

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

I.A. 3850 OF 2023

Under Section 60(5) of Insolvency &
Bankruptcy Code, 2016

Ashdan Properties Private Limited

...Applicant

Vs.

Mr. Rajesh Sureshchandra Sheth,
Resolution Professional

I.A. 4043 OF 2023

Under Section 60(5) of Insolvency &
Bankruptcy Code, 2016

Investors Action Forum Charitable Trust
& Others

...Applicant

I.A. 4047 OF 2023

Under Section 60(5) of Insolvency &
Bankruptcy Code, 2016

Ashdan Properties Private Limited

...Applicant

Vs.

Mr. Rajesh Sureshchandra Sheth,
Resolution Professional

...Respondent

INVP. 40 OF 2023

Under Section 60(5) of Insolvency &
Bankruptcy Code, 2016

Counsel of CoC

Thodur Law Associates

...Applicant

INVP. 42 OF 2023

Under Section 60(5) of Insolvency &
Bankruptcy Code, 2016

Mr. Nitin Suresh Satghare & 99 Others

...Applicant

Vs.

Pan Card Clubs

...Respondents

INVP. 43 OF 2023

Under Section 60(5) of Insolvency &
Bankruptcy Code, 2016

Suvarna Raghunath More & Others

...Applicant

Vs.

Pan Card Clubs

...Respondents

In the matter of

I.A. 3850 OF 2023

Ashdan Properties Private Limited

...Applicant

Vs.

Mr. Rajesh Sureshchandra Sheth,
Resolution Professional

... Respondents

In the matter of

C.P.(IB) No. 4578 /MB/2018

Mr. Nitin Suresh Satghare & 99 Others

. Operational Creditor

Vs.

Pan Card Clubs Limited

...Corporate Debtor

Order delivered on: 01/11/2023

Coram:

Shri Prabhat Kumar
Hon'ble Member (Technical)

Justice Shri V.G. Bisht
Hon'ble Member (Judicial)

Appearances:

For the Applicant in IA 3850/2022	:	Mr. Vikram Nankani, Sr. Advocate a/w Mr. Devesh Juvekar i/b Rajani Associates
For the Applicant in INVP 42/2023	:	Mr. Nausher Kohli, Advocate i/b Thodur Law Associates
For the Applicant in INVP 43/2023	:	Mr. M.S. Bhardwaj, Advocate
For the Applicant in INVP 40/2023	:	None
For the RP	:	Mr. Amir Arsiwala a/w Ms. Ankita Bajpai, Advocates

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This application IA 3850/2023 was filed on 25.08.2023 by M/s Ashdan Properties Private Limited (“Applicant”) in the matter of M/s Pancard Clubs Limited (Corporate Debtor) under Section 60(5) of The Insolvency and Bankruptcy Code, 2016 (“Code”), for direction to the Resolution Professional Sh. Rajesh Sureshchandra Sheth (“Respondent No. 1”) in the Corporate Insolvency Resolution Process (“CIRP”). The Applicant seeks following reliefs being prayer (b) to (f), the prayer (a) and (f) being general in nature –

B. Setting aside comparative evaluation of resolution plans as prepared by Respondent No. 2 and declare all actions taken in view of the same as null and void;

- C. Pending the hearing and disposal of the application, stay on the voting on the resolution plans in view of the glaring discrepancies and urgency pointed out in the application including but not limited to the pendency of depositors claim verification.
- D. Direction to Respondent No. 1 & Respondent No. 2 to place before the CoC the final Resolution Plan and Final Addendum of the Applicant and provide the true, fair and correct revised evaluation of the Applicant's resolution plan;
- E. Direction to Respondent No. 1 to extend the voting timelines for such further period till the time prayer clause (d) above is complied with;
- F. Direction to Respondent No. 1 and Respondent No. 3 to exercise the option of Challenge Mechanism as available under the RFRP and Regulation 39 of the CIRP Regulations.
2. Ritesh Prakash Aditya representing Mantra Insolvency Professional Pvt. Ltd., the Resolution Plan evaluator agency, is impleaded as Respondent No. 2 and Sh. Vitthal Dahake, the Authorised Representative of class of Financial Creditors is impleaded as Respondent no. 3.
3. The Applicant is a Prospective Resolution Applicant and had proposed a Resolution Plan for the resolution of debts of Corporate Debtor. However, during the pendency of this Application, the voting lines for vote on resolution approving the Resolution Plan submitted by the Prospective Resolution Applicant(s) were closed on 28.08.2023 and it was orally informed to this Tribunal that the Plan presented by the Applicant was voted out, while Resolution

