CRIP and it cannot be prosecuted for such offences from the date the Resolution Plan has been approved by the Adjudicating Authority under Section 31, if the Resolution Plan results in a change of management or control of the Corporate Debtor subject to certain conditions. Section 32A reads as follows:

> *"32A. (1) Notwithstanding anything to the contrary contained in this Code or any other law for the time being in force, the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease, and the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved by the Adjudicating Authority under section 31, if the resolution plan results in the change in the management or control of the corporate debtor to a person who was not-*
>
> *(a) a promoter or in the management or control of the corporate debtor or a related party of such a person; or*
>
> *(b) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the*

commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court:

[…]

(2) No action shall be taken against the property of the corporate debtor in relation to an offence committed prior to the commencement of the corporate insolvency resolution process of the corporate debtor, where such property is covered under a resolution plan approved by the Adjudicating Authority under section 31, which results in the change in control of the corporate debtor to a person, or sale of liquidation assets under the provisions of Chapter III of Part II of this Code to a person, who was not –

(i) a promoter or in the management or control of the corporate debtor or a related party of such a person; or

(ii) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court.

[…]

(3) Subject to the provisions contained in sub-sections (1) and

(2), and notwithstanding the immunity given in this section, the corporate debtor and any person, who may be required to provide assistance under such law as may be applicable to such corporate debtor or person, shall extend all assistance and co-operation to any authority investigating an offence committed prior to the commencement of the corporate insolvency resolution process."

Thus, in any case even if it is found that there was any misconduct in the affairs of Educomp prior the commencement of the CIRP, Ebix will be immune from any prosecution or punishment in relation to the same. The submission that Ebix has been placed in a prejudicial position due to the initiation of investigation into the affairs of Educomp by the CBI and SFIO is nothing but a red herring since such investigations have no bearing on Ebix.

182 Finally, it is also important to note that no clause of Ebix's own Resolution Plans provides them with a right to revise/withdraw their Resolution Plan after its approval by the E-CoC, but before its confirmation by the Adjudication Authority. Clause 9.1 permits withdrawal in the event the Resolution Plan is not approved in its entirety by the NCLT, while Clause 9.7 allows for an amendment for the purposes of implementation of the Resolution Plan but only when the E-CoC approves it with a seventy-five per cent vote. Hence, Ebix did not have any right under their own Resolution Plan to revise/withdraw it.

183 It is also pertinent to note that Ebix did not stop pursuing their Resolution Plan after the expiry of six months, if the true import of the commercial bargain was a withdrawal of the Resolution Plan after six months of its submission. The First Withdrawal Application was filed on 10 September 2019, which was after one year of the alleged expiry of the six-month period. Therefore, even if the submitted Resolution Plan was considered as a conditional offer the terms did not enable a withdrawal of the Resolution Plan in the event that the Adjudicating Authority does not approve it under Section 31 within six months of its submission.

184 Before we conclude our analysis on the substantive arguments raised by Ebix, we will be briefly dealing with its arguments that the RP had failed in its obligation to provide information under Section 29 of the IBC.

K.1.3 Duties of the RP

185 Appearing on behalf of Ebix, Mr KV Vishwanathan has argued before this Court that the E-RP failed in its duties under Section 29 of the IBC when it failed to inform Ebix about the ongoing investigations against Educomp. While this argument was made in order to justify Ebix's withdrawal of its Resolution Plan, which we have already rejected, we shall assess it nonetheless. On behalf of the E-RP, Mr

Nakul Dewan has appeared and argued that the obligation on an RP to provide information under Section 29 has to be understood on a "best effort basis".

186 Section 29 of the IBC places a duty upon the RP to provide an IM to the Resolution Applicant, containing such information which may be relevant to the Resolution Applicant to draft its Resolution Plan. It states:

> *"29. Preparation of information memorandum. —(1) The resolution professional shall prepare an information memorandum in such form and manner containing such relevant information as may be specified by the Board for formulating a resolution plan.*
>
> *(2) The resolution professional shall provide to the resolution applicant access to all relevant information in physical and electronic form, provided such resolution applicant undertakes—*
>
> *(a) to comply with provisions of law for the time being in force relating to confidentiality and insider trading;*
>
> *(b) to protect any intellectual property of the corporate debtor it may have access to; and*
>
> *(c) not to share relevant information with third parties unless clauses (a) and (b) of this sub-section are complied with.*
>
> *Explanation. — For the purposes of this section, "relevant information" means the information required by the resolution applicant to make the resolution plan for the corporate debtor, which shall include the financial position of the corporate debtor, all information related to disputes by or against the corporate debtor and any other matter pertaining to the corporate debtor as may be specified."*

187 The BLRC Report elucidates the duties of the RP:

> *"1. **The RP must provide the most updated information about the entity as accurately as is reasonably possible to this range of solution providers.** In order to do this, the RP has to be able to verify claims to liabilities as well as the assets disclosed by the entity. The RP has the power to appoint whatever outside resources that she may require in*

order to carry out this task, including accounting and consulting services.

2. ***The information collected on the entity is used to compile an information memorandum, which is signed off by the debtor and the creditors committee, based on which solutions can be offered to resolve the insolvency.*** *In order for the market to provide solutions to keep the entity as a going concern, the information memorandum must be made available to potential financiers within a reasonable period of time from her appointment to the IRP.* ***If the information is not comprehensive, the RP must put out the information memorandum with a degree of completeness of the information that she is willing to certify.***

For example, as part of the information memorandum, the RP must clearly state the expected shortfall in the coverage of the liabilities and assets of the entity presented in the information memorandum. Here, the asset and liabilities include those that the RP can ascertain and verify from the accounts of the entity, the records in the information system, the liabilities submitted at the start of the IRP, or any other source as may be specified by the Regulator.

3. Once the information memorandum is created, the RP must make sure that it is readily available to whoever is interested to bid a solution for the IRP. She has to inform the market (a) that she is the RP in charge of this case, (b) about a transparent mechanism through which interested third parties can access the information memorandum, (c) about the time frame within which possible solutions must be presented and (d) with a channel through which solutions can be submitted for evaluation. The Code does not specify details of the manner or the mechanism in which this should be done, but rather emphasises that it must be done in a time-bound manner and that it is accessible to all possible interested parties."

(emphasis supplied)

188 Similarly, the UNCITRAL Guide notes:

"5. Duties and functions of the insolvency representative

[…]

(e) Obtaining information concerning the debtor, its assets, liabilities and past transactions (especially those taking place during the suspect period), including examining the debtor and any third person having had dealings with the debtor…"

189 Under the IBC, there is a duty upon the RP to collect as much information about the Corporate Debtor as is accurately possible to do. When such information is communicated through an IM to the Resolution Applicant, the RP must be careful to clarify when its information is not comprehensive and what factors may cause a change.

190 In the present case, Ebix has alleged that the E-RP did not inform it of the financial investigations into the conduct of Educomp in a timely fashion. To assess this claim, it is important to underline a few dates:

(i) 5 December 2017 – E-RP provided Virtual Data Room access to Ebix and other prospective Resolution Applicants in relation to Educomp, and the final RFRP was issued;

(ii) 7 March 2018 – E-RP filed the Approval Application before NCLT in relation to Ebix's Resolution Plan, after its approval by the E-CoC;

(iii) 3 April 2018 and 26 April 2018 – two articles are published in The Wire in relation to financial mismanagement of Educomp;

(iv) 4 May 2018 – the IFC Application came up before NCLT, having been filed by a financial creditor of Educomp seeking investigation of the affairs/transactions, in which the E-RP was directed file its reply and IFC was directed to serve a notice on Ebix;

(v) 12 June 2019 – Educomp made regulatory disclosures to the BSE and NSE in relation to the ongoing investigations by SFIO and CBI; and

(vi) 5 July 2019 – Ebix filed the First Withdrawal Application.

191 Ebix cannot dispute that E-RP had provided it the relevant information required under Section 29 to formulate its Resolution Plan.

The issues in relation to financial investigations into the conduct of Educomp arose when the two articles were published by The Wire, both of which were after the Approval Application had been filed by the E-RP. Further, Ebix was aware of all the proceedings before the NCLT since the various applications were often listed along with the Approval Application, in which it continued to appear. Finally, Ebix has brought nothing on record to prove that E-RP knew of the SFIO and CBI investigations before a regulatory disclosure was made by Educomp. Hence, it cannot be stated that the E-RP had faltered in its duty to provide relevant information to Ebix.

XXX

L Conclusion

201 This Court is cognizant that the extraordinary circumstance of the COVID19 pandemic would have had a significant impact on the businesses of Corporate Debtors and upon successful Resolution Applicants whose Plans may not have been sanctioned by the Adjudicating Authority in time, for myriad reasons. But the legislative intent of the statute cannot be overridden by the Court to render outcomes that can have grave economic implications which will impact the viability of the IBC.

202 The residual powers of the Adjudicating Authority under the IBC cannot be exercised to <u>create</u> procedural remedies which have substantive outcomes on the process of insolvency. The framework, as it stands, only enables withdrawals from the CIRP process by following the procedure detailed in Section 12A of the IBC and Regulation 30A of the CIRP Regulations and in the situations recognized in those provisions. Enabling withdrawals or modifications of the Resolution Plan at the behest of the successful Resolution Applicant, once it has been submitted to the Adjudicating Authority after due compliance with the procedural requirements and timelines, would create another tier of negotiations which will be wholly unregulated by the statute. Since the

330 days outer limit of the CIRP under Section 12(3) of the IBC, including judicial proceedings, can be extended only in exceptional circumstances, this open-ended process for further negotiations or a withdrawal, would have a deleterious impact on the Corporate Debtor, its creditors, and the economy at large as the liquidation value depletes with the passage of time. A failed negotiation for modification after submission, or a withdrawal after approval by the CoC and submission to the Adjudicating Authority, irrespective of the content of the terms envisaged by the Resolution Plan, when unregulated by statutory timelines could occur after a lapse of time, as is the case in the present three appeals before us. Permitting such a course of action would either result in a down-graded resolution amount of the Corporate Debtor and/or a delayed liquidation with depreciated assets which frustrates the core aim of the IBC.

203 If the legislature in its wisdom, were to recognize the concept of withdrawals or modifications to a Resolution Plan after it has been submitted to the Adjudicating Authority, it must specifically provide for a tether under the IBC and/or the Regulations. This tether must be coupled with directions on narrowly defined grounds on which such actions are permissible and procedural directions, which may include the timelines in which they can be proposed, voting requirements and threshold for approval by the CoC (as the case may be). They must also contemplate at which stage the Corporate Debtor may be sent into liquidation by the Adjudicating Authority or otherwise, in the event of a failed negotiation for modification and/or withdrawal. These are matters for legislative policy.

204 In the present framework, even if an impermissible understanding of equity is imported through the route of residual powers or the terms of the Resolution Plan are interpreted in a manner that enables the appellants' desired course of action, it is wholly unclear on whether a withdrawal of a CoC-approved Resolution Plan at a later stage of the process would result in the Adjudicating Authority

directing mandatory liquidation of the Corporate Debtor. Pertinently, this direction has been otherwise provided in Section 33(1)(b) of the IBC when an Adjudicating Authority rejects a Resolution Plan under Section 31. In this context, we hold that the existing insolvency framework in India provides no scope for effecting further modifications or withdrawals of CoC-approved Resolution Plans, at the behest of the successful Resolution Applicant, once the plan has been submitted to the Adjudicating Authority. A Resolution Applicant, after obtaining the financial information of the Corporate Debtor through the informational utilities and perusing the IM, is assumed to have analyzed the risks in the business of the Corporate Debtor and submitted a considered proposal. A submitted Resolution Plan is binding and irrevocable as between the CoC and the successful Resolution Applicant in terms of the provisions of the IBC and the CIRP Regulations. In the case of Kundan Care, since both, the Resolution Applicant and the CoC, have requested for modification of the Resolution Plan because of the uncertainty over the PPA, cleared by the ruling of this Court ***in Gujarat Urja*** *(supra), a one-time relief under Article 142 of the Constitution is provided with the conditions prescribed in Section K.2."*

19. In the wake of the aforementioned judgment delivered by Hon'ble Supreme Court particularly para 153 thereof, the captioned IA(IBC) 195/2018 filed by the RP for approval of the plan is taken up for hearing with reference to the provisions of Section 30(2) of IBC, 2016 and other applicable provisions of IBC and IBC 2016 and IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. Surprisingly, the Resolution Applicant which failed in its earlier attempts to withdraw the Resolution Plan, sought to oppose the application filed by the Applicant (RP) for approval of the Resolution Plan. The salient contentions espoused on behalf of the SRA, in opposition of the application are:-

I. CD is no longer a going concern and its net worth is completely eroded and the Resolution Plan is not feasible, viable or implementable.

