NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.729 of 2020

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Company Appeal (AT) (Insolvency) No. 729 of 2020

[Arising out of Impugned Order dated 09 July, 2020, passed by the Adjudicating Authority/National Company Law Tribunal, Chandigarh Bench, Chandigarh in IA No. 222/2020 in Company Petition (IB) No.42/Chd./Hry./2017 (admitted)]

IN THE MATTER OF:

Union Bank of India
(Erstwhile Corporation Bank)
Stressed Assets Management Vertical
Overseas Branch
M – 93, Connaught Place
New Delhi – 110001 **Appellant**

Versus

1. **Mr Dinkar T. Venkatasubramanian**
   Resolution Professional of
   Amtek Auto Limited
   EY Restructuring LLP
   Golf View Corporate Tower B
   Sector – 42, Gurugram, Haryana **Respondent No.1**

2. **DVI PE (Mauritius) Ltd**
   A company under the laws
   of the Republic of Mauritius
   Having its Registered Office at:
   IQ EQ Fund Services (Mauritius) Limited
   33 Edith Cavell Street
   Port Louis 11324
   Through his Counsel
   Mr Himanshu Gupta Advocate
   215 C, Sector 4, MDC, Panchkula **Respondent No.2**

3. **Deccan Value Investors L P**
   A Limited Liability Partnership
   Incorporated in Delaware USA
   Having its registered office at:
   850, New Burton Road
   Suite 201, Dover
   Delaware 19904, USA
   Through his Counsel
   Mr Himanshu Gupta Advocate
   215 C, Sector 4, MDC, Panchkula **Respondent No.3**

Present:

For Appellant : Mr Gopal Jain, Sr Advocate with Mr Alok Kumar, Mr Manan Gambhir, Mr Nikhil Malhotra and Ms Garima Soni, Advocates.

For Respondent : Mr Sanjay Bhatt, Mr Karan Kohli and Ms Niharika Sharma, Advocates for R1.
Mr Chanakya Keswani and Mr Dinesh Pednekar, Advocates for R2 & 3.

Glossary

IRP	**Interim Resolution Professional**
NCLT	**National Company Law Tribunal**
NCLAT	**National Company Law Appellate Tribunal**
I&B Code/ Code	**Insolvency and Bankruptcy Code**
CIRP	**Corporate Insolvency Resolution Process**
ICD	**Insolvency Commencement Date**
CoC	**Committee of Creditors**
LC	**Letter of Credit**
LHG	**Liberty Housing Group**
CD	**Corporate Debtor**

CORAM:
Hon'ble Mr Justice M. Venugopal, Member (J)
Hon'ble Mr V. P. Singh, Member (T)
Hon'ble Dr Alok Srivastava, Member (T)

J U D G M E N T
(Virtual Mode)

[Per; V. P. Singh, Member (T)]

1. The present Appeal emanates from the Order of the Adjudicating Authority/National Company Law Tribunal, Chandigarh Bench, Chandigarh dated 09 July 2020, passed in IA No. 222/2020 filed U/S 60(5) of the Insolvency and Bankruptcy Code, 2016 (in short '**I&B Code**') in Company Petition (IB) No.42/Chd./Hry./2017.

2. The Parties are represented by their original status in the Company Petition for the sake of convenience.

Factual Background

3. The Appellant (Union Bank of India) Financial Creditor applied for initiation of Corporate Insolvency Resolution Process under Section 7 of the Insolvency and Bankruptcy Code, 2016 against Corporate Debtor (Amtek Auto Limited). The Adjudicating Authority admitted the petition and appointed Shri Dinkar T. Venkatasubramanian as the Interim Resolution Professional (IRP).

4. Corporation bank, a Financial Creditor of the Corporate Debtor, now known as Union Bank of India, filed an Application, IA No 222/2020, seeking direction for modification of the Approved Resolution Plan of Respondent No. 2 and 3, in compliance with Regulations 42 and 44 of the liquidation Process Regulation 2016 for not deducting ₹ 34 crores from the final payment to be made to the Applicant/Appellant as per the scheme of distribution from out of the amount under the Resolution Plan was rejected. Therefore, feeling aggrieved by the said Order, the present Appeal is filed.