Plan presented by another Resolution Applicant has been approved by CoC, comprising sole member representing the class of depositors. Consequently, the Applicant filed an IA 4047 of 2023 seeking following further reliefs in IA 3850 of 2023 , in full or in part,

- A. Insertion of prayer (bb) for “*setting aside the resolution passed by the committee of creditors of approving resolution plan of the prospective resolution applicants and the issuance of letter of intent by Respondent No. 1 to the prospective resolution applicant and declare the voting on the resolution plans as well as all actions taken in view of the same as null and void*”;
 - B. insertion of prayer (cc) for “*Order of status quo and refrain the Respondents from taking any action in furtherance to the issuance of the letter of intent to the prospective resolution applicant*”;
 - C. insertion of prayer (ff) for “*Order directing Respondent No. 1 and Respondent No. 2 to place on record the minutes of all CoC Meetings and the Plan Evaluator’s Report*”.
4. The Applicant has filed this application, inter alia, highlighting the apparent breach of duties on the part of Respondents including but not limited to the following –
- i) Misrepresentation of data contained in the Applicant's Resolution Plan that may seriously prejudice the voting process : For instance, the aggregate amount 'Total Gross Committed Payout' under the Resolution Plan is shown as INR 211 crores rather INR 361 crores. The Applicant had also specified that 6 assets (Durgapur Resort, West Bengal; Mysore Hotel, Karnataka; East Midnapur Beach Hotel,

West Bengal, Prabhadevi Office, Mumbai; Thane Commercial Office; Navi Mumbai Offices) aggregating to value range of INR 150 - 220 crores (basis various valuation estimates) are to be fully allocated to the CoC. Thus, such amount ought to have been included in the aggregate Committed Amount or mentioned the realisation value of 6 assets explicitly which are committed to the CoC to show as allocated consideration to the CoC. There is no legitimate justification for the marks awarded against the item titled 'Total Score on Quantitative and Qualitative Parameters as per Evaluation Criteria' and the remark 'Challenging' as mentioned against the item titled 'Meeting the requirement of Feasibility and Ease of Execution'. The core mode / manner of resolution as contemplated under Resolution Plans proposed by the PRAS was found missing.

- ii) Delegation of essential functions by Respondent No. 1 : Respondent No. 1 seems to have delegated/outsourced an essential function of evaluation of resolution plans to Respondent No. 2 which is de hors the provisions of the Code, the CIRP Regulations and the IP Regulations read with the Code of Conduct for Insolvency Professionals. In fact, such a decision also leads to a rise in CIRP costs which already stand at approximately INR 10 crores or more for which no explanation and/or justification has been provided by Respondent No. 1. It is humbly submitted that the exercise of evaluation of resolution plans could have very well been undertaken by Respondent No. 1 and his IPE team

or by the CoC along with Respondent No. 3. It is also important to note that the earlier Plan Evaluator, who was part of the process from the beginning, resigned at the last moment of the CIRP process under protest and allegedly because of the clash of opinions as to how Plan Evaluator is supposed to summarise the data. The current Plan Evaluator viz. Respondent No. 2 was appointed only in this month of August 2023 and no interactions held with the Applicants before summarising the data.