II. The judgment passed by Hon'ble Supreme court in Ebix Singapore Pte. Ltd. vs. Committee of Creditors of Educomp Solutions Limited and Another, 2021 SCC OnLine SC 707 did not permit the Ebix to withdraw the Resolution Plan, but the decision cannot come in the way of this Tribunal to examine the feasibility, viability and implementability of the Resolution Plan. In view of the judgments of Hon'ble Supreme Court in K. Shashidhar v. IOC, 2019 SCC Online 257; CoC of Essar Steel v. Satish Kumar Gupta & Ors., 2019 SCC Online 1478; ArcelorMittal India Pvt. Ltd. v. Satish Kumar Gupta, 2018 SCC OnLine SC 1733; Innoventive Industries Ltd. v. ICCI Bank, (2018) 1 SCC 407, this Tribunal while deciding the plan approval application has to independently assess and ensure that the Resolution Plan meets the requirements of Section 30(2) of the Code and not just mechanically approve the plan on the basis of CoC's endorsement.

III. Sections 20, 23 and 24 of the Code make it incumbent upon the RP to manage and protect the assets of the Corporate Debtor and to manage its operations as a 'going concern'. The RP failed to disclose the latest financial information pertaining to the affairs of the Corporate Debtor and to the best of the knowledge of the Applicant, there are hardly any revenues in the Corporate Debtor and the Corporate Debtor is no longer a going concern.

IV. The Financial Statements of the Corporate Debtor for the financial year 2020-21 (FY 2020-21 Audited Statement) was approved at the AGM dated

25.08.2023 (3 days before the hearing dated 29.08.2023). The Annual Report was uploaded on 31.07.2023.

V. There is contrast in the financial affairs of the Corporate Debtor.

VI. The CD has incurred substantial losses and most of its assets have eroded. The CD has also lost its control on most of its subsidiaries.

VII. The subsequent events that significantly impact the Resolution Plan viability should be considered before approving or rejecting for approval of the plan.

20. To take on record the stand taken on behalf of the SRA, in opposition of the application for approval of plan in elaborate, it would be appropriate to reproduce some of the excerpts from its written submissions dated 05.09.2023. Para 11 of the submissions reads thus:

> *"11. Soon after the hearing, the Applicant examined the financial statements for FY 2020- 21 and FY 2021-22 of the Corporate Debtor to learn shocking and surprising details:*
>
> *i. Contrary to the submissions of the RP, it was learnt that the Financial Statements of the Corporate Debtor for FY 2020-21 ("FY 2020-21 Audited Statement") were approved at the AGM of 25.08.2023 (3 days before the hearing held on 29.08.2023). The Annual Report was uploaded on 31.07.2023.*
>
> *Copy of the Financial Statements of the Corporate Debtor for FY 2020-21 is annexed herewith as* ***Annexure A-1***
>
> *ii. The Statutory Auditors of the Corporate Debtor have subsequently resigned and the audited financial statements for FY 2021-22 and FY 2022-23 have not been published. The mere fact of resignation of the Statutory Auditors and inability of the*

RP to appoint any new auditor raises grave concerns on the affairs of the Corporate Debtor and management by the RP.

iii. *Separately, on 27.07.2023, the RP has published the unaudited financial statements of the Corporate Debtor for FY 2021-22 ("FY 2021-22 Unaudited Statement"). Interestingly however, the financial statements for FY 2018-19, 2019-20 have still not been prepared, audited and uploaded by the RP.*

A copy of the unaudited financial statements for FY 2021-22 is annexed herewith as ***Annexure A- 2 .***

iv. *The FY 2020-21 Audited Statement and the FY 2021-22 Unaudited Statement unequivocally prove the submissions of the Applicant that the Corporate Debtor is no longer a going concern. They also show that the RP has made false statements and misled this Hon'ble Tribunal as to the affairs of the Corporate Debtor.*

	FY 2015-16	***FY 2016-17***	***FY 2019-20***	***FY 2020-21***	***FY 2021-22***
Revenue from Operations	*Rs. 1863.39 Million*	*1774.77 Million*	*Rs. 96.61 Million*	*Rs. 9.66 Million*	*Rs. 13.8 Million*
Sale of educational products and technology equipment	*Rs. 345.18 Million*	*Rs. 502.48 Million*	*Rs. 0.11 Million*	***NIL***	*NA*
Assets of Subsidiaries	*NA*	*Rs. 22347.82 Million*	*NA*	*NA*	*NA*
Revenues from Subsidiaries	*NA*	*Rs. 1342.14 Million*	*Rs. 1.62 Million*	***NIL***	*NA*

v. *A perusal of the FY 2020-21 Audited Statement, the FY 2021-22 Unaudited Statement and financial statements for FY 2016-17*

(immediately prior to the commencement of CIRP) would reveal the following contrast in the financial affairs of the Corporate Debtor:

A copy of the Financial Statements of the Corporate Debtor for FY 2016-17 is annexed herewith as ***Annexure A-3.***

vi. *What is even more interesting is that the Statutory Auditor of the Corporate Debtor and the Corporate Debtor have stated that they have "lost control" of all the subsidiaries of the Corporate Debtor. The Corporate Debtor states "Despite regular follow-ups, we have not been able to get the financials from last 3-4 years and in absence of no communication, we are unable to control the subsidiaries located outside India." At the time of commencement of CIRP, the total assets of the subsidiaries of the Corporate Debtor stood at Rs. 2234.78 Crores. Under Clause 6.1.5 of the Resolution Plan, all the interest of the Corporate Debtor in these subsidiaries is to accrue to the Applicant. Now, the Applicant has lot the benefit of these assets and in the absence thereof, the Resolution Plan is unviable.*

vii. *Most importantly, the Statutory Auditor has observed in the FY 2020-21 Audited Statement:*

> *"The Company, has incurred substantial losses, its net worth has been completely eroded, has defaulted in repayment of its loans and related interest, has negative working capital and has applied under the IBC for CIRP. All these conditions has raised substantial doubt about the Company's ability to continue as a going concern." (Emphasis supplied)*
>
> *This observation is ex-facie contrary to the statement made by the Resolution Professional before the Hon'ble Tribunal."*

21. After the arguments qua IA-195/2019 were concluded and the order was reserved on 29.08.2023, the SRA filed an IA-4845/2023, reiterating the pleas canvassed in the written submissions dated 05.09.2023. The arguments in IA

were concluded on 19.09.2023 and order was reserved qua the same. The prayer made in the IA reads thus:

i. *"That this Hon'ble Tribunal take on record the Audited Financial Statement for FY 2020-21 and the unaudited Financial Statement of FY 2021-22 of the Corporate Debtor.*
ii. *That is view of these financial statements, declare that the Corporate Debtor is no longer a going concern.*
iii. *Appropriate Directions to the IBBI under Section 218 of the Insolvency Code and the appropriate regulations for an investigation into the management and affairs of the Corporate Debtor by the Resolution Professional.*
iv. *Appropriate proceedings be initiated against the Resolution Professional under Sections 195 and 340 of the Code of Criminal Procedure, 1973 for making false statements to the Hon'ble Tribunal about the affairs of the Corporate Debtor."*
v. *Direct that the Applicant is no longer required to provide any Performance Bank Guarantee as directed by the Order dated 29.08.2023 passed by the Hon'ble Tribunal."*

22. As can be seen from the contents of the application, the most of contentions espoused therein are reiteration of the pleas raised in the written submissions dated 05.09.2023 (ibid). The averments made in paragraphs 16 and 18 of the application reads thus:-

> *"16. The Applicant further learnt that on 27.07.2023, the Resolution Professional has published the unaudited financial statements of the Corporate Debtor for FY 2021-22 (**FY 2021-22 Unaudited Statement**) in newspapers. A copy of the extract of the unaudited financial statements for FY 2021-22 along with the disclosure to the stock exchanges is annexed herewith **as Annexure A-9.***
>
> *Despite the statement made by the Resolution Professional before the Hon'ble Appellate Tribunal, the Resolution Professional has not yet*

uploaded the audited financial statements of the Corporate Debtor for FY 2017-18, 2018-19, 2019-20.

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18. A perusal of the FY 2020-21 Audited Statement, the FY 2021-22 Unaudited Statement and financial statements for FY 2016-17 (immediately prior to the commencement of CIRP) would reveal the following contrast in the financial affairs of the Corporate Debtor:

	FY 2015-16	*FY 2016-17*	*FY 2019-20*	*FY 2020-21*	*FY 2021-22*
Revenue from Operations	*Rs. 1863.39 Million*	*1774.77 Million*	*Rs. 96.61 Million*	*Rs. 9.66 Million*	*Rs. 13.8 Million*
Sale of educational products and technology equipment	*Rs. 345.18 Million*	*Rs. 502.48 Million*	*Rs. 0.11 Million*	***NIL***	*NA*
Assets of Subsidiaries	*NA*	*Rs. 22347.82 Million*	*NA*	*NA*	*NA*
Revenues from Subsidiaries	*NA*	*Rs. 1342.14 Million*	*Rs. 1.62 Million*	***NIL***	*NA*

23. Nevertheless, the additional pleas espoused by the Applicant raised in the application are that there is a need for issuance of direction to IBBI to conduct investigation under Section 218 of the Insolvency Code as also for initiation of action against the RP under Section 195 of IPC read with Section 340 of the Code of Criminal Procedure 1973. The grounds saliently espoused by the Applicant in IA by SRA/Ebix in support of the application are that the CD is not maintained by the RP as on going concern; the Resolution Plan is not

viable, feasible or implementable; in giving impression to this Tribunal that the CD is an on-going concern, the RP committed offence under Section 195 of IPC, 1860, inviting action under Section 340 of the Code of Criminal Procedure, 1973; having failed to maintain the CD as on going concern, the RP mismanaged the affairs of the Corporate Debtor, thus action need to be initiated against him under Section 218 of IBC, 2016. It is also the submission raised by the Applicant/SRA in the application that it cannot be called upon to pay Rs.400 crores, when there is absolutely no prospect for revival of the Corporate Debtor.

24. While dealing with the various contentions raised by the Applicant to oppose the application for approval of the Resolution Plan, we cannot be oblivious of the fact that the SRA/Ebix made repetitive efforts to withdraw the Resolution Plan and it moved three applications before this Tribunal/Adjudicating Authority, for the purpose. Filing of such applications by the SRA clearly reflect the approach of the SRA/Ebix qua its plan. When the plan was put to votes from 7 p.m. of 21 February 2018 to 7 p.m. of 22 February 2018 and had been placed before this Tribunal on 20 August 2018 and on 5 July 2019 itself i.e., within one year, the SRA/Ebix had filed first application for withdrawal of the plan. In the backdrop, it is difficult to avoid to draw and inference that the SRA/Ebix had changed its intention qua the plan, soon after it was placed for approval by this Tribunal. Regarding the management of financial affairs of the CD, as has been noted in para 18 of the judgment dated 13.09.2021 passed by Hon'ble Supreme Court, it was on 1st August 2018 itself when the allegations qua financial mismanagement of Educomp between 2014-

18 were made and in terms of the Order No. 32/2018 by SFIO/CL-II, MCA had directed investigation in this regard. Thus, the SRA/Ebix was fully conscious about the financial affairs of the CD from the beginning and the concern expressed by it in this regard was duly taken note of by Hon'ble Supreme Court and dealt with, while hearing its appeal preferred against the order of NCLAT, passed by it, reversing the order of this Tribunal, whereby the application filed by the SRA to withdraw the Resolution Plan was allowed.