5. Respondent No. 1 is the Resolution Professional of the CD[1], and Respondents 2 & 3 are jointly the Successful Resolution Applicants.

6. Corporation Bank, a Financial Creditor of the Corporate Debtor, now known as Union Bank of India, filed the instant IA 222 of 2020 on 12 March 2020 against the Resolution Professional of the Corporate Debtor (Respondent

[1] corporate debtor

No. 1) and Successful Resolution Applicant [2], (Respondent No. 2 & 3), under Section 60 (5) (c) of the I&B Code read with Rule 11 of the NCLT Rules seeking the following directions/reliefs:

a. *Allow the instant Application filed by the Applicant and direct the IRP to get the Resolution Plan modified so as to comply with Regulation 42 and 44 of the Liquidation Process Regulation 2016;*

b. *direct the Respondent Resolution Professional to not to deduct the amount of ₹ 34 crores from the final payment to be made to Applicant as per the scheme of distribution of amount under Resolution Plan; and*

c. *direct the Respondent Resolution Professional to further include amount of ₹ 6,22,58,072.64 towards LC payments and ₹ 61,39,000 towards Bank Guarantee (BG) payments and the total admitted claim of the Applicant.*

7. **Appellants Submission**

7.1 The Appellant contends that Respondent No.1 erroneously denied the Appellant's a claim of ₹ 39,61,54,488 towards Non-Fund Based Facility[3] despite actively operating the bank accounts of the Corporate Debtor and being well aware of all the financial transactions, including the fact that the NFB Facility falls well within the definition of financial debt under Section 5(8)(h) of the IBC. The fact that Respondent No.1 was operating the bank account of Corporate Debtor can be seen from the documents, Annexure 4-5 at Pg. 111 of the Appeal Paper book.

[2] SRA
[3] NFB

7.2 The Appellant is one of the dissenting Secured Financial Creditors allotted the 'Liquidation value as per the allocation sheet and, therefore, approved by the CoC. The claim of Rs. 39.61 crores were erroneously rejected by the IRP only because the same was not crystallised.

7.3 Respondent No.1 /RP had been regularly giving instructions regarding debiting a cash credit account as and when any LC/BG[4] is presented before the Appellant for payment and in case of issuance of any fresh LC/BG (NFB Facility). This admitted arrangement between the Appellant and Respondent No.1 is reflected in the letter dated 08.08.2017, annexed as Annexure A-5 at Pg. 111 of the Appeal Paper book.

7.4 In any event, all the payments were made directly to the supplier/vendor /beneficiary of the NFB Facility by debiting the cash credit account of the Corporate Debtor. No amount has been credited towards the loan account of the Corporate Debtor. It is reiterated that the payments were made directly to the vendors, and no amount was appropriated or adjusted by the Appellant towards any outstanding claim under CIRP. Therefore, the Appellant has not done unjust enrichment by alleged recovery of ₹ 33.34 crores from the Corporate Debtor during the CIRP.

7.5 It is also clearly admitted by Respondent No.1 that the NFB Facility has been issued in favour of the beneficiary/vendors for the purchase of various types of steels and other alloys. However, despite this admitted fact, Respondent No.1 failed to appreciate that the Corporate Debtor is liable to

[4] Letter of Credit Bank Guarantee

pay the suppliers/beneficiaries during the CIRP period. The Appellant did the same by debiting the cash credit account of the Corporate Debtor as instructed by Respondent No. 1. Therefore, the payments consequently made to such beneficiaries by debiting the Corporate Debtor's account are misconceived as recovery towards the dues.