- iii) Instances from the CIRP lacking transparency and arbitrary decisions and procedures adopted by Respondent No. 1 : Addendum as submitted by the Applicant was put to vote by Respondent No. 1 independent of and in complete disregard of the Resolution Plan of the Applicant. The requirement of CIRP Regulations, particularly of placing the resolution plan in its final form before the CoC, has to be scrupulously complied with. It is also pertinent to point out that there was no simultaneous voting on the Applicant's Addendum as well as the Resolution Plans submitted by the other PRAs. This act of Respondent No.1 per se is in the teeth of the mandate of Regulation 39(3A) and Regulation 39(3B) of the CIRP Regulations.

5. As stated aforesaid that the Voting Lines were closed on 28.08.2023 during the pendency of this application, accordingly, prayer (c) and Prayer (e) became infructuous.

6. The case of the Applicant is that the correct financials as contained in the Resolution Plan along with Addendum as submitted by the Applicant were not communicated and understood by all members of the CoC in the true and correct spirit.
- 6.1. In response to the Request for Resolution Plan ("RFRP") as shared by Respondent No. 1 with the Applicant, the Applicant submitted its Resolution Plan on April 14, 2023. The Applicant made some revisions to the Resolution Plan, and accordingly on June 26, 2023, the Applicant submitted its revised resolution plan ("Resolution Plan") to the Respondent No.1.
- 6.2. Respondent No.1 sought clarifications on the legal compliances and also on the financial proposal of the Applicant's Resolution Plan. Respondent No. 1 enquired whether there was any change in the financial proposal in the Resolution Plan submitted by the Applicant. The Applicant clarified to Respondent No.1 that there were no changes to the financial proposal. After several rounds of discussions between Respondent No. 1 and the Applicant, one day prior to the scheduled COC meeting where the Applicant was to present its Resolution Plan to the COC, Respondent No. 1 advised Applicant to submit a Clarificatory Note on the financial proposal for the benefit of the large investors/ depositors which was duly submitted. Additionally, on July 21, 2023, after incorporating the clarifications as requested and sought by Respondent No. 1, the Applicant shared an updated document by way of an addendum to the Resolution Plan ("Addendum along with Clarificatory Note"). The Applicant queried

Respondent No. 1 multiple times as to why Respondent No. 1 was taking so much of interest in the financial proposal of the Applicant as the Applicant was yet to present its financial proposal to the CoC and when the then Plan Evaluator had not sought any clarifications. There was no response from Respondent No. 1.

- 6.3. Between July 20, 2023, and July 29, 2023, various emails are stated to be exchanged between Respondent No.1 and the Applicant containing allegations and disputes regarding the Addendum along with Clarificatory Note sent by the Applicant to Respondent No. 1.
- 6.4. The Applicant had attended the 14th CoC Meeting dated July 22, 2023, where it presented its Addendum along with Clarificatory Note and clarified that there was no commercial change to the Resolution Plan. Neither the then Plan Evaluator (surprisingly who resigned as the Plan Evaluator during the 14th CoC Meeting on July 22, 2023) nor Respondent No. 1 mentioned anything to the Applicant that they have a contrary view on the financial proposal/ clarification submitted. However, the Applicant was informed by Respondent No. 1 by its email dated August 2, 2023 that the Addendum along with the Clarificatory Note proposed by the Applicant was put to vote by Respondent No. 1 following the 14th CoC Meeting and the same was rejected by the CoC.
- 6.5. Following that, the Applicant submitted a final addendum dated August 17, 2023 ("Final Addendum") incorporating certain further clarifications including but not limited to the

implication of order of the NCLT dated August 3, 2023, with regard to delayed submission of claims.