25. As could be noted in para 37 of the judgment of Hon'ble Supreme Court, in the 16th meeting of CoC, held on 30 March 2020, the RP provided the updates in relation to CBI and SFIO investigation qua the CD. As per the updates provided by the RP, upon a complaint by SBI on behalf of a consortium of banks, the CBI searched the premises of Educomp on 11 February 2020; after the initiation of enquiry by the MCA on 1st August 2018, the SFIO had requisitioned documents/information which had been provided; the last communication from the SFIO was received on 27 February 2020; in response to the grievance of some members of the CoC that the RP had informed them about the investigation belatedly, the RP explained that the communication could only take place only after completion of the investigation. Nevertheless, the RP took note of the suggestion that he would add all the members of CoC to a Whatsapp group, where the real time updates could be shared. The position regarding the investigation by SFIO and CBI could also be noticed in para 38 and 39 of the judgment of Hon'ble Supreme Court to the extent that on 8th May 2020, the RP had provided further updates in relation to CBI and SFIO investigation noting that they were still on going and the last communication

received from the SFIO was dated 4th September 2020. To deal with the plea of the Applicant/SRA regarding pending investigation (ibid), Hon'ble Supreme Court viewed that the Ebix/SRA was responsible for conducting its own due diligence of Educomp and could use that as a reason to revise/modify their own approved Resolution Plan. To further address its fear in this regard, Hon'ble Supreme Court could take a view that the Section 32 (a) of IBC grants immunity to the Corporate Debtor qua the offences committed by the CD prior to the commencement of CIRP and it cannot be prosecuted for such offences from the date of the approval of Resolution Plan, when the plan result in change of management. Para 181 of the judgment has been reproduced hereinabove. Nevertheless at the cost of repetition, relevant excerpt of said para is again reproduced herein below: -

> *"181 Ebix has also tried to argue that its position has changed manifestly because of new allegations which have come up in relation to the financial conduct of Educomp. However, in this regard, it is pertinent to note Clause 1.3.2 of the RFRP which directs prospective Resolution Applicants to conduct their own due diligence. In so far as is relevant, it reads:*
>
> > *"1.3.2 The Resolution Applicant(s) shall be provided access to the electronic as well as physical data room ("Data Room") established and maintained by the Company acting through the Resolution Professional and coordinated by PwC in order to conduct a due diligence of the business and operations of the Company"*
>
> *Similarly, Clause 1.13.6 also requires prospective Resolution Applicants to conduct independent investigations:*
>
> > *"1.13.6 This RFRP does not purport to contain all the information required by the Resolution Applicant. The Resolution Applicant should conduct independent investigations and analysis and should check the accuracy,*

reliability and completeness of the information in this RFRP and obtain independent advice from appropriate sources, prior to making an assessment of the Company."

Ebix was responsible for conducting their own due diligence of Educomp and could not use that as a reason to revise/modify their approved Resolution Plan. In any event, Section 32A of the IBC grants immunity to the Corporate Debtor for offences committed prior to the commencement of CRIP and it cannot be prosecuted for such offences from the date the Resolution Plan has been approved by the Adjudicating Authority under Section 31, if the Resolution Plan results in a change of management or control of the Corporate Debtor subject to certain conditions. Section 32A reads as follows:"

26. The grievance of the Applicant/SRA regarding the affairs of the RP could also be addressed by Hon'ble Supreme Court in para 185 of its judgment. It was the plea raised by the Ld. Counsel appearing for the SRA/Ebix before the Hon'ble Supreme Court that the RP failed to perform the duties made incumbent upon it in terms of the provisions of Section 29 of IBC, as it failed to inform Ebix/SRA about on-going investigation against the CD. Hon'ble Supreme Court noted the plea and viewed that though the plea had been rejected in earlier part of the judgment, but could be assessed again. Their lordships viewed that the RP had provided the SRA the relevant information required under Section 29 to formulate its Resolution Plan. Regarding the pending investigation it could be viewed in the judgment passed by Hon'ble Supreme Court in the appeal of SRA/Ebix that it was aware of all the proceedings before this Tribunal since the various applications were often listed along with the approval application in which it continued to appear. Finally, the Hon'ble Supreme Court categorically viewed that the RP did not falter in its

duty to provide relevant information to SRA/Ebix. Though, the paragraphs 185 to 191 of the judgment, wherein the issue could be dealt with, have been reproduced hereinabove, but at the cost of repetition and for relevant reference, para 191 is reproduced herein below again: -

> *"191 Ebix cannot dispute that E-RP had provided it the relevant information required under Section 29 to formulate its Resolution Plan. The issues in relation to financial investigations into the conduct of Educomp arose when the two articles were published by The Wire, both of which were after the Approval Application had been filed by the E-RP. Further, Ebix was aware of all the proceedings before the NCLT since the various applications were often listed along with the Approval Application, in which it continued to appear. Finally, Ebix has brought nothing on record to prove that E-RP knew of the SFIO and CBI investigations before a regulatory disclosure was made by Educomp. Hence, it cannot be stated that the E-RP had faltered in its duty to provide relevant information to Ebix."*

27. The aforementioned view could be taken by Hon'ble Supreme Court, when their lordships were fully conscious about the duty of the RP to manage the operations of the Corporate Debtor during CIRP period and to keep it as a going concern. As has been noted in para 132 and 144 of the judgment, such duty was incumbent upon the RP in terms of the provisions of Section 23(1) and 23(2) of IBC. The para has been reproduced hereinabove.

28. Here, it would not be out of place to refer to Regulation 36(2) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, which provides for highlighting the key selling propositions, needed to be contained in the Information Memorandum (IM). The selling point also includes the operations and financial statements qua the CD as significant information.

Besides, it also contains the latest Annual Financial Statements, Audited Financial Statements of the Corporate Debtor for the previous two financial years and provisional Financial Statement for the current financial year. As can be seen from Regulation 36(2)(j) of the Regulations, the IM also needs to contain the CD's (Company's) overview including snapshot of business performance qua it, key contracts, key investment highlights and other factors which bring out the value as a going concern over and above the assets of the Corporate Debtor such as brought forward losses in the Income Tax Return, input credit of GST, key employees, key customers, supply chain linkages, utility connections and other pre-existing facilities. The clause reads thus: -

"36. Information memorandum.

.....

(2) .....

(j) company overview including snapshot of business performance, key contracts, key investment highlights and other factors which bring out the value as a going concern over and above the assets of the corporate debtor such as brought forward losses in the income tax returns, input credit of GST, key employees, key customers, supply chain linkages, utility connections and other pre-existing facilities."

29. As can be seen from Regulation 36B(1) of the aforementioned regulations, the RP issues the Information Memorandum, Evaluation Matrix and request for Resolution Plan within 05 days of date of issue of the provisional list of Prospective Resolution Applicant under sub-regulation (10) of Regulation 36A to every PRA as also to every PRA who contested the decision of the RP against its non-inclusion in the approval list. The request for Resolution Plans

given to PRAs along with IM and EM allows 30 days' time to PRA to submit the Resolution Plan. The steps taken with reference to RFRP are enumerated in Regulation 36B in detail. Thus, when the SRA/Applicant submitted its plan with reference to the Information Memorandum which contained the complete details qua the CD, which also included the Financial Statements as also the value as a going concern in respect of the CD, at this stage, it is not open to it to try to back out from the plan on the plea that the CD is not an on-going concern.

30. The factual and legal position regarding the submission of Resolution Plan by the Applicant and the ramification of the same could be dealt with in paragraphs 133 to 135 of the judgment. In para 135, the Hon'ble Supreme Court categorically noted that the Resolution Plan is submitted after consideration of the Information Memorandum (IM). Not only this, in para 152 of the judgment, Hon'ble Supreme Court also took notice of the ramification of issuance and acceptance of LOI. The CoC issues a LOI to a Successful Resolution Applicant stating that it has been selected as the Successful Resolution Applicant and its plan would be submitted to the Adjudicating Authority for its approval. The SRA is typically required to accept the LOI unconditionally and submit a PBG. Sequentially, the issuance of LOI is followed by its unconditional acceptance by the SRA. Having analysed the ramifications of the submission of Resolution Plan with reference to IM and action upon LOI, Hon'ble Supreme Court categorically ruled that the binding nature of the Resolution Plan on the Resolution Applicant who is the proponent of the plan which has been accepted by the CoC cannot remain indeterminate at the

discretion of the Resolution Applicant. Hon'ble Supreme Court analysed the issue in detail in para 152 and 153 of the judgment. The paras have been reproduced hereinabove.

31. Not only the SRA/Ebix could be apprised about the status of the CD as on-going concern in terms of the IM, on which it acted upon, but also it could know regarding the status of the CD from the invitation for Expression of Interest in Form G of Schedule I to the IBBI (Insolvency Resolution Process for Corporate Persons) Regulation 2016. In 6th row of the invitation for Expression of Interest, it was required to be mentioned specifically that what was the quantity and value of main products/services sold in the last financial year. So, having submitted the Resolution Plan after considering the invitation for Expression of Interest as also Information Memorandum, the SRA/Ebix cannot be allowed to contend that its own plan should be rejected on the ground that the CD is not an on-going concern.

32. The concern regarding breakout of Covid-19 pandemic, the economic slowdown flagged by the SRA/Ebix could also be addressed by Hon'ble Supreme Court in para 147 of the judgment. The para has been reproduced hereinabove. Hon'ble Supreme Court could also consider the plea espoused on behalf of the SRA/Ebix regarding viability, implementability of the plan. The plea raised by the Ebix/SRA regarding the delay in approval of plan by Adjudicating Authority and the ramification thereof could also be examined by Hon'ble Supreme Court in its judgment dated 13.09.2021. None of the contentions could find favour with their lordships. The contentions in this regard raised on behalf of SRA/Ebix before Hon'ble Supreme Court could be noted in the para 86(h) and

(j) of the judgment, the para has been reproduced hereinabove. The plea could be dealt with in para 147 to 160 and para 177 to 181 of the judgment. The paras 177, 179 and 181 of the judgment may be referred to in particular, to deal with the arguments advanced on behalf of the SRA/Ebix, regarding the current financial condition of the SRA to buttress the plea for rejection of application for approval of the plan. In para 179 of the judgment, Hon'ble Supreme Court ruled that the submission of the Ebix regarding the scenario emerged after submission of the Resolution Plan to Adjudicating Authority could not be a basis to permit the SRA to backout from the plan. Para 179 of the judgment of Hon'ble Supreme Court reads thus: -

> *"179 This submission of Ebix cannot be accepted since the terms of the RFRP or the Resolution Plan relate to the validity of the Resolution Plan for the period of negotiation with the E-CoC and not for a period after the Resolution Plan is submitted for the approval of the Adjudicating Authority. The time which may be taken before the Adjudicating Authority is an imponderable which none of the parties can predict. In fact, this is emphasized by Clause 1.3.7 of the RFPF which contains a schedule of the Resolution Plan submission process. As regards the approval of the Adjudicating Authority, it provides clearly that there is no time-line:*
>
> > *"1.3.7 Schedule of Resolution Plan Submission Process*
> >
> > *[…]*
> >
> > *11. Approval of NCLT regarding the Resolution Plan of Successful Resolution Applicant – As per NCLT."*
>
> *Parties cannot indirectly impose a condition on a judicial authority to accept or reject its Plan within a specified time period, failing which the CIRP process will inevitably come to an end. In this case, the draft Resolution Plan of Ebix was submitted on 29 January 2018 and remained valid for the term of the multiple rounds of negotiations with*

the E-CoC, until its submission to the Adjudicating Authority on 7 March 2018, which was within the six-month period envisaged in the Plan."

33. In fact, what the Ebix/SRA could not achieve directly i.e., by withdrawing the Resolution Plan, it is trying to achieve indirectly i.e., by opposing the present application filed by the RP for approval of the plan. In **K.C. Gajapati Narayan Deo vs. State of Orissa** (Civil Appeal No. 71 of 1953), Hon'ble Supreme Court categorically ruled that one cannot do indirectly what he cannot do directly. The relevant excerpt of para 21 reads thus: _

"Whole doctrine of colourable legislation is based upon the maxim that you cannot do indirectly what you cannot do directly."

34. Even otherwise also, the SRA/Ebix had submitted the Resolution Plan consciously and the exercise of submission of plan by it excluded many financial and legal situation from the process. Even if as per the thought of the SRA/Ebix, there are infirmities in the Resolution Plan, which should be ground to reject the same, it is not open for the SRA/Ebix to take such plea. It is stair decisis that no man can advantage of his own wrong (Nullus commodum copere potest de injuria sua propria). In **Ashok Kapil vs. Sana Ullah (Dead) and Others** (http://JUDIS.NIC.In) decided on 25.09.1996, the Hon'ble Supreme Court ruled thus: -

"But can the respondent be assisted by a court of law to take advantage of the mischief committed by him? The maxim "Nullus commodum copere potest de injuria sua propria" (No man can take advantage of his own wrong) is one of thee salient tenets of equity Hence, in the normal course, respondent can not secure the assistance of a court of law for enjoying the fruit of his own wrong".