7.6 It is further submitted that since 'LHG'[5] failed to fulfil the condition in the Resolution Plan to provide a cover for equivalent amount from a scheduled bank in the event, it intends to avail the NFB Facility, the Appellant specifically mentioned in its letter dated 24.10.2018 that any provision concerning the NFB Facility will be subject to the fulfilment of the condition mentioned in the Resolution Plan. The letter dated 24.10.2018 is annexed as Annexure 4-6 at Pg. 149 of the Appeal Paper book.

7.7 On perusal of the letter dated 30.10.2018 sent by Respondent No. 1 to the Appellant, it is clear that Respondent No.1 was aware that the NFB Facility limits were subject to covering the limit by another scheduled commercial bank. This is in line with the discussions with LHG[6] and is also mentioned in the Resolution Plan. The letter dated 30.10.2018 is marked in the Reply filed by Respondent No.1 at pg. 45.

7.8 The Appellant references the letter dated 30.10.2018, i.e. Email dated 21.11.2018 sent by Corporate Debtor regarding the Continuance of NFB Facility of Rs. 43 Crores (NFB Limits) in the capacity of the person-in-charge

[5] Liberty House Group
[6] Liberty House Group

for the management of the Corporate Debtor, and Respondent No. 1 addressed himself as the Insolvency Professional in the said Email. The said Email is annexed in the Reply filed by Respondent No.1, Resolution Professional, Annexure R, at Pg.49.

7.9 Further, Respondent No.1, in its Reply, has mentioned that there was no reservation shown or recorded in the CoC minutes on behalf of the Appellant. Therefore, the CoC meeting dated 07.02.2020 records the objections raised by the Appellant at para (n) of the CoC meeting. On the contrary, Respondent No. 1 misrepresented the CoC by giving it a colour of recovery of LCs made by Appellant from the Corporate Debtor during CIRP. Based on the incorrect information about the interim finance, the claim of ₹ 34 Crores towards LC[7] got rejected, despite that the amount was directly paid to the vendors of the Corporate Debtor from the current account under the specific instructions of Respondent No. 1 to keep the Corporate Debtor a going concern.

7.10 Further, the Appellant had also objected vide its letter dated 20.02.2020 to the acts of Respondent No. 1 and made it clear that the LCs availed by the Corporate Debtor is like a contingent liability. Therefore, the amounts were being paid directly to the vendors/suppliers of the Corporate Debtor by the Appellant.

7.11 But Respondent No. 1 misled the CoC by not placing all the facts and records. In particular, his various requests for debiting the current account

[7] Letter of Credit

of Corporate Debtor or issuance of fresh NFB Facility. Furthermore, Respondent No.1 had also misled the CoC by stating that the Appellant had made a recovery of ₹ 34 Crores when the vendors of the Corporate Debtor were the ultimate beneficiaries under the NFB Facility. Therefore, the decision taken by the CoC is based on the incorrect information provided by Respondent No.1.

7.12 The Adjudicating Authority failed to consider that the Appellant, a dissenting Financial Creditor, is entitled to liquidation value according to Section 53 of the IBC. Therefore, it did not comply with Regulations 42 & 44 of the IBC (Liquidation Process) Regulations, 2016.

7.13 The Adjudicating Authority vide its Impugned Order observed that the Appellant has not objected to the said actions of Respondent No.1 in the CoC meetings, contrary to the materials placed before the Adjudicating Authority. Furthermore, the Appellant had refuted the actions of Respondent No. 1 vide its Email dated 20.02.2020, which the Adjudicating Authority has overlooked. Therefore, the Adjudicating Authority has misconstrued the payments made to the beneficiaries/vendors as recovery by the Appellant and dismissed the IA. No. 222 of 2020 in CP (IB) in CP (IB) No. 42/Chd./Hry./2017 without any application of mind.