6.6. The Applicant was invited to present its Resolution Plan along with the Final Addendum in the 15th CoC Meeting dated August 17, 2023. During the meeting, the following transpired:

- (i) The Applicant learnt that the resolution for approval/rejection of the Addendum along Clarification Note dated July 21, 2023, was clubbed along with certain other alleged non-compliance with regard to the Applicant's resolution plan as per The Companies Act, 2013;
- (ii) The Applicant mentioned that it is unable to negotiate with CoC since no one is coming ahead on behalf of the CoC and the meetings are attended by merely 100 investors out of 15 lakhs investors and that the investors attending the meeting are categorically requesting for increasing the value of the Resolution Plan;
- (iii) The Applicant stated that their Resolution Plan is being misinterpreted;
- (iv) Lastly, the Applicant pointed out that, some of the investors had intimated the Applicant that the resolution for voting on the Applicant's Addendum was framed improperly and hence they did not have the option to vote in favor of commercial aspect of the addendum as the same was clubbed with the non-compliance issue which was bad in law and hence the investors rejected the Applicant's Addendum.

- 6.7.No communication was received by the Applicant from Respondent No. 1 post the 15th CoC Meeting. However, the Applicant has recently come across a letter dated August 22, 2023 on the letterhead of one Shree Sadguru Samarth Marketing Representative Welfare Association which is being widely circulated. The said letter contains an extract depicting comparative analysis of resolution plans submitted by various PRAs and the Applicant is given to understand that the same is an exact copy of the slide uploaded which is claimed to be downloaded from on the Virtual Data Room sans the watermark but with the stamp of Respondent No. 2.
- 6.8. The Applicant is highly concerned as to how the data got leaked to selective sources. Further, data as contained in the said letter is not represented correctly. Thus, the Applicant had written an email communicating its concerns and certain immediate actions which were required to be taken by Respondent No. 1 and Respondent No. 3 on August 23, 2023.
- 6.9.It was also submitted that every commercial decision of the CoC is to be supported by suitable reasoning and is to be recorded and every inappropriate action or omission by the CoC cannot be accepted in the garb of supremacy and justiciability of commercial wisdom of CoC. Respondent No. 1 and Respondent No. 3 have a statutory role and discharge a sort of public function. Therefore, they are liable to apply the highest standard, duty of care and follow due process, to be fair to all stakeholders and also act in a transparent manner in discharge of its functions. The above acts of Respondent No. 1

lack demonstrable transparency in conducting the CIRP process which leads to gross violation of principles of natural justice of the Applicant.

- 6.10. It was also submitted that the Applicant had pointed to Respondent No. 1 out that certain claims of depositors/investors were still under verification/reconciliation. The Applicant had also pointed out that under the garb of evaluation, several months/timelines were given a go-by by the RP and it was represented to us that no sufficient time would be given to interact with the CoC (which are depositors in this case) so that the plan can be explained to them since the statutory timelines of the Code are coming to an end and everything is actually pushed in rushed manner, thus, jeopardising the entire CIRP process.
- 6.11. The RFRP read with Regulation 39(1A) enables a challenge mechanism for the PRAS to improve their resolution plans. The Applicant submits that it is ready and willing to participate positively in such a challenge mechanism in order to achieve the value maximisation objective of the Code and secure best values for lakhs of depositors/investors.
- 6.12. The Respondent No. 1 filed reply dated 29.08.2023 stating that post multiple deliberations in the CoC meeting, the Applicant withdrew their Addendum dated 12.08.2023 and during the said CoC meeting itself submitted another Addendum dated 17.08.23 vide email dated 17.08.2023 to the Resolution Professional. The Resolution Professional shared the Addendum dated 17.08.2023 submitted by the Applicant

with the CoC, CoC Legal Advisor, RP Legal Advisor and CoC Evaluator/ Resolution Plan Evaluator. It was noted in the CoC meeting that the Applicant had again changed the commercials inspite of giving Addendum dated 12.08.2023 (emailed to the Resolution Professional on 14.08.2023). This was inspite of the Applicant knowing that the earlier Addendum read with Clarificatory Note dated 21.07.2023 was rejected by the CoC and the same was already been communicated to the Applicant by the Resolution Professional vide email dated 02.08.2023. Due to paucity of time and the agenda items left (including the review of Addendum dated 17.08.2023 submitted by the Applicant) to be deliberated and discussed upon, the 15th Meeting of the CoC was adjourned to 18.08.2023.