Such a view could also be taken by the Hon'ble Supreme Court in **Eureka Forbes Limited vs. Allahabad Bank & Ors.** in Civil Appeal No. 4029 of 2010 (@SLP © No. 3883 of 2008), the relevant excerpts of the Judgement read thus:

> *"36 .....The purpose was also to prevent wrong doers from taking advantage of their wrong/mistakes, whether permissible in law or otherwise. These preventive measures are required to be applied with care and purposefully in accordance with law to ensure that the mischief, if not entirely extinguished, is curbed.*
>
> *37. Maxim Nullus commodum capere potest de injuria sua propria has a clear mandate of law that, a person who by manipulation of a process frustrates the legal rights of others, should not be permitted to take advantage of his wrong or manipulations. In the present case Respondent Nos. 2 & 3 and the appellant have acted together while disposing off the hypothecated goods, and now, they cannot be permitted to turn back to argue, that since the goods have been sold, liability cannot be fastened upon respondent Nos. 2 & 3 and in any case on the appellant."*

The view as above could also be taken by their Lordships of Hon'ble Supreme Court in the matter of "**Indore Development Authority vs. Shailendra (Dead) Through LRS. & Ors.**" (Civil Appeal No. 20982 of 2017). The relevant excerpts of the judgement reads thus:

> *"106 .....It is a settled proposition that one cannot be permitted to take advantage of his own wrong. The* ***doctrine "commodum ex-injuria sua Nemo habere debet****" means convenience cannot accrue to a party from his own wrong. No person ought to have advantage of his own wrong. A litigant may be right or wrong. Normally merit of lis is to be seen on date of institution. One cannot be permitted to obtain unjust injunction or stay orders and take advantage of own actions. Law intends to give redress to the just causes; at the same time, it is not its policy to foment litigation and enable to reap the fruits owing to the*

delay caused by unscrupulous persons by their own actions by misusing the process of law and dilatory tactics."

In view of the aforementioned, the Resolution Applicant/Ebix cannot be permitted to argue for rejection of its own Plan. Having submitted a Plan, the Ebix/SRA cannot say that the same does not deserve to be approved.

35. Though in the wake of the Judgement of Hon'ble Supreme Court (ibid), there is no scope left to Ebix/SRA to question its own Plan, still we may refer to the contents of para 18 of the IA-4845/2023 filed by the SRA. In the said para the SRA/Ebix itself has taken stand that for the financial year 2020-21, the revenue of CD from operation was INR 13.8 million. It is also the stand taken by the SRA/Ebix in para 16 of the application that the Resolution Professional had published unaudited financial statements of the Corporate Debtor for the financial year 2020-21 in newspaper. As per the stand taken by the SRA/Applicant itself, in para 15 of the application that on search qua the portal of Ministry of Corporate Affairs and the Stock Exchanges the SRA could see that the Financial Statement of F.Y. 2020-21, approved at the AGM of the CD on 25.08.2023. The SRA has enclosed a copy of the audited financial statement qua the financial debtor for F.Y. 2020-21 as Annexure A-6 to IA-4845/2023 (ibid). As can be seen from the financial statement, the CD had total income of INR 14.73 million as on 31.03.2021. Besides, Mr. Neeraj Malhotra, Ld. Sr. Counsel for the RP submitted that for the Assessment Year 2021-22 the revenue of the CD could rise to 40 million and the revenue for the year 2021-22 in fact reflects the impact of the pandemic Covid-19. The Clause 3 of the Financial Performance canvassed in the audited financial statement for the

Financial Year 2020-21 reflecting the total income of the CD as on 31.03.2021 reads thus:

> ***"3. OPERATING RESULTS AND BUSINESS:***
>
> ***On Standalone basis Company's*** *total income stands at Rs. 14.73 million as on March 31, 2021 as compared to Rs. 106.58 million as on March 31, 2020, a decline of 86.18%. The loss before taxes is Rs. 505.98 million as on March 31, 2021 as against loss before taxes of Rs. 1513.68 million as on March 31, 2020.*
>
> *On Consolidated basis Company's total income stands at Rs. 14.73 million as on March 31, 2021 as compared to Rs. 108.20 million as on March 31, 2020, registering a decline of 86.38 %. The loss before tax and exceptional items stands at Rs. 511.87 million as on March 31, 2021 as against loss of Rs. 1438.03 million as on March 31, 2020.*
>
> ***MANAGEMENT DISCUSSION AND ANALYSIS REPORT***
>
> *Management's Discussion and Analysis Report for the year under review detailing economic scenario and outlook, as stipulated under Schedule V of the SEBI (Listing Obligations and Disclosures Requirements) Regulations, 2015 ("SEBI LODR Regulations") is presented in a separate section and forms integral part of this Report."*

36. In **re Indor Rama Textile Limited** (2013)4CompLJ141(Del), Hon'ble Delhi High Court viewed that a Company can be said to be transferred as going concern when the assets and liabilities being transferred constitute a business activity capable of being run independently for a foreseeable future. It is the case of Ebix itself that the CD is having the business activity capable of being run independently. From the aforementioned, it is more than clear that the CD is an ongoing concern. We are unable to appreciate that what persuaded the SRA/Ebix to allege commission of offence under Section 195 by the RP. We do

not see that in what manner, the RP could make false statement about the affairs of the Corporate Debtor. No averment made in the application (IA-4845/2023) satisfies the ingredients of Section 195 of the Indian Penal Code. One can be said to have committed an offence under Section 195 of the Code only when he gives or fabricates the false evidence intending thereby to cause or knowing it to be likely that he will thereby cause any person to be convicted of an offence which by the law for the time being in force in India is punishable with life imprisonment or imprisonment for 07 years. Section 195, 195A and 196 of the IPC reads thus:

> ***"195. Giving or fabricating false evidence with intent to procure conviction of offence punishable with imprisonment for life or imprisonment.—****Whoever gives or fabricates false evidence intending thereby to cause, or knowing it to be likely that he will thereby cause, any person to be convicted of an offence which 1 [by the law for the time being in force in 2 [India]] is not capital, but punishable with 3 [imprisonment for life], or imprisonment for a term of seven years or upwards, shall be punished as a person convicted of that offence would be liable to be punished.*
>
> *Illustration*
>
> *A gives false evidence before a Court of Justice, intending thereby to cause Z to be convicted of a dacoity. The punishment of dacoity is 4 [imprisonment for life], or rigorous imprisonment for a term which may extend to ten years, with or without fine. A, therefore, is liable to 5 [imprisonment for life] or imprisonment, with or without fine.*
>
> ***[6][195A. Threatening any person to give false evidence. —****Whoever threatens another with any injury to his person, reputation or property or to the person or reputation of any one in whom that person is interested, with intent to cause that person to give false evidence shall*

be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both;

and if innocent person is convicted and sentenced in consequence of such false evidence, with death or imprisonment for more than seven years, the person who threatens shall be punished with the same punishment and sentence in the same manner and to the same extent such innocent person is punished and sentenced.]

196. Using evidence known to be false. — *Whoever corruptly uses or attempts to use as true or genuine evidence any evidence which he knows to be false or fabricated, shall be punished in the same manner as if he gave or fabricated false evidence."*

37. Even otherwise also, as has been held by Hon'ble Supreme Court in **Amarsang Nathaji Vs. Hardik Harshadbhai Patal & Ors.** (Civil Appeal No. 11120 of 2016) (arising out of SLP (C) No. 13749 of 2016) decided on, 23 November, 2016, the mere fact that a person has made a contradictory statement in a judicial proceeding is not by itself always sufficient to justify prosecution and it must be shown that the defendant has intentionally given a false statement at any stage of the judicial proceedings. Besides, even after the above position emerges also, still the court has to form an opinion that it is expedient in the interest of justice to initiate an enquiry into the offences of false evidence. An offence is against public justice. Para 6 to 8 of the judgment reads thus: -

"6. The mere fact that a person has made a contradictory statement in a judicial proceeding is not by itself always sufficient to justify a prosecution under Sections 199 and 200 of the Penal Code, 1860 (45 of 1860) (hereinafter referred to as "IPC"); but it must be shown that the defendant has intentionally given a false statement at any stage of

the judicial proceedings or fabricated false evidence for the purpose of using the same at any stage of the judicial proceedings. Even after the above position has emerged also, still the court has to form an opinion that it is expedient in the interests of justice to initiate an inquiry into the offences of false evidence and offences against public justice and more specifically referred to in Section 340(1) CrPC, having regard to the overall factual matrix as well as the probable consequences of such a prosecution. (See K.T.M.S. Mohd. V. Union of India). The court must be satisfied that such an inquiry is required in the interests of justice and appropriate in the facts of the case.

7. In the process of formation of opinion by the court that it is expedient in the interests of justice that an inquiry should be made into, the requirement should only be to have a prima facie satisfaction of the offence which appears to have been committed. It is open to the court to hold a preliminary inquiry though it is not mandatory. In case, the court is otherwise in a position to form such an opinion, that it appears to the court that an offence as referred to under Section 340 CrPC has been committed, the court may dispense with the preliminary inquiry. Even after forming an opinion as to the offence which appears to have been committed also, it is not mandatory that a complaint should be filed as a matter of course. (See Pritish Vs. State of Maharashtra).

8. In Iqbal Singh Marwah V. Meenakshi Marwah, a Constitution Bench of this Court has gone into the scope of Section 340 CrPC. Para 23 deals with the relevant consideration: (SCC pp. 386-87).

> *"23. In view of the language used in Section 340 CrPC the court is not bound to make a complaint regarding commission of an offence referred to in Section 195(1)(b), as the section is conditioned by the words "court is of opinion that it is expedient in the interests of justice". This shows that such a course will be adopted only if the interest of justice requires and not in every case. Before filing of the complaint, the court may hold a preliminary enquiry and record a finding to the effect that it is expedient in the interests of justice that enquiry should be made into any of the offences referred to*

in Section 195(1)(b). This expediency will normally be judged by the court by weighing not the magnitude of injury suffered by the person affected by such forgery or forged document, but having regard to the effect or impact, such commission of offence has upon administration of justice. It is possible that such forged document or forgery may cause a very serious or substantial injury to a person in the sense that it may deprive him of a very valuable property or status or the like, but such document may be just a piece of evidence produced or given in evidence in court, where voluminous evidence may have been adduced and the effect of such piece of evidence on the broad concept of administration of justice may be minimal. In such circumstances, the court may not consider it expedient in the interest of justice to make a complaint."

38. Also, in **Ved Prakash Yadav vs. Sanjay Kumar** (Criminal Appeal No. 866/2015 decided on 30.08.2017), Delhi High Court ruled that when the Appellant did not intend to stake any claim over the money which was deposited in the trial court, there could be no cause to initiate proceedings u/s 340 of Cr.P.C. relevant excerpt of the judgment read thus: -

"11. It has been submitted on behalf of the appellant that the statement made in the suit regarding the ownership and possession of the property in question being in the hands of the appellant was not incorrect. It was meant for the purposes of obtaining permanent/mandatory injunction against the respondent for not causing any interference in the peaceful enjoyment of the said property. True it is that the property was conveyed to one Mr. Shailesh Kumar Awasthi but the possession still remained with the appellant. The property in question was not conveyed to the respondent only on the ground that the balance consideration amount was not paid."

XXX

In Chajoo Ram v. Radhey Shyam, (1971) 1 SCC 774: AIR 1971 SC 1367, the Supreme Court has held as hereunder: -

> *"7. The prosecution for perjury should be sanctioned by courts only in those cases where the perjury appears to be deliberate and conscious and the conviction is reasonably probable or likely. No doubt giving of false evidence and filing false affidavits is an evil which must be effectively curbed with a strong hand but to start prosecution for perjury too readily and too frequently without due care and caution and on inconclusive and doubtful material defeats its very purpose. Prosecution should be ordered when it is considered expedient in the interests of justice to punish the delinquent and not merely because there is some inaccuracy in the statement which may be innocent or immaterial. <u>There must be prima facie case of deliberate falsehood on a matter of substance and the court should be satisfied that there is reasonable foundation for the charge.</u>*

39. Also, in **Seema Thakur vs. Union of India & Ors.** (Crl. M.A. 19647/2012 decided on 16th February, 2017) Hon'ble Delhi High Court viewed that to impute criminality, an element of mens rea need to be present. The relevant excerpt of the judgment reads thus:-

> *"14. It is trite that to impute criminality, an element of mens rea has to be found. It is also well settled that it is sine qua non for initiation of criminal action by the court under Section 340 Cr.P.C. that satisfaction as to the expediency of such course is reached {Iqbal Singh Marwah vs. Meenakshi Marwah, (2005) 4 SCC 370}."*

40. In **Indian Structural Engineering Company Private Limited vs. Pradip Kumar Saha & Ors.**, a Division Bench of Hon'ble Calcutta High Court ruled that the court has to take a very cautious approach in dealing with application u/s 340 of the Cr. P.C. and should initiate the proceedings only if it is absolutely necessary to preserve the purity and dignity of the judicial system.