RESPONDENT NO.1. RESOLUTION PROFESSIONAL's SUBMISSION

8. Respondent No.1 submits that the captioned Appeal is not maintainable, entirely misconceived and devoid of any substance in facts or law.

a) The Appellant itself filed the Application under Section 7 of the Insolvency & Bankruptcy Code, 2016 (hereinafter, "IB Code") seeking initiation of the Corporate Insolvency Resolution Process (hereinafter, "CIRP") under the IB Code in respect of Amtek Auto Limited (hereinafter, "Corporate Debtor" and/or "AAL") and Respondent was appointed as IRP/RP.

b) During CIRP, Respondent made the Public Announcement on 29.07.2017. Pursuant to the Public Announcement, the Appellant filed its proof of claim under Form C dated 04.08.2017 as on the insolvency commencement date (hereinafter, "ICD"), for an aggregate amount of ₹ 876,42,09,926/-. In the said claim, the Appellant claimed an amount of ₹ 39,61,54,488/- under the Non-Fund based Letter of Credit Bank Guarantee facility (from now on, "NFB Facility"). Respondent RP on verification and collation of the claim filed by the Appellant in terms of the provisions of the IB Code and the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016 (from now on, the "CIRP Regulations") verified an amount of ₹ 836,80,55,438/- as *'financial debt'* of the Appellant. The Appellant was included as a member of the Committee of Creditors (from now on, "CoC") and was assigned voting right of 6.64% in the CoC based on its financial debt.

c) The Appellant did not challenge the non-verification of the said uncrystallised amount and thus accepted the same. The Corporate Debtor did not receive any material during the CIRP on account of these

uncrystallised LCs, and thus the said un-crystallised amount never became a "financial debt". A copy of the proof of claim dated 04.08.2017 filed by the Appellant is already produced on record by the Appellant *(Annexure A-3 at 91-99 of the captioned Appeal)*.

d) Respondent RP in terms of the duty cast under Section 20 & 25 of the IB Code to continue and maintain the business of the Corporate Debtor as a going concern, requested the Appellant to continue and maintain the NFB Facility limits at the current level as being drawn by the Corporate Debtor prior to the insolvency commencement date. The said request was made on account of the business requirement of the Corporate Debtor. The Corporate Debtor is engaged in manufacturing, fabrication, and engineering automotive parts. As part of its said business, it is required to purchase various types of steel and other alloys. As per the existing market practice, the purchase and procurement of steel and alloys is always backed by Letters of Credit Bank Guarantee issued by the purchaser's Bank in favour of the beneficiary vendor, and thus the continuation of the NFB Facility by the Appellant was very much needed as a lifeline for the continuation of the business of the Corporate Debtor as a going concern.

e) That upon the request made by the Answering Respondent/ RP, the Appellant agreed to continue the NFB Facility at an existing level as granted to the Corporate Debtor. On the basis of such understanding, during the CIRP period, the Appellant from time to time issued various Letters of Credit Bank Guarantee on behalf of the Corporate Debtor

under the said NFB Facility and on devolvement of them used to deduct the amount from the collection account of the Corporate Debtor maintained with them acting as the Financial Institution under Section 17(d) of the IB Code and issue fresh Letters of Credit Bank Guarantee against the available limit of NFB Facility during the CIRP.

f) By the provisions of the IB Code, a resolution plan submitted by Liberty House Group Pvt. Limited (from now on, "LHG") was put to electronic voting by the CoC of the Corporate Debtor in the meeting held on 02.04.2018 and was approved via e-voting concluded on 05.04.2018. In pursuance of it, the Answering Respondent /RP filed an' Application, being CA No.114 of 2018 under Section 30(6) & 31(1) of the IB Code for approval of the resolution plan of 'LHG' before the Ld. NCLT on 16.04.2018. The Ld NCLT approved the LHG Resolution Plan vide Order dated 25.07.2018. Later on, LHG defaulted in the implementation of the Resolution Plan.

g) During the implementation of the LHG resolution plan, the Appellant, in a high handed and unreasonable manner vide letter dated 24.10.2018, asked the Answering Respondent to get the NFB Facility covered/backed by a comfort letter/ guarantee by a scheduled commercial bank despite the fact that during that time the Answering Respondent was only acting as the Insolvency Professional and the management of the Corporate Debtor was vested with the Monitoring Committee constituted under the LHG Resolution Plan.