6.12.1. It was further stated that the Applicant at the time of the presentation of their resolution plan in the 15th meeting of the CoC informed that the Applicant had been having discussions with the investors and the presentation on the resolution plan is prepared accordingly and the same has also been shared with some of the investors directly by them. Further, the Applicant had also informed that English, Hindi and Marathi version of the presentation shall also be shared with the RP/AR of the financial creditors in a class to be put on VDR for the sake of the investors. The CoC Evaluator/ Resolution Plan Evaluator presented their analysis and evaluation of all the three resolution plans and pointed that the commercials in the revised addendum dated 17.08.23 of the Applicant have

revised commercials as compared to the revised resolution plan dated 26.06.23.

6.12.2. Accordingly, it was contended that, given that the Applicant was changing his addendums again and again, to address the issue, the CoC Legal Advisor and Authorised Representative of the financial creditors in a class suggested that the resolution for approval of the resolution plan of the Applicant, along with a detailed note should be put to vote. Accordingly, all the three Resolution Plans along with their Addendum and Clarification, were simultaneously put to vote for voting at the 15 meeting of the CoC dated 17.08.2023 and adjourned to 18.08.2023. The voting on the three resolution plans by the financial creditors in a class started at 8 am on 23.08.2023 and concluded at 8 am on 28.08.2023. Subsequently the AR made his vote on behalf of the CoC at 9:36 am on 28.08.2023 and the resolution plan of the successful resolution applicant was approved with absolute majority. Subsequent thereto Letter of Intent dated 28.08.2023 has been issued by the Resolution Professional to the Successful Resolution: Applicant.

6.12.3. It was further stated that the evaluation of the resolution plan falls within the commercial wisdom of the CoC and Resolution Professional has no role to play in the same. Further, the AR of financial creditors in a class also facilitated meeting the resolution applicants with the CoC members and as such the Applicant cannot make any

grievance that the CoC members were misled even otherwise.

6.12.4. It was also stated that in terms of Regulation 39(1A) of the CIRP Regulations, the Resolution Professional can only accept revision in the resolution plan once. In order to iron out the compliance issues, all the PRAs were given opportunity to give revised Addendum to address Code and RFRP compliance issues only. However, the Applicant while submitting the Addendum dated 21.07.2023, revised commercials of the revised resolution plan dated 26.06.2023. Accordingly, the permissibility of revision of plan more than once, being in domain of CoC, was put to vote, however, the same was rejected, accordingly, the addendum enhancing the commercial could not have been taken up.

6.12.5. It was also alleged that the Applicant has deliberately suppressed that vide email dated 14.08.2023 they had submitted an Addendum dated 12.08.2023 reverting to the original commercials in resolution plan dated 26.06.2023. This fact has been deliberately been concealed from this Tribunal and no reference has been made to the submission of the said Addendum dated 12.08.2023. It is noteworthy, that the Applicant again submitted Addendum dated 17.08.2023 ignoring the Addendum dated 12.08.2023 and reinstating the commercials as made in Addendum dated 21.07.2023

which had been already rejected by the CoC. Despite this, Addendum dated 17.08.2023 along with the resolution plan dated 26.06.2023 be put before the CoC with complete disclosure of facts and the CoC in its commercial wisdom can accordingly decide on the same even though no revision in commercials were made by the other PRAs.

6.12.6. In view of the settled law by the Hon'ble NCLAT that any further revision of resolution plans is within the domain of the CoC, in the 14th meeting of the CoC dated 14.07.2023 it was discussed that whether the revision vide Addendum dated 21.07.2023 can be accepted by the CoC and further if all the other resolution applicants should also be given equal opportunity to revise their resolution plans. This was done to create parity and fair/ equitable opportunity for all PRAS, if the COC decides so. However, both the agendas were rejected by the CoC, and the Applicant was accordingly informed that their Addendum dated 21.07.23 read with the Clarificatory Note on Financial Proposal to the Revised Resolution Plan dated 26th June, 2023 was rejected by the CoC vide email dated 02.08.2023.