41. In view of the aforementioned, we do not find any merit in the objection espoused by the Ebix/SRA qua the IA(IBC)-195/2018 as also in IA-4845/2023, thus the same are nixed and the IA-4845/2023 is rejected.

42. As can be seen from the aforementioned, the RP had filed CA-160(PB)2018 to seek directions from this Tribunal (Adjudicating Authority) regarding the fate of the voting share (1.19%) of CSEB, which sent an email dated 23.02.2018 espousing that it wanted its affirmative vote to be recorded qua the Resolution Plan but could not participate in the voting process due to technical error. Though Ebix/SRA opposed its own Plan and advanced prolix arguments, even by filing IA-4845/2023, after we had reserved the orders qua CA-195/2018, but it never raised the plea regarding the vote shares in support of the Resolution Plan. Even otherwise also, Hon'ble Supreme Court in Judgement dated 13.09.2020 (supra) viewed that the clearance qua the vote share of CSEB, conveyed belatedly was a mere formality. The para 175 of the Judgement of Hon'ble Supreme Court in which the issue of delayed casting of vote by CSEB could be dealt with has been reproduced herein above, but it would be pertinent to refer to the same again, to deal with the subject matter of CA-160(PB)2018. The relevant excerpt of Judgement of Hon'ble Supreme Court (ibid) reads thus:

> *"175 ……. Ebix submitted its draft Resolution Plan after the last date of 27 January 2018, and after securing an extension from the Adjudicating Authority, on 29 January 2018. Ebix took the benefit of an extension of time which was granted to it to submit its Resolution Plan. In the absence of an extension of time, it would not have been permitted to enter the fray. After multiple rounds of negotiations, on 9 February 2018, Ebix was declared the successful Resolution Applicant*

and a LOI was issued by the E-CoC. On 17 February 2018, Ebix's Resolution Plan was approved by a 74.16 per cent voting share of the E-CoC, which was subsequently upgraded to 75.35 per cent by CSEB's vote being added belatedly on 23 February 2018. While it is true that the votes of CSEB were received in favour of the Resolution Plan on a later date, all the parties including Ebix proceeded on the notion that the Resolution Plan has been approved by the requisite majority of seventy-five per cent of the voting share of the E-CoC as was required then (now the requisite percentage has been reduced to sixty-six per cent pursuant to an amendment). Thus, the CSEB Application filed before the NCLT seeking a clearance of its delayed vote was a mere formality and there was no controversy raised in relation to that application at that stage. In fact, the Approval Application for the approval of the Resolution Plan was filed before the NCLT on the basis that the Plan has been duly approved by the requisite majority of the CoC. No objections were raised against the Approval Application on the ground that the threshold of seventy-five per cent of votes was not met. The Resolution Plan dated 19 February 2018 and the addendum dated 21 February 2018 for a total bid amount of Rs 400 crores were then submitted by the E-RP to the Adjudicating Authority for approval on 7 March 2018."

43. In terms of the view taken by Hon'ble Supreme Court, as above, the CA-160(PB)2018 stands allowed.

44. In para 153 of the Judgement dated 13.09.2021, Hon'ble Supreme Court viewed that the negotiations between the Resolution Applicant and the CoC are brought to an end after the CoC's approval and the only conditionality remains is the approval of the Adjudicating Authority, which has a limited jurisdiction to confirm or deny the legal validity of the Resolution Plan. The relevant excerpts of the para 153 of the Judgement reads thus:

"153 ……. The IBC does not envisage a dichotomy in the binding character of the Resolution Plan in relation to a Resolution Applicant between the stage of approval by the CoC and the approval of the Adjudicating Authority. The binding nature of a Resolution Plan on a Resolution Applicant, who is the proponent of the Plan which has been accepted by the CoC cannot remain indeterminate at the discretion of the Resolution Applicant. The negotiations between the Resolution Applicant and the CoC are brought to an end after the CoC's approval. The only conditionality that remains is the approval of the Adjudicating Authority, which has a limited jurisdiction to confirm or deny the legal validity of the Resolution Plan in terms of Section 30 (2) of the IBC. If the requirements of Section 30(2) are satisfied, the Adjudicating Authority shall confirm the Plan approved by the CoC under Section 31(1) of the IBC."

45. In the wake of the view taken by the Hon'ble Supreme Court as above, we may refer to Section 30(2) of IBC 2016, which read thus:

"*30. Submission of resolution plan. –*

(1) ….

(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan –

(a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the [3][payment] of other debts of the corporate debtor;

[4][(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 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 purpose 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;]

(c) provides for the management of the affairs of the Corporate debtor after approval of the resolution plan;

(d) the implementation and supervision of the resolution plan;

(e) does not contravene any of the provisions of the law for the time being in force

(f) confirms to such other requirements as may be specified by the Board.

[Explanation. — For the purposes of clause (e), if any approval of shareholders is required under the Companies Act, 2013(18 of 2013) or any other law for the time being in force for the implementation of actions under the resolution plan, such approval shall be deemed to have been given and it shall not be a contravention of that Act or law.]"

46. In terms of the aforementioned provision of the Code, the Resolution Professional shall examine each Resolution Plan received by him to confirm that the Plan – (i) provides for the payment of Insolvency Resolution Process cost in a manner specified by the board in priority to the payment of the other debts of the Corporate Debtor; (ii) provides for the payment of debt of Operational Creditor in such manner as specified by the board, which should not be less than the amount to be paid to such creditor in the event of liquidation of a corporate debtor under Section 53 or the amount that would have been paid to such creditor, if the amount to be distributed under the Resolution Plan had been distributed in accordance with order of priority in sub Section 1 of Section 53, whichever is higher and provides for the payment of debt of Financial Creditor, 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 liquidation of the Corporate Debtor; (iii) provides for management of the affairs of the Corporate Debtor after approval of the Resolution Plan; (iv) provides for implementation and supervision of the Resolution Plan; (v) does not contravene any of the provision of the law for the time being in force.

47. As can be seen from the Resolution Plan dated 19.02.2018, the proposal for repayment of the debt to Operational Creditors of the Company in a manner that the amount received by the Operational Creditor not less than the amount which would have been otherwise received by them in the event of liquidation of the Company shall in any event be made before the expiry of 30 days after the approval of the Plan by this Tribunal has been made in Section 6.1.1 and Section 8.5 of the Plan. The proposal for payment of liquidation value due to the dissenting member of the CoC and provision for making such payment is there in Section 6.1.5 and Section 8.5 of the Resolution Plan. The proposal for payment of the Insolvency Resolution Process cost in priority is there in Section 6.1.1 and Section 8.5 of the Resolution Plan. The term of the Plan and its implementation schedule is given in Section 7 of the Resolution Plan. The Plan provides for management and control of the business of the CD during the term of the Plan. It has been mentioned in key note of the Plan that Section 8.2 of the Resolution Plan provides for adequate means for supervising the implementation of the Resolution Plan. The statement as to how the Resolution Applicant has dealt with the interest of all stakeholders, including financial creditors and operational creditors of the Company is there in Section 6.1.1 to 6.1.7 of the Plan. We could refer to Sections 4.2 and 4.3 of the Plan to find

mechanism regarding management and control of the affairs of the Company post the transfer date. Section 8 of the Plan also provides manner of implementation and supervision of the proposed transaction. The Sections 4.2, 4.3, 6.1.1, 6.1.2, 6.1.5, 6.1.7, 8.5 and 8.7 of the Resolution reads thus:

"*4.2 Proposed Board of Directors for the Company*

The Resolution Applicant proposes to reconstitute the current Board of Directors (BOD) of the Company immediately on transfer of management control, where it is selected as the Successful Resolution Applicant by CoC and same is approved by Hon'ble NCLT.

The Resolution Applicant proposes to induct people with significant experience in the area of financial and governance to ensure that there is strong oversight over the operations of the Company, and new management of the Company adheres to strict financial discipline.

Proposed Board of Directors by the Resolution Applicant are as follows:

Robin Raina	*Mr. Raina is Chairman of the Board, President and CEO at Ebix, Inc.* *Mr. Raina serves as the Director on the Board of other Ebix group entities internationally. He has been leading the Ebix organization since 1999 and has been instrumental in playing the key role in the transformational growth of Ebix since 1,999. Proposed new management of the Company will directly report to Mr. Raina, and he will be personally involved in overseeing the operations of the Company (once Ebix group is awarded as successful applicant) to ensure quick turnaround of the Company.*
Pavan Bhalla	*Pavan Bhalla is an independent director on the Board of Ebix, Inc., He is also the Chairman of Audit Committee of Ebbs, Inc. Mr. Bhalla holds a master's degree in business administration from the University of Chicago's Booth School of Business,*

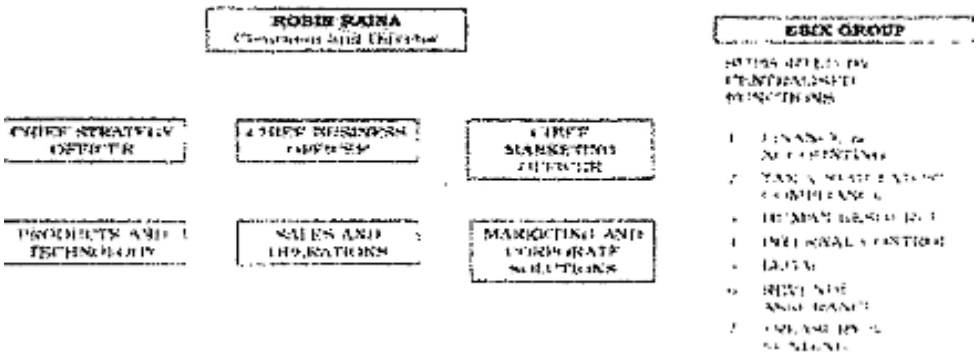
	and has more than 25 years of experience in the area of finance, control and governance. *The Resolution Applicant proposes to have Mr. Bhalla as independent director on the Board of the Company, to ensure that the Company follows strong financial discipline and has in place robust internal control mechanism.*
Neil D. Eckert	*Neil D. Eckert has been director on the Board of Ebix, Inc., since 2005. Mr. Eckert has significant experience in the area of business strategy, capital markets and technology.* *The Resolution Applicant proposes to have Mr. Eckert as independent director on the Board of the Company, and leverage his experience in area of business strategy, fund raising and expansion of operations in the international markets.*
Gagan Sethi	*Gagan is Group CTO of Elix, Inc. He has done Masters in Information Technology from University of Phoenix, and Bachelors in Computer Science from Delhi University* *Gagan has more than 20 years of experience in the field of technology, particularly in the area of enterprise solutions. He played significant role in turning around the upgrading products of A.DAM (Health S learning company, acquired by Boix in 2011) and ensured that A.D.A.M products keep pace with latest technology and are continuously evolving. His experience will help in re-energizing the R&D team of the Company, and coming with new products leveraging latest technology and tools.*
Vikas Verma	*Vikas Verma is professionally qualified in Finance with considerable expertise in the areas of Financial Planning & Analysis, General Accounting, Legal, Tax & Regulatory compliances, Mergers & Acquisitions,*

	Running Global Teams in Finance Functions serving multiple Jurisdictions. *Since last 16 years, Mr. Vikas is working with Ebix Software India Private Limited and has held various senior and strategic roles within Global Finance Function. Prior to Epix. Mr. Vikas has worked with Word Bank, New Delhi for two years*

4.3 New management structure for the Company

4.3.1 As mentioned in Section 3.5 above, Ebix group's well-defined acquisition and integration strategy, which has been consistently followed since 2004. The Resolution Applicant will follow the similar group strategy to ensure quick integration with overall Ebix organization.

4.3.2 ***Overall Responsibility*** *- Mr. Raina (Group CEO) will have direct oversight on the new management of the Company, to ensure speedy recovery from the existing business affairs of the Company. High level management structure of the Company (once it is taken over by Ebix group) is outlined below:*



Note: the details mentioned in the plan are not legible.