h) The Respondent/RP responded to the said letter sent by the Appellant vide letter dated 30.10.2018 and requested the Appellant to continue the NFB Facility without insisting on the condition as stipulated till the resolution plan of LHG is implemented. It was also pointed out that withdrawal of the NFB Facility at that stage would hurt the operations of the Corporate Debtor as a going concern. A copy of the letter dated 30.10.2018 issued by the Answering Respondent is already attached in Annexure R-1.

i) The Appellant, without responding to the said request by misusing its power and position, imposed auto-debit instructions and started debiting the collection account of the Corporate Debtor maintained by it as 'Financial Institution for any devolvement of Letter of Credit/ Bank Guarantee and made recovery of an aggregate amount of ₹ 33.34 Crores. Monthly details of Letters of Credits (from now on, "LCs") opened by the Appellant against deductions for LCs made from the Corporate Debtor during CIRP are already annexed with the reply of RP.

j) This unexpected act on the Appellant led to extreme hardship for the Corporate Debtor to keep up its performance due to this unexpected reduced working capital at hand. More pertinently, the time during which the Appellant took this action was when the Corporate Debtor needed the working capital most due to higher than average sales in the auto sector on account of the festive season. However, the Corporate Debtor could not take advantage of the same due to the unexpected

action of the Appellant and lack or non-availability of working capital to procure the raw material on a timely basis. It is also evident from the dip in revenues of the quarter ending 31.12.2018, amounting to approximately INR 261 crores instead of the revenue generated in the quarter ended 31.09.2018.

k) That alarmed by such arbitrary act on the part of the Appellant and the continuous fall in the performance of the Corporate Debtor, the Respondent/RP immediately rushed and convened a meeting with the Managing Director and the General Manager of the Appellant at the head office of the Appellant at Mangalore on 21.11.2018 and discussed the situation caused by such arbitrary action on the part of the Appellant.

l) That after the meeting, it was agreed that (a) out of the total sanctioned limit of ₹ 43.00 Cr, ₹ 29.08 Cr, which had been utilised as on date, will be protected and revolved; (b) No auto-debit for payments of the outstanding LCs as of 21.11.2018 for ₹ 29.08 Cr. until fresh LCs are opened; and (c) Concerning the un-utilised limit of ₹ 14 Cr, further discussion will take place.

m) It is pertinent to note that while it was agreed that further discussion on the unutilised limit of INR 14 crores would be held, however, the same never materialised, which led to a reduction of -33% in the LC limit available with the Corporate Debtor for procurement of raw material thereby further imposing unnecessary pressure on

working capital and thus disrupting operations. The Answering Respondent conveyed the aforesaid decision to the concerned branch of the Appellant with a request not to enforce auto-debit instructions from the collection account maintained with them under Section 17(d) of the IB Code. The Answering Respondent further followed it up again vide Email dated 26.11.2018. Vide letters dated 21.11.2018 and 26.11.2018, the Respondent in his capacity of the Resolution Professional directed the Appellant to not deduct any amount from the collection account of the Corporate Debtor maintained with it during the CIRP suo-moto. The extracts of the letter are reproduced below:

> *"Post the meeting between Resolution Professional and the MD and GM of the Corporation Bank on 21 November 2018, the RP's office had issued the below mail and signed letter regarding the agreements in the afore-mentioned meeting, to the Circle office in Delhi. As discussed, request you to kindly not initiate any debit (Auto/Manual) of the outstanding amount for the utilised limits of LC as on 22 November 2018 and also support us with issuance of fresh LC's, which is of paramount importance for treasury operations at Amtek Auto Limited.*
>
> *Also, please let us know in case there is any disconnect in understanding regarding the aforesaid subject matter.*
>
> *Your continued support in this regard is well appreciated.*"
>
> *(verbatim copy)*