7. We have heard the Counsel and perused the material on record.

7.1. During the pendency of this Application, an IA 4043/2023 came to be filed on 31.08.2023 by Investors Action Forum Charitable Trust, Marketing Persons Welfare Association, and Investors Welfare Forum Maharashtra, claiming to represent the interest of various creditors/investors in a class of the

Corporate Debtor, aggregating to more than 1,00,000 in number. The Applicants in IA 4043 of 2023 has stated that "in many cases, investors found that someone else had already cast their votes and there was no denial of this aspect by the Respondent R.P. and no steps to rectify the same has been taken by the Respondent R.P. despite being apprised of such misconduct", and "RP needs to control any fraud voting...if number of votes are cast from the same IP address, the owner of the IP should have some authorization from all the Claimants putting up vote from that IP Address". In nutshell, the Applicants in 4043 of 2023 has complained of irregularities in the voting and denial of voting to the correct person.

7.2. Further, three more Intervenor Applications Nos. INVP. 40/2023 by the Legal Counsel appointed by CoC, 42,2023 by Nitin Suresh Satghare & 99 Others the original Applicant in CP 4578 of 2018, & 43/2023 by Suvarna Raghunath More & 77 other Investors came to be filed on 29.08.2023, 31.08.2023 and 05.09.2023 respectively.

7.2.1. The Applicant in INVP 40/2023 has stated that "*COC has by way of voting rejected the Resolution No.3 put forward for voting between July 27, 2023 to July 30, 2023 whether to allow the acceptance of fresh commercial offer from all the proposed Resolution Applicants pursuant to the COC meeting held on July 21, 2023 whereby the COC has duly exercised its commercial wisdom and has not accepted any challenge mechanism and that the COC was not influenced by any suggestions and the plan*

Evaluator's report was not before the COC when such a decision was made.”

7.2.2. The Applicant in INVP 42/2023 has stated that “*COC has by way of voting rejected the Resolution No.3 put forward for voting between July 27, 2023 to July 30, 2023 which was put to vote to decide whether to allow the acceptance of fresh commercial offer from all the proposed Resolution Applicants*”.

7.2.3. The Applicant in INVP 43/2023 has stated that “*Applicant who has filed I.A.No.3850 of 2023 is an unsuccessful resolution Applicant and in view thereof the same deserves to be rejected. On 28/08/2023 CIRP came to an end as the COC has voted in favour of a Resolution Plan by cent percent majority votes cast by the Authorized Representative and the Letter of Intent and now the I.A by the unsuccessful Resolution Applicant was nothing but a misadventure seeking to rewind the process and to Vote on its resolution plan again as of 26th June 2023.*”

7.3. Since, IA 4043/2023, INVP 40/2023, INVP 42/2023, and INVP 43/2023 are in nature of objections to the IA 3850/2023, we consider it appropriate to take into account the submission also in the interest of justice. Further, IA no. 4047, 2023 seeking amendment of prayers in the light of further developments is allowed considering the fact some of the prayers in IA 3850 of 2023 are rendered infructuous consequent upon closure of voting lines and making known the result of vote. Accordingly, we deal with the issues raised in IA 3850/2023 after taking into consideration the modified prayers and the objections in IA

4043/2023, INVP 40/2023, INVP 42/2023, and INVP 43/2023.