4.3.3 Sumit Khadria is the CFO of Ebix India's operations. He will directly work with Ebix Group CEO - Mr. Raina, to ensure integration of the Company within overall Ebix organization. Sumit is

a qualified Chartered Accountant from Institute of Chartered Accountants of India (ICAI) with more than 16 years of professional experience. Prior to joining Ebix group, Sumit was Partner with Ernst & Young India with subject matter expertise in the area of International tax & Regulatory matters,

4.3.4 The Resolution Applicant believes in the retention of existing sales and operational workforce of the Company (to the extent possible) for the successful revival of the business. Once the Resolution Applicant gets control of the management of the Company, it will start engaging with the existing Sales head (CBO) of the Company, who will directly report of Group CFO (Mr. Raina) and will come with new business plan and overall growth strategy for the Company. Sales and service delivery team will report into CBO

4.3.5 The Resolution Applicant also intends to recruit best of the talent from other e-learning companies in the country to further strengthen core operations of the Company. In addition, the Resolution Applicant is also looking for other e-learning targets in India, which will not only help in consolidation of e-learning market but would also bring in new talent to the Company and help in accelerating the revival of its business.

4.3.6 Chief Strategy Officer (CSO) The Resolution Applicant proposes to have in place C90, who will be responsible for organic and inorganic business growth, and operational efficiency. CSO will also be responsible for managing new product innovation and technology.

43.7 Chief Marketing Officer (CMO) The Resolution Applicant proposes to retain current marketing team of the Company, with direct oversight by Mr. Bhavik Vasa Chief Growth Officer of Ebix Cash (Financial Services exchange of Ebix group in India. Bhavik Vasa as Chief Growth officer at EbixCash, loads the charge as Business head alongside product, Alliances, and Marketing & Communication functions. He is a Business leader with over a decade of global

experience across Digital Commerce, mobile technologies, financial platforms. At EbixCash, he has been instrumental for new business roll-outs of Incentives solutions. Prepaid card & Mobile wallet programs. Prior to EbixCash, Bhavik led the expansion and setup of Global Prepaid Exchange (UK) presence across the India & South Asia, Entrepreneurial at heart, Bhavik has been a founding member et Radical Payments and ISTS Worldwide US based bespoke technology solutions ventures across financial services, retail and mobile payments. Bhavik earned hist Bachelor's degree with honors in International Business & Management from Northwood University, Florida and has executive training in Entrepreneurship from Stanford University

4.3.8 Finance, HR, Legal, Internal Control, etc.-Once the acquisition of the Company and takeover of management is complete, the Resolution Applicant proposes to integrate functions such as Finance, HR, Legal, Internal Control, R&D with existing centralized functions of Ebix India. This will help in exercising better control over the operations of the Company, and have in place. consistent policies as applicable in case of other Ebix group entities. This will also help in cost optimization and improving efficiency by centralizing non-core business functions.

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6.1.1 Payment of CIRP Costs

Amount attributable to the CIRP costs limited at Rs. 4 crores, are proposed to be paid from the free cash flows of the Company prior to take over of the control and management by the Resolution Applicant. If the CIRP costs to be paid are more than Rs. 4 crores, it is proposed to be paid from the Residual Amount

6.1.2 Resolution of Claims of Operational Creditors (other than employees and statutory dues)

At the outset, the Resolution Applicant will like to submit that it is not aware of the liquidation value of the Company and the

amount assignable to Operational Creditors in the event of liquidation of the Company. Given this, for the purpose of this Resolution Plan, the underlying assumption of the Resolution Applicant is that the liquidation value assignable to the operational creditors is Nil

Having said the above, the Resolution Applicant proposes the following:

(a) All related party liabilities (whether claimed or not) as of the cut-off date (e commencement of CIRP which is May 30, 2017) shall be extinguished without any payment;

(b) The Resolution Applicant proposes that an amount equivalent to the liquidation value shall be paid to the operational creditors. However, in the event that the liquidation value is nil, then the admitted claims of the operational creditors, which is Rs. 1.06 Crores as on the date of commencement of CFRP, shall be settled on a pro-rata basis of 5% of the admitted amount. Such amount shall be paid from the residual Amount, however, in the event that the Residual Amount is not sufficient to pay the entire admitted claims, then the Residual Amount shall be distributed proportionately to settle the admitted claims. In respect of the claims which have not been admitted, the Resolution Applicant shall have no liabilities, whatsoever, presently or in future.

(c) All the litigations/ proceedings by such operational creditors, whether in relation to admitted claims or not (whether present or future litigations) against the Company for the period prior to the takeover of the control and management of the Company by the Resolution Applicant, shall stand quashed and the Company shall no longer be required to make any payments and have no liabilities in relation to such litigations/ proceedings.

XXXX XXXX XXXX XXXX XXXX

6.1.5 Resolution of Claims of Financial Creditors

The Resolution Applicant proposes that the debt provided by the financial creditors should be such that cumulative outstanding debt shall reduce to Rs. 314 Crores. Thereafter, the financial creditors are proposed to be paid Rs 314 Crores (subject to adjustments in case an amount equivalent to the liquidation value is to be paid to the dissenting financial creditors) against the full and final settlement of their entire financial debts including but not limited to foreign currency convertible bonds and external commercial borrowings, to the Company (including contingent liabilities), against:

(a) All the security interest created by the Company, its subsidiaries and/ or by any third party, in favour of the financial creditors in relation to such financial debts to the Company (including contingent liabilities), shall stand revoked, cancelled and reduced to zero. This is subject to the understanding that in respect of any other claims or liabilities other than the admitted claims, the Resolution Applicant or the Company shall have no obligatives. liabilities whatsover.

(b) All security intenst (other than only plodge of shares of subsidiary Vidya Mandir Class Limited to ICICI Bank or any other entities) created by the Company to secure the loans availed by the subsidiaries of the Company or any other entity shall stand revoked, cancelled and reduced to zero. This includes any corporate guarantees, security interest (pledge other than pledge of shares of Vidya Mandir Classes Limited to ICICI Bank, mortgage, hypothecation, etc.) issued by the Company in favour of the financial creditors with respect to such loans taken by the subsidiaries or novated to the subsidiaries. In no event shall the Company, the Resolution Applicant and/ or Ebix E-Learning Ventures Pte. Ltd., shall have any obligations

and/ or ability in relation to any of its subsidiaries or the Company itself, and the holders of any such security interest shall have no right to impose any such security interest against the Company, the Resolution Applicant and/ or Ebix E-Learning Ventures Pte. Ltd.

(c) All the litigations/proceedings by such financial creditors, whether in relation to admitted claims or not (whether present or future litigations) against the Company for the period prior to the takeover of the control and management of the Company by the Resolution Applicant, shall stand quashed and the Company shall no longer be required to make any payments and have no liabilities in relation to such litigations/proceedings.

(d) The personal guarantees issued by the existing promoters of the Company including but not limited to Mr. Shantanu Prakash and Mr. Jagdish Prakash may continue to subsist. The Company, the Resolution Applicant and/ or Ebix E-Leaming Ventures Pte. Ltd shall not have any liabilities or obligations arising under or in relation to such personal guarantees. Further, there shall not be any rights of subrogation under or in relation to such personal guarantees against the Company and/ or the Resolution Applicant and/ or Ebix E-Learning Ventures Pte. Ltd.

(e) Any pledge over the shares of subsidiaries/third parties created by the Company in favour of creditors of its subsidiaries/any other party, to secure the leans outstanding against the subsidiaries of the Company or any other third party entity shall continue unaffected However, the creditors would have no right to enforce any action against the Company to any extent whatsoever. Also, in relation to any such loans, the financial liability al the Company shall stand reduced to zero and the

Company shall not be liable to make any payment to any such creditors or holders of such security interests or pledges Additionally, any obligations of the Company in this regard, shall also stand extinguished and the Company shall not have any obligations arising thereunder. The creditors must make all their realizations only by enforcing any actions available under the law to them with respect to the subsidiaries/any third party, without imposing any liability, demand for any payment or enforcing any action on the Company.

(d) As per the Information Memorandum, the list of following corporate guarantees issued by the Company with respect to its subsidiaries which have yet not been revoked and hence shall stand revoked, cancelled and reduced to zero. In addition, if there are any other outstanding corporate guarantees (not mentioned below), then same should also stand revoked, cancelled and reduced to zero.

*	***Particulars***	***Overall value of the guarantee (Rs. In Crores)***
A	***Educomp Infrastructure and School Management Limited***	
A.1	*State Bank of Patiala*	*261.63*
A.2	*Axis Bank*	*270.22*
A.3	*Bank of India*	*108.09*
A.4	*Punjab National Bank*	*108.09*
A.5	*Andhra Bank*	*81.05*
A.6	*Corporation Bank*	*54.05*
A.7	*Karnataka Bank*	*54.05*
A.8	*Yes Bank*	*100.00*
A.9	*Sub- total (A.1 to A.8)*	*1,037.18*
B	*Educomp Learning Hour Private Limited*	
B.1	*ICICI Bank*	*12.00*
C	***Edu Smart Services Private Limited***	
C.1	*IndusInd Bank*	*50.00*
C.2	*DBS*	*67.50*

C.3	*Sub -total (C.1 + C.2)*	*117.50*
Total (A.9 + B.1 + C.3)		***1,274.68***

(g) Besides the above, there are certain corporate guarantees issued by the Company with respect to its subsidiaries to lenders (including the ones listed below), which have already been invoked by such lenders and forms part of the total admitted claims of the financial creditors and hence should stand revoked, cancelled and reduced to zero.

*	***Particulars***	***Overall value of the guarantee (Rs. In Crores)***
A	***Educomp Asia Pacific Pte. Ltd. Singapore***	
A.1	*SBI Singapore*	*136.16*
	Edu Smart Services Private Limited	
	Standard Chartered Bank Loan (Assignee KB Educational Services Private Limited)	*100.00*
	SICOM Limited	*7.50*
	Punjab National Bank	*
	Sub-total (B.1 to B.3)	*107.50*
Total (A.1 to B.4)		*243.66*

XXXX XXXX XXXX XXXX XXXX

6.1.7 Customers

The Resolution Applicant proposed to fulfil the existing obligations towards the customers of the Company in the normal course of business and in the interest of the continued operations of the Company.

The Resolution Applicant shall, in mutual agreement with the CoC and with the consent of Hon'ble NCLT, appoint a reputed monitoring agency Monitoring Agency") pursuant to the approval of the Hon'ble NCLT, which shall have the following responsibilities till the time of take-over of the management control of the Company by the Resolution Applicant:

(a) To ensure implementation of the Resolution Plan as approved by the Hon'ble NCLT, by the new management of the Company:

(b) To provide updates to the IBBI as and when required; and

(c) To ensure disbursement of dues from the Settlement Account as per the approved Resolution Plan.

XXXX XXXX XXXX XXXX XXXX

8.5 Disbursement of Amounts

Simultaneously with steps envisaged in Section 84 above, the disbursement of the total amount. of Rs 325 Crores shall be carried out from the Settlement Account. The disbursement shall be carried out in accordance with the terms and conditions of this Resolution Plan and in the order of priority set out in the table below.

#	Particulars	Admitted dues (Rs Cr)	Proposal (Rs Cr	% to be paid	Comments
1	CIRP Cost	N.A.	N.A.	N.A.	To be paid in accordance with Section 6.1.1
2	Operational Creditors	1.06	0.05	5%	To be paid in accordance with Section 6.1.1. CoC to decide the proportionate amount to be distributed among the operational creditors
3	Statutory Government dues	1.75	1.75	100%	To be paid in accordance

					with Section 6.1.3.
4	*Dissenting CoC members*	*N.A.*	*N.A.*	*N.A.*	*To be paid in accordance with Section 6.1.3.*
5	*Employees*	*2.40*	*2.40*	*100%*	*To be paid in accordance with Section 6.1A.*
6	*Financial Creditors*	*3,003*	*314.00*	*10.46 %*	*To be paid in the ratio of 1:10 between unsecured and secured lenders in proportion to their respective share of the total financial claims (as per the list provided by the resolution professional and attached as Annexure A) (with the unsecured creditors being entitled to one-tenth)) unless otherwise decided by the CoC and subject to Section 6.1.5*
7	*Non-Promoter shareholders*	*N.A.*	*6.80*	*Rs. 1/- per share*	*To be paid in accordance with Step 2 of Section 8.4.*
	Total	*3,008.3*	*325.00*		

XXXX XXXX XXXX XXXX XXXX

8.7 Management and Control of the Company

Once the Resolution Applicant takes over the management control of the Company, the Resolution Applicant proposes that the Company shall continue as a going concern and operate in its normal course of business upon implementation of the proposed Resolution Plan. The management of affairs of the Company after approval of the Resolution Plan would be carried out as follows:

(a) Complete control of the Company and the business activities of the Company shall move to the Resolution Applicant. The Company shall continue its operations in the normal course of business. While the implementation of the Resolution Plan and settlement of the creditors shall happen in parallel, the newly appointed Board shall take up the responsibilities of the day to day affairs of the Company and manage it in its regular course.