A copy of the Email dated 21.11.2018 and dated 26.11.2018 sent by the Answering Respondent to the Appellant is already attached in Annexure R-1, respectively.

n) However, despite having arrived at the understanding with the highest level with the Appellant, the Appellant, without any further communication to the Answering Respondent, arbitrarily and in a high handed manner, withdrew the NFB Facility granted to the Corporate Debtor while making recovery of a further amount of ₹ 33.34 Crores from the collection account of the Corporate Debtor maintained with it during the CIRP by misusing its power as Financial Institution under Section 17(d) of the IB Code contrary to the instructions of the Respondent/RP.

o) The Respondent/RP vehemently protested and objected to the withdrawal of the NFB facility by the Appellant vide letter/ email dated 14.12.2018. On account of the illegal and unauthorised recoveries being made by the Appellant and to prevent further loss of working capital, the Answering Respondent was forced to stop the usage of the collection account with the Appellant and use another account with Axis Bank Limited for collections starting from December 2018. This caused an undue burden on the Corporate Debtor during the already uncertain times to change the collection account with 43 domestic and international customers. Furthermore, this entire exercise made the Corporate Debtor susceptible to certain cyber fraud, which was eventually identified at an early stage, and its after-effects

were nullified because of the Responding Appellant's proactive intervention and coordination with multiple institutions. A copy of the letter/email dated 14.12.2018 sent by the Answering Respondent to the Appellant is already attached in Annexure R-1.

p) The aforesaid arbitrary, illegal and highhanded actions of recovery of ₹ 33.34 Crores by the Appellant during the continuation of the moratorium under the IB Code left the Corporate Debtor high and dry with an almost negligible amount of working capital or cash in hand to operate as a going concern.

q) Respondent RP further submitted that the tall claims of support to the Corporate Debtor during the CIRP averred by the Appellant are very hollow as the result of the illegal action taken by the Appellant is recovery/unjust enrichment ₹ 33.34 Crores from the Corporate Debtor during the CIRP contrary to mandate under Section 17(d) of the IB Code and prohibited under Section 14 of the IB Code.

r) Respondent RP duly brought the action above of illegal recovery of ₹ 33.34 Crores made by the Appellant from the Corporate Debtor to the knowledge of the CoC from time to time. **To cover up and avoid any consequences under the IB Code for such an illegal act of recovery, the Appellant urged the rest of the members of the CoC to treat the unlawful recoveries made by it as interim finance. On being asked, the Answering Respondent, in all fairness and independence as is expected from an Insolvency Professional under the IB Code, suggested two options to the CoC to either treat the**

illegal recovery made by the Appellant as an 'interim finance' under the IB Code or accent to deduction of the amount of illegal recovery made by the Appellant out of distribution amount payable to the Appellant under the resolution plan submitted by the Respondent No. 2 & 3 in the instant Appeal. Accordingly, the CoC (which includes the Appellant with its voting share of 6.64%) on deliberation consented to deduction of the said amount from the distribution amount payable to the Appellant under the resolution plan submitted by Respondent No. 2 & 3 in the 30th and 31st meeting of the CoC held on 05.02.2020 and 07.02.2020, respectively. This treatment led to an increase in the Appellant's admitted debt and voting share to 7.72%. A perusal of the minutes above filed by the Appellant (Refer Annexure A-7 at Page 151-161 of the instant Appeal) itself shows that no reservation of any kind was shown or recorded in the said minutes on behalf of the Appellant.

s) Respondent further submits that it had no intention to make any harsh statements against the Appellant but was forced to do so. Despite having admittedly made a recovery during the moratorium from the Corporate Debtor, the Appellant still had the audacity to approach the Ld. NCLT by filing the Application being IA. No. 222 of 2020 seeking reliefs against the Respondent/RP for not deducting the illegally recovered amount by the Appellant from the amount to be distributed to it in terms of the resolution plan submitted by the Respondent No. 2 & 3 for approval by the Ld. NCLT.