7.4. The scope of power u/s 31 of the Code is elaborated in the case *K. Sashidhar Vs. Indian Overseas Bank & Ors. [2019] ibclaw.in 08 SC; Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta and Ors.: (2020) 8 SCC 531; Jaypee Kensington Boulevard Apartments Welfare Association & Ors. Vs. NBCC (India) Ltd. & Ors. (2021) ibclaw.in 63 SC; and recently in Paschimanchal Vidyut Vitran Nigam Ltd. Vs. Raman Ispat Pvt. Ltd. & Ors. (2023) ibclaw.in 81 SC*. It has consistently been held that (i) the ultimate discretion of what to pay and how much to pay each class or sub-class of creditors is with the Committee of Creditors, but, the decision of such Committee must reflect the fact that it has taken into account maximizing the value of the assets of the corporate debtor and the fact that it has adequately balanced the interests of all stakeholders including operational creditors; (ii) while the Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of Creditors, the limited judicial review available is to see that the Committee of Creditors has taken into account the fact that the corporate debtor needs to keep going as a going concern during the insolvency resolution process; that it needs to maximize the value of its assets; and that the interests of all stakeholders including operational creditors has been taken care of; (iii) 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; (iv) The assessment about maximization of the value of assets, in the scheme of the Code, would always be subjective in nature and the question, as to whether a particular resolution plan and its propositions are leading to maximization of value of assets or not, would be the matter of enquiry and assessment of the Committee of Creditors alone; (v) The generalized submissions and objections made in relation to this aspect of value maximization do not, by themselves, make out a case of interference in the decision taken by the Committee of Creditors in its commercial wisdom; (vi) the Parliament did not empower the Adjudicating Authority “with the jurisdiction or authority to analyze or evaluate the commercial decision of the CoC much less to enquire into the justness of the rejection of the resolution plan by the dissenting financial creditors; (vii) the matters or grounds be it under Section 30(2) or under Section 61(3) of the I&B Code are regarding testing the validity of the “approved” resolution plan by the CoC; and not for approving the resolution plan which has been disapproved or deemed to have been rejected by the CoC in exercise of its business decision.

7.5. We also find that the Hon’ble NCLAT, in case of in *Darshak Enterprise Pvt. Ltd. Vs. Chhaparia Industries Pvt. Ltd. passed in CA (AT)(Ins) No. 327/2020*, held that “*in absence of any discrimination or perverse decision it is not open to the Adjudicating Authority or Appellate Tribunal to modify the plan.*”; and, it, in the case of *PNC Infratech Ltd. Vs. Deepak Maini (2022) ibclaw.in 612 NCLAT*, further held that “*there is no such mechanism under the*

Code that gives the right to the Unsuccessful Resolution Applicant to challenge the score granted as per the evaluation matrix prepared by the CoC and the Resolution Professional as per the provisions of CIRP Regulations”.

7.6. In view of the above judicial proposition, we find that the present application can be examined only on the issue of discrimination or perversity in exercise of commercial wisdom of CoC.

7.7. In the present case, the CoC comprises of class of small depositors in category of Financial Creditors and such class is represented by one Authorised Representative Sh. Sh. Vitthal Dahake, who is Respondent No. 3 in this application. In other words, there is one CoC member, having 100% vote share. It is stated that there are approx. 15.00 lacs deposits to whom the Corporate Debtor owes more than 15,000 crores. The Respondent No. 3, who represents these depositors in Sole member CoC, votes on the basis of majority decision of such depositors taken in the meeting of such depositors convened by Respondent No. 3. It is stated that majority of the depositors remain unrepresented on account of some issue or another. In these facts of the case, it becomes imperative to examine the aspect of commercial wisdom.