(b) Erstwhile promoters and other shareholders will not be in control or promoters to the Company

(c) Please refer to Section 4.2 and Section 43-of this document for the proposed Board of Directors and management structure of the Company, once the Resolution Applicant gets control over the management of the Company.

(d) Under the new management and execution team, the affairs of the Company shall be carried out in compliance with all applicable laws. Employee head count can be increased or reduced based on the operational performance and growth of the Company.

(e) In line with the Resolution Applicant's corporate policies and control processes, the Resolution Applicant shall appoint its existing Ebix India auditors to audit the Company or the consolidated merged entity under which the Company might be placed.

(f) All undertakings and declarations submitted by the Resolution Applicant along with the Resolution Plan shall be incorporated herein by reference and shall be deemed to be a part of the Resolution Plan."

48. As has been stated in the Reference List/ Key Contents of the Resolution Plan (serial no. 10), the declaration to the effect that the Resolution Plan is not in contravention of the provisions of the applicable law could be made in the plan.

49. The Appendix-1 to the plan gives the detail (as defined in the CIRP Regulations) of the Resolution Applicant and other connected person (as defined in CIRP Regulations) to enable the committee to assess the credibility of the Resolution Applicants and other connected person to take a prudent decision while considering the Resolution Plan for its approval. The proposal to takeover and execute the existing contracts is there in Section 6.1.7 of the Plan. Sections 4.4 and 8.9 of the Plan provides for building the capability and required technical, financial, infrastructure and manpower etc. to ramp up the scale of operations of the CD. The Section 8.9 of the plan reads thus:

"8.9 Other considerations

#	***Contents***	***Remarks***
1.	*Proposal for the takeover and execution of the existing contracts.*	*The Resolution Applicant will take over all the existing contracts of the Company*
2.	*Action plan for building the capability required (technical, financial. manpower etc.) to ramp up the scale of operations.*	*The Resolution Applicant will infuse capital into the Company to build Sales, R&D, Marketing and Operational*

		Teams for revival of business. *Please refer to Section 4.4 for further details*
3.	*Action plan to bid for future clients and gaining new contracts for future execution.*	*The Resolution Applicant will focus on consolidation on E-Leaming market, both organically and inorganically through acquisitions. It is already under discussion with other Target companies in E Learning space for potential acquisition, which will not only help in access to new customers but would also bring in new talent / sales resources to help in the organic growth of the business.*
4.	*Planned expenditure for meeting capital expenditure, start-up expenses, working capita, debt service, any such other expense, proposed means of finance and key terms of debt (amount, interest rate offered, tenor, quarterly repayment schedule etc) thereof*	*As mentioned in Resolution Proposal, the Resolution Applicant proposes to infuse amount of Rs. 75 Crores in the Company These funds will be used for the purpose of development of new E-Leaming content, sales and marketing and inorganic initiatives to grow the overall business of the Company.*
5.	*Detailed financial projections (in the form of a linked MS Excel file) for the tenor of the Outstanding Debt including detailed financial projections*	*Please refer to Annexure 6.1 for 5 years projections of the Company.*

	should include order book projections (including revenue projections), profit and loss, balance sheet. and cash flow ratios and assumptions	
6.	*Proposed plan for protecting interests of other stakeholders (other than lenders).*	*The Resolution Applicant has provided for appropriate consideration for protecting the interest of other stakeholders such as employees. operational creditors, government dues, non-promoter shareholders, in the Resolution Plan Please refer to Section 6 and 8.5 above for details.*

50. The proposal for protecting interest of other stakeholders other than lenders is also there in the Plan, mentioned in Section 6.1.1 to 6.1.7 and 8.5 thereof (ibid). The overview of the Plan as mentioned in Section 2 of the plan reads thus:

> ***"2. Overview of the Resolution Plan***
>
> *Set out below is an overview of the Resolution Plan, which is to be read along with the detailed terms and conditions as set out in Section 6 and Section 8 of the Resolution Plan, below.*
>
> *2.1 The Ebix Group through the Resolution Applicant puts forth a Rs. 400 Crores (including Rs. 75 Crores towards the revival of the business operations of the Company) proposal in which the Resolution Applicant or its wholly owned subsidiary i.e., Ebix E-Learning Ventures Pte. Ltd. proposes to take management control of the Company by acquiring up to 100% shareholding of the Company in a manner detailed in the Resolution Plan herein below.*

2.2 The Resolution Applicant proposes that the debt provided by the financial creditors should be such that cumulative outstanding debt shall reduce to Rs. 314 Crores. Thereafter, the financial creditors are proposed to be paid Rs 314 Crores against the full and final settlement of their entire financial debts to the Company (including contingent liabilities), against: (a) release of all security interest created by the Company to secure such financial debts to the Company (including contingent liabilities); (b) release of all security interest or other obligations including the corporate guarantees issued by the Company with respect to debts) taken by subsidiaries/ affiliates of the Company (as set out in Section 6.1.5 of the Resolution Plan); and (c) waiver of subrogation rights of the guarantors with respect to personal guarantees issued by the existing/ erstwhile Promoters of the Company

The above is subject to the understanding that in respect of any other claims or liabilities other than the admitted claims, the Resolution Applicant or the Company shall have no obligations, liabilities whatsover.

Notwithstanding anything to the contrary contained herein, it is clarified that nothing herein shall affect the rights of the financial creditors in relation to the guarantees or securities provided by the existing promoters of the Company in their personal capacity or any third party, provided that such guarantees or securities do not create any claims or liabilities in any manner whatsover against the Company and/ or the Resolution Applicant and/ or the Resolution Applicant's affiliates, including no entitlement to any subrogation rights.

2.3 The Resolution Applicant proposes that the admitted claims of the employees, which amount to Rs 2.4 Crores, shall be settled from the basket of Rs. 11 Crores (over and above Rs. 314 Crores proposed to be paid to the financial creditors) ("Residual Amount") in full. However, in the event that the Residual Amount is not sufficient to pay

the entire admitted claims, then the Residual Amount shall be distributed proportionately to settle the admitted claims. In respect of the claims which have not been admitted, the Resolution Applicant shall have no liabilities, whatsoever, presently or in future.

2.4 The Resolution Applicant proposes that all employee liabilities of any kind, including but not limited to gratuity, bonuses, past salaries, leave rollovers, etc., shall be settled in full from the Residual Amount. However, in the event that the Residual Amount is not sufficient to pay such liabilities, then the Residual Amount shall be distributed proportionately to settle such liabilities

2.5 The Resolution Applicant proposes that an amount equivalent to the liquidation value shall be paid to the operational creditors. However, in the event that the liquidation value is nil, then the admitted claims of the operational creditors, which is Re 1.06 Crores as on the date of

commencement of CIRP, shall be settled on a pro-rata basis of 5% of the admitted amount. Such amount shall be paid from the Residual Amount. However, in the event that the Residual Amount is not sufficient to pay the entire admitted claims, then the Residual Amount shall be distributed proportionately to settle the admitted claims, in respect of the claims which have not been admitted, the Resolution Applicant shall have no liabilities, whatsoever, presently or in future.

2.6 The Resolution Applicant proposes that the outstanding statutory claims/ dues of the government authorities, if any, related to the period prior to the takeover of the control and management of the Company by the Resolution Applicant and which couldn't be paid due to insufficiency of funds with the Company prior to the takeover of the management and control of the Company, shall be paid in full from the Residual Amount.

2.7 The Resolution Applicant proposes that any new claims filed by any operational creditors or otherwise before the date on which the Resolution Plan is approved by the CoC, shall be paid proportionately from the Residual Amount. If any claims are submitted after this Resolution Plan is approved by the CoC, the same shall not be eligible for any payment.

2.8 The Resolution Applicant proposes that the Company will set a bad debt reserve for any receivable (from customers, ICT, Skilling business partners etc.) that is pending for a period of 90 days or more as of 31 March 2018 or resolution award date, whichever is earlier.

2.9 The Resolution Applicant proposes that the Company will write-off any capitalization or amortization amounts in its books as of 31 March 2018 or the date on which the Honorable National Company Law Tribunal ("Hon'ble NCLT) approves the Resolution Man, whichever is earlier.

2.10 The Resolution Applicant expects that all cash flows of the Company as on the date of takeover of the management control of the Company shall continue to be left in the Company and the Resolution Applicant shall be free to utilize such cash towards the future revival of the business of the Company.

2.11 The Resolution Applicant expects that no changes would be made to the business other than normal ongoing operational business matters, that would have the effect of reducing Company's cash or have the effecting of creating new expenses for the resolution Applicant.

2.12 The Resolution Applicant proposes to fulfill all the existing contracts of the existing customers of the Company.

2.13 The Resolution Applicant believes in the retention of existing sales and operational workforce of the Company (that fit to into its turnaround plans) for the successful revival and turn-around of the

business. The Resolution Applicant also aims to recruit best of the talent from other e learning companies to strengthen the existing sales force of the Company, In addition, the Resolution Applicant is also looking for other e-learning targets in India, which will not only help in consolidation of e-learning market but would also bring in new talent to the Company and help in accelerating the revival of its business.

2.14 Neither of the Restricted Persons (as defined in the RFRP) shall form part of the management of the Company.

2.15 The terms of the offer by the Resolution Applicant and the obligation of the Resolution Applicant to proceed with the Proposed Transaction (as defined in the RFRP), is conditional upon the acceptance of the proposed Resolution Plan in its entirely by the Hon'ble NCLT. In the event that the Resolution Plan is not accepted in its entirety, the Resolution Applicant reserves the right to withdraw the Resolution Plan and not proceed with the Proposed Transaction (as defined in the RFRP).”

51. The summary of admitted claim and details of the claims as mentioned in para 5.3 and 5.4 to 5.4.7 of the Resolution Plan reads thus:

“5.3 Summary of Admitted Claims

#	***Particulars***	***Admitted Claims (Rs. Crore)***
1.	*Financial Creditors*	*3,003*
2.	*Operational Creditors*	*1.06*
3.	*Employee Dues*	*2.4*
	Total	*3,006.5*

5.4 Details of Claims

5.4.1 Workmen dues

The Company does not have any workmen, as defined in the industrial Disputes Act, 1947.

5.4.2 Financial Creditors

The total admitted claims of financial creditors are Rs 3,003 Crores. The details and break-up of the financial creditors along with the nature of security interest is set out in Annexure 6.2.

5.4.3 Guarantees

The Company has provided certain corporate guarantees and the existing promoters of the Company have provided certain personal guarantees with respect to the debt taken by the Company and/ or its subsidiaries. The details of such guarantees have been provided in Annexure 6.3.

5.4.4 Employee wages and unpaid dues

The total claims of employees are Rs 2.6 Crores and the admitted claims amount to Rs 2.4 Crores. The detailed list is enclosed as Annexure 64.

5.4.5 Government does and other secured creditors

As per the Information Memorandum, no claims have been filed by the Government Authorities in relation to statutory dues, however, the total statutory dues payable as on March 31, 2017 is Rs 1.75 Crores. The details of such dues are as follows:

Particulars	*Amount-Rs*	*Remarks*
VAT/Sales Tax payable	*2,385,975*	*For the month of March, 17*
TDS payable	*7,807,634*	*For the month of March, 17*
PF Payable	*6,010,473*	*For the month of March, 17*
ESI Payable	*1,231,178*	*For the month of March, 17*
Emp. Cont to Lab. Welfare Payable	*5,300*	
Professional Tax Payable	*90,908*	*For the month of March, 17*
Total	*17,531,468*	*For the month of March, 17*

5.4.6 Any other debts and dues

As per the information memorandum, there are no other debts or dues outstanding against the Company.

5.4.7 Operational Creditor Claims

The total amount claimed by the operational creditors is Rs 16.3 Crores out of which the admitted amount of the claims is Rs 1.06 Crores. The detailed list is enclosed as Annexure 6.5."

52. The provision regarding the debt provided by the Financial Creditors is found in Section 6.1.5 of the plan, reproduced hereinabove.

53. The provision regarding disbursement of total amount of Rs. 325 crores is mentioned in the table, reproduced in Section 8.5 of the plan (ibid). The total admitted claim qua the claimants/creditors/stakeholders is Rs.3,008.3 Crores while the proposal for distribution is for Rs.325.00 Cr. Even otherwise also, the provision regarding the plan value and the distribution thereof amongst the stakeholders is subject matter of the commercial wisdom and once the CoC has approved the plan, it is not for this Adjudicating Authority to comment upon the same, as far as the issue of plan value and disbursement of the proposed amount is concerned. Such view could be taken by Hon'ble Supreme Court in **Committee of Creditors of Essar Steel India Limited through Authorised Signatory vs. Satish Kumar Gupta & Ors.** in Civil Appeal No. 8766-67 of 2019. The view reads thus: -

"While the Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of Creditors, in limited judicial review it needs 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; it needs to maximize the value of its assets; and the interest of all stakeholders including Operational Creditors has been taken care of."