t) The Ld. NCLT, after elaborately hearing the Appellant and the Answering Respondent and while passing the Order dated 09.07.2020, took note of the fact that the Appellant accented to deduction of the amounts of ₹ 33.34 Crores and, in fact, nowhere disputed the distribution of amounts payable to the Appellant being a 'dissenting creditor' under the terms of the resolution plan of Respondent No. 2 & 3. The relevant part of the Order dated 09.07.2020 reproduced hereunder:

> "*7. The decisions of the Committee of Creditors passed with the required majority percentage as per the Code, are Binding On all the stakeholders, including the dissenting members of Committee of Creditors, if any. No member of the Committee of Creditors, after a resolution plan was approved by the Committee of Creditors with the required majority percentage, on one ground or other, cannot challenge the said decisions of the Committee of Creditors. It is for the Adjudicating Authority to apply its judicious mind whether a particular plan submitted for its approval is in compliance of the provisions of the Code and the Regulations made thereunder. The Applicant even in its rejoinder; to the Reply filed by the Resolution Professional, has not denied the fact of deliberations and acceptance of the action of the Resolution Professional for deducting the amount of Rs.34 Crores and for distribution of amount payable to the Applicant under the Resolution Plan of DVI, by the Committee of Creditors, wherein the Applicant is a member.*

8. In the circumstances and for the aforesaid reasons, we do not find any merit in the IA and accordingly, the same is dismissed."

u) Respondent RP states that Appellant did not challenge the decision taken by the CoC in the 30th and 31st meeting of the CoC held on 05.02.2020 and 07.02.2020 before the Ld. NCLT and confined its challenge against the Respondent/RP only despite knowing very well that the decision to make a deduction of ₹ 33.34 Crores from the proceeds payable to the Appellant under the Resolution Plan of the Respondent No. 2 & 3 was taken by the CoC and not the RP/Respondent; the current challenge deserves to be rejected. It is further surprising that the Appellant has chosen to not even array the CoC as a party in the instant Appeal. Section 30(4) of the IB Code casts supervising distribution amongst all creditors, and the resolution professional has no say in that. Section 30(4) of the IB Code is reproduced hereunder for the sake of easy reference of this Hon'ble Appellate Tribunal:

"(4) The Committee of creditors may approve a resolution plan by a vote of not less than sixty-six per cent. of voting share of the financial creditors, after considering its feasibility and viability, the manner of distribution proposed, which may take into account the Order of priority amongst creditors as laid down in sub-section (1) of section 53, including the priority and value of the security interest of a secured creditor and such other requirements as may be specified by the Board..."

Emphasis Supplied

v) The Hon'ble Supreme Court in the case of ***Committee of Creditors of Essar Steel India Limited Through Authorized Signatory Vs. Satish K. Gupta & Ors. [(2019) SCC Online SC 1478]*** in Para 64 of Judgment and Order has reinforced the said position and has held as under:

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

w) **In the present case, the Resolution Plan submitted by the Respondent Nos. 2 & 3 is silent on the manner of distribution to dissenting creditors.** Even otherwise, it is the CoC and not the Resolution Professional of the Corporate Debtor who is cast with the duty to decide and supervise the manner of distribution inter-se creditors. Therefore, the alleged grievance of the Appellant being a member of the CoC itself against the Answering Respondent is not only wholly misconceived but contrary to law. The Hon'ble Supreme Court in ***Swiss Ribbons Private Limited Vs. UOI (2019) SCC Online SC 73]*** has categorically held that the resolution professional is a facilitator of the resolution process, whose administrative functions are overseen by the CoC and the Ld. NCLT.