7.8. The Hon'ble Supreme Court in the case of *Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta and Ors.: (2020) 8 SCC 531* elucidated this aspect by stating that “*Besides, the commercial wisdom of the CoC has been given paramount status without any judicial intervention, for ensuring completion of the*

stated processes within the timelines prescribed by the I&B Code. There is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. The opinion on the subject matter expressed by them after due deliberations in the CoC meetings through voting, as per voting shares, is a collective business decision. The legislature, consciously, has not provided any ground to challenge the “commercial wisdom” of the individual financial creditors or their collective decision before the adjudicating authority. That is made nonjusticiable”. The Hon’ble Court further held that “The subjective satisfaction of the financial creditors at the time of voting is bound to be a mixed baggage of variety of factors. To wit, the feasibility and viability of the proposed resolution plan and including their perceptions about the general capability of the resolution applicant to translate the projected plan into a reality. The resolution applicant may have given projections backed by normative data but still in the opinion of the dissenting financial creditors, it would not be free from being speculative. These aspects are completely within the domain of the financial creditors who are called upon to vote on the resolution plan under Section 30(4) of the I&B Code.”

- 7.9. The commercial wisdom of CoC have been consistently held to be paramount and non-justiciable on the premise that they act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts, accordingly the opinion on the subject matter expressed by them after due deliberations in the CoC meetings through

voting, as per voting shares, is a collective business decision. In the present case, the CoC comprise of Sole member, i.e. Respondent No. 3 who represents interest of approx. 15 lakhs depositors, majority of whom have not participated in the deliberations. These depositors were dependent on the evaluation of the Resolution Plans carried out by the Respondent No. 2 and they were to exercise their vote on the basis of the comparative analysis posted on the Virtual Data Room for the information of each of such investors. It is not in dispute that the evaluator's analysis including the impact of addendum placed by the Applicant was not posted on such designated place. In other words, the decision of these depositors in rejecting the addendum was not taken basis of complete understanding of the financial recovery to such depositors in terms of addendum of the Applicant No. 1. Even though it is claimed that the Respondent No. 1 had placed such analysis before the Respondent No. 3, but the same could not be taken note of by the class of depositors while according mandate on the manner in which to vote by them to the Respondent No. 3. We are of considered view that the Authorised Representative ought to have brought to the knowledge of the class about the financial impact of addendum when seeking their vote on allowing the revision in financials to the Resolution Applicant in this Application. Considering that the Respondent No. 3 represents 15 Lakhs small depositors, who may understand only what they are getting, it was incumbent on the Authorised Representative to exercise

diligence while seeking the vote of the class of depositors on the proposed plans or allowability of further revision opportunity in terms of Regulation 39(1A) of the CIRP Regulations. This assumes more importance considering the fact that these depositors are getting less than 1% of the total amount owed by the Corporate Debtor.

7.10. Value maximisation is one of the objective enshrined in the preamble, though we are conscious that in the garb of value maximisation, the process cannot be allowed to go on for an infinite period. However, when the Respondent No. 1 presented the addendum before the CoC for allowability thereof, we do not find any reason on the part of Respondent No. 3 to resist this value maximization on the ground that CIRP period is expiring, in a case where the CIRP is going on since 9.9.2022. It is not the case here that the mandate to vote in a particular manner was given by majority of whole class, but the mandate was accorded by the majority who voted, which was not significant if compared to the total number of depositors.

7.11. In view of the above, we direct the Resolution Professional to allow all the shortlisted Resolution Applicant to apprise their financial bids, place it before the Respondent No. 3, who shall seek evaluation thereof from Respondent No. 2. Thereafter, the comparative analysis, in lay man language shall be uploaded at the designated place. The Respondent No. 3 shall intimate all the depositors who have filed their claim about the next voting on these plans if they so desire. Any

depositor, who claims that his/her vote was already casted by someone else or who could not cast votes due to system limitation shall be allowed one final opportunity to vote, provided such complaints are sufficient so as to influence the decision taken by depositors who have already voted. The whole process shall be completed within period of one month.

7.12. The existing voting is cancelled consequently.

7.13. IA 3850 of 2023 is allowed. IA 4047 of 2023 is allowed. IA 4043 of 2023, INVP 40/2023, INVP 42/2023 & INVP 43 of 2023 are dismissed.

Sd/-

Prabhat Kumar
Member (Technical)

Sd/-

Justice V.G. Bisht
Member (Judicial)