In the said Judgement, the Hon'ble Supreme Court also noticed the provision of Section 30(2)(e) of IBC 2016. Para 46 of the Judgement reads thus:

"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 subclass of creditors is with the Committee of Creditors, but, the decision of such Committee must reflect the fact that it has taken into account 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."

54. The view as above taken by the Hon'ble Supreme Court in the Committee of Creditor of Essar Steel India Limited (ibid) could be reiterated in **Maharashtra Seamless Limited vs. Padmanabhan Venkatesh & Ors.** in Civil Appeal No. 4242 of 2019. As can be seen from sub section (2) of Section 30 of IBC 2016, it is for the Resolution Professional to examine and confirm that the Plan is in consonance with the provisions contained in Clause (a) to (f) of the sub-Section. Only when the Plan is found in consonance with the provisions of sub-Section (2) of Section 30 (ibid), the Adjudicating Authority approves the same.

55. The amended sub-regulation 4 of Regulation 39 of IBBI (Insolvency Resolution for the Corporate Persons) Regulations, 2016 was introduced w.e.f. 04.07.2018, thus at the relevant point of time i.e., on 23.02.2018 when the Plan was voted as also on 07.03.2018, when the IA-(IBC) 195/2018 was filed, there was no practice for compliance certificate by the RP in Form H, thus no such form was filed with the application for approval of Plan. Nevertheless, subsequently the RP filed IA-20/2023, enclosing therewith such certificate. The

amount provided for the stakeholders has been mentioned in para 7 of the certificate (Form H), which reads thus:

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

(Amount in Rs. Crores)

S. No.	**Category of Stakeholder***	**Sub-Category Stakeholder of**	**Amount Claimed**	**Amount Admitted**	**Amount Provided under the Plan#**	**Amount Provided to the Amount Claimed (%)**
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1.	Secured Financial Creditors	(a) Creditors not having a right to vote under sub-section (2) of section 21	N.A.	N.A.	N.A.	N.A.
		(b) Other than (a) above: (I) who did not vote in favour of the resolution Plan	(i) 817.13**	(i) 743.83	(i) 64.02	(i) 7.83%
		(ii) who voted in favour of resolution plat the	(ii) 2740.50	(ii) 2254.34	(ii) 249.75	(ii) 9.11%
		Total [(a) + (b)]	3,557.63	2998.17	313.77	16.94%
2.	Unsecured Financial Creditors	Creditors not having a right in vote under sub-section (2) of section 21 (b) Other (a) than above:	NA	NA	NA	NA
		(i) who did not vote in favour the resolution Plan	(i) 1.48**	(i) 1.48	(i) 0.01	(i) 0.78%
		(ii) who voted in favour of the	(ii) 24.62	(ii) 24.62	(ii) 0.22	(ii) 0.91%

		resolution plan				
		Total [(a)+(b)]	26.10	26.10	0.23	1.69%
3.	Operational Creditors	(a) Related Party of Corporate Debtor (6) Other than (a) above	NIL	NIL	NIL	NIL
		(b) Other (a) than above:	(i) NIL	(i) NIL	(i) 1.75	(i) 0
		(i) Government	(ii) NIL	(ii) NIL	(ii) NIL	(ii) NIL
		(ii) Workmen	(iii) 7.75	(iii) 3.09	(iii) 0.05	(iii) 0.22
		(iii) Employees**	(iv) 21.98	(iv) 16.41	(iv) 0.05	(iv) 0.22
		(iv) OC ***** (Other than Workmen, Employees and Government dues)				
		Total [(a)+(b)]	29.72	19.50	4.20	14.13%
4.	Other debts and dues					
Grand Total			3,613.45	3,043.77	318.20	8.80%

** *Dissenting Creditors include those creditors who abstained from the voting.*

*** *The amounts disbursed between Unsecured and Secured Financial Creditors under the Resolution Plan is in the ratio of 1:10 in terms of Clause 8.5 of the Resolution Plan.*

*** *The claims of the Employees as stated in the Information Memorandum and also as stated in the Plan is INR 2.40 crores, however, certain claims which were under verification were duly verified and accordingly the claim of the employees before the Plan was voted upon was INR. 3.09 crores.*

*** *As per the IM, the amount claimed by Operational Creditors increased in view of the order dated 10.01.2019 and 25.01.2019 passed by the Hon'ble NCLT, in terms of which the Resolution Professional was directed to verify the claim of IBM India Pvt Ltd which was for an amount of INR 14.89 Crores. Accordingly, the*

claim amount for Operational Creditors has increased to INR 21.98 crores and admitted amount has increased to INR 16.41 crores

** If there are sub-categories in a category, please add rows for each sub-category.*

 # Amount provided over time under the Resolution Plan and includes estimated value of non-cash components. It is not NPV.]"

56. As can be seen from the aforementioned, the Plan provided only for payment of 8.80% of the admitted amount. Nevertheless, as has been noted hereinabove, the proposal in the Plan for stakeholders is the issue to be checked by CoC in exercise of its commercial wisdom and this Adjudicating Authority needs to examine only that the Plan is in consonance with the provisions of Section 30(2) of IBC 2016. From the aforementioned discussion and analysis, we are satisfied that the Plan is compliant of the provisions of Section 30(2) of IBC, 2016. We also find that a letter indicating the compliance of Section 29A of IBC 2016 is also there on record as enclosure to the affidavit dated 20.02.2018. The relevant excerpt of the letter reads thus:

"In reference to the receipt of resolution Plan from EBIX Singapore Pte. Ltd., pursuant to the Request for Resolution Plan Submission document dated December 5, 2017 (amended on January 17, 2018 and January 20, 2018) ("RFRP") issued by Educomp Solutions Limited ("ESL") (as represented by the Resolution Professional) and the CoC of ESL. I, the undersigned, to the best of my knowledge and on the basis of information submitted by the resolution applicant and other publicly accessible information, hereby confirm that:

1. *As per information, communications and explanations received and relied upon by me, in 2016, a company by the name of Ebix Education Learning Pvt. Ltd. was formed to bid for Govt. tenders, with 51% ownership with Ebix Group. Thereafter, the company*

has gone inactive and no filings of financials or ownership data were made with MCA as no business was conducted, though the company is yet to be deleted from records, and remains 'active' for MCA filing.

2. *As per information, communication and explanations received by me and relied upon by me, neither EBIX Singapore Pte Ltd. nor EBIX E-Learning Ventures Pte. Ltd. (wholly owned subsidiary of EBIS Singapore Pte. Ltd.) are bared from submitting their Resolution Plan, under the provisions of Section 29A of the Insolvency and Bankruptcy Code, 2016.*
3. *As per information and explanations received by me and relied upon by me, the Resolution Plan is in compliance with the requirements prescribed under Section 30(2) of the Insolvency and Bankruptcy Code.*

Provided that the Resolution Plan including its provisions thereof is subject to approval of the Hon'ble NCLT (subsequent to the approval by the CoC members) and Hon'ble NCLT shall have the right to strike off any provision of the Resolution Plan, in the event it is of the opinion that the same is contrary to the provisions of applicable law."

57. Sub-Regulation (4A) of Regulation 36B of IBBI (CIRP) Regulations, 2016 provides that in terms of the request for Resolution Plan, the PRA needs to provide a performance security within the time specified in RFRP and such performance security is liable to be forfeited if the Resolution Applicant of such plan after its approval by the Adjudicating Authority fails to implement or contribute to the failure of the implementation of the plan in accordance with the terms of the plan and its implementation schedule. In terms of the judgment dated 13.09.2021, Hon'ble Supreme Court specifically viewed that there is no scope to resile to implementation of the Resolution Plan, once it is submitted to the Adjudicating Authority, except in the event of rejection. Clause 1.9.3 of the

RFRP required Ebix/SRA to replace its EMD with a PBG equivalent to the extent of 10% of the Resolution Plan value, if it were to be declared as Successful Resolution Applicant. The PBG can be invoked under Clause 1.9.5 of RFRP if the Resolution Applicant fails to implement the plan. Relevant excerpt of para 180 of the judgment which has been reproduced hereinabove reads thus: -

> *"180 Even if it were to be assumed, for the sake of argument, that the term in the submitted Resolution Plan was in the nature of a qualified offer which would expire after six months of its submission, failing the imprimatur of the Adjudicating Authority under Section 31 which would make it binding on all parties, the surrounding terms of the RFRP and the subsequent legal materials including the LOI and the Compliance Certificate (Form H) under CIRP Regulations make it clear that there was no scope to resile from the implementation of the Resolution Plan, once it had been submitted to the Adjudicating Authority, except in the event of a rejection. Clause 1.9.3 of the RFRP required Ebix to replace its EMD with a PBG equivalent to ten per cent of the Resolution Plan value, if it were to be declared as the 'successful Resolution Applicant'. This PBG can be invoked under Clause 1.9.5 of the RFRP if the Resolution Applicant fails to implement the Resolution Plan. Further, Clause 1.8.4 of the RFRP states that "[a] Resolution Plan submitted by a Resolution Respondent shall be irrevocable". Clause 1.10(l) of the RFRP also provides that a successful Resolution Applicant is not permitted to withdraw an approved Resolution Plan:*
>
> > *"Clause 1.10 of the RFRP*
> >
> > *"By procuring this RFRP and obtaining access to the Data room and Information Memorandum, in accordance with the terms of this RFRP, the Resolution Respondent is deemed to have made the following acknowledgements and representations:*
> >
> > *[...]*
> >
> > *(l)* ***The Resolution Respondent upon declaration as Successful Resolution Respondent shall remain***

responsible for the implementation and supervision of the Resolution Plan from the date of approval by the Adjudicating Authority, and will not be permitted to withdraw the Resolution Plan *and the Resolution Professional, PwC or the CoC assume no responsibility or liability in this respect."*

(emphasis supplied)

58. However, the SRA/Ebix has not submitted any PBG. In the wake of the order passed by Hon'ble Supreme Court, in terms of the order dated 07.08.2023, this Tribunal specifically directed the Ebix/SRA to furnish the PBG for implementation of the Plan within 03 weeks. The order has not yet been carried out. One may wonder that once the provisions of Regulation 36B(4A) could not be carried out, how the Resolution Plan can be found valid. The doubt can be clarified from the fact that the RFRP in the present case was issued on 05.12.2017 and the sub-Regulation (4A) of Regulation 36B of IBBI (Insolvency Resolution for Corporate Persons) Regulations, 2016 was incorporated on 24.01.2019 only. Thus, as it may, the non-provision of Performance Security by the SRA did not infringe any Regulation. Nevertheless, in terms of the provisions of the RFRP, the SRA is liable to furnish the PBG, which is required as security for implementation of the Plan.

59. In the backdrop of aforementioned factual position, discussion, analysis and findings, **the IA(IBC)-195//2018 filed by the RP for approval of the Resolution Plan is allowed.** The Plan submitted by the Ebix/SRA, certified by the RP is approved. **The SRA shall furnish the Performance Bank Guarantee for an amount of Rs.32.5 Crore qua implementation of the Plan and shall implement the Plan qua Resolution of Insolvency of CD, submitted by it,**

in letter and spirit, with due deference to all the terms and conditions thereof. The Plan shall be binding on the Corporate Debtor and its employee, members, creditors (including the Central, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authority to whom the statutory dues are owed), Guarantors and other Stakeholders involved in the Resolution Plan. The Moratorium declared under Section 14 of IBC 2016 shall cease to have effect forthwith. The Resolution Professional shall forward all the records relating to the conduct of the CIRP and the Resolution Plan to IBBI to be recorded on its data base (Section 31(3)(b) of IBC 2016). The RP shall also forthwith send a copy of this order to the participants and the Resolution Applicant. He would also send a copy of this order to the ROC concerned within 15 days of this order. The RP shall intimate each claimant about the principle or formulae, as the case may be, for payment of debts under the Plan. The SRA shall act in terms of Section 31(4) of IBC 2016. The SRA shall be entitled to all immunities available to it in terms of the provision of Section 30(2)(a) of IBC 2016.

Sd/-
(L. N. GUPTA)
MEMBER (T)

Sd/-
(ASHOK KUMAR BHARDWAJ)
MEMBER (J)