9. **Rejoinder of Appellant against the Reply of the Resolution Professional**

a) In its rejoinder to the Reply of the Resolution Professional, the Appellant vehemently denied that the Appellant accepted the non-verification of the un-crystallised amount. On the contrary, the Appellant was denied the claim towards ₹ 39,61,54,488 towards Non-Fund Based LC/BG Facilities, which by operation of law is a Financial Debt. Therefore, it is clear that Respondent No.1 is taking a contradictory stand. On the one hand, the submission of Respondent No.1 is that the Non-Fund Based LC/BG doesn't become a Financial Debt due to non-crystallisation.

b) On the other hand, Respondent No. 1 submits that when the said LC/BG devolves, the same becomes the obligation of the Appellant. It is further denied that the said un-crystallised amount never became a 'financial debt. It is also explicitly denied that the Corporate Debtor did not receive any material during the CIRP because of the un-crystallised Non-Fund Based Facility. In the case of alleged non-receipt of goods, the same was to be taken up with the supplier of the goods and not the Bank who has issued the LC at the request of Respondent No.1. It is submitted that Respondent No. 1 was actively operating the bank accounts of the Corporate Debtor and was well aware of all financial transactions, including the fact that the NFB Facility falls well within the definition of financial debt under Section 5 (8) (h) of the IBC.

c) The Section 5 (8) (h) of the IBC provides the following:

"Section 5 (8): "financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes –

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;".

(c) The Appellant denied that there was an understanding between the Appellant and the Respondent No. 1 that as and when the LC/BG would devolve, the same will be paid directly to the beneficiary from the current account of the Corporate Debtor and fresh LC/BG will be issued as and when the request for the same was made by Respondent No. 1

for which the amount would be debited from the current account of the Corporate Debtor. Further, as and when any fresh LC/BG was to be issued, the same was done on the specific request of Respondent No. 1. This admitted arrangement is reflected in the documents annexed as Annexure A-5 on page 111 of the Appeal.

d) The Respondent has clearly admitted that the LCs/ BGs have been issued in favour of the beneficiary/vendors to purchase various types of steels and other alloys. However, the respondent has failed to appreciate that the Corporate Debtor is liable to pay the suppliers/beneficiaries under the LCs/BG during the ÇIRP period. The payments consequently made to such beneficiaries by debiting to the Corporate Debtors accounts have been misconceived as recovery towards our dues and thereby caused huge loss to the Applicant in denying the claim.

e) It is submitted that Liberty House Group was selected as a successful Resolution Applicant and the approved Resolution Plan had a condition that the Resolution Applicant will provide a cover of an equivalent amount from a scheduled bank in the event it intends to avail NFB LC/BG Credit facilities and the same was intimated to the IRP on 24.10.2018 which the Resolution Plan failed to fulfil. Copy of the letter dated 24.10.2018 has been annexed and marked in the Appeal as Annexure A-6 (Pg. 149 to Pg. 150).

f) It is vehemently denied that the Appellant acted in a high-handed manner. Further, upon perusal of the letter dated 30.10.2018 (page 45 of the Reply of the Respondent No. 1) written by Respondent No. 1 to the Appellant, it is amply clear that Respondent No. 1 had accepted that the NFB limits be subject to covering the limit by another scheduled commercial bank which is in line with the discussions with the Resolution Applicant and has also been mentioned as a part of Resolution Plan. Further, it is also denied that Respondent No.1 was only acting as the Insolvency Professional, and the management of the Corporate Debtor was vested exclusively with the Monitoring Committee. Further, the Email dated 21.11.2018 referred to the letter dated 30.10.2018 sent by Amtek Auto Limited regarding the Continuance of LC/BG Facilities of ₹ 43 Crores (NFB Limits) in the capacity of the person-in-charge for the management of the Corporate Debtor, and Respondent No. 1 addressed himself as the Insolvency Professional in the said Email dated 21.11.2018. Copy of the Email dated 21.11.2018 has been annexed and marked in the Reply filed by Respondent No.1 as Annexure R-1 (Page 49).

g) It is submitted that while honouring the LCs/BGs issued on behalf of the Corporate Debtor, the Appellant being the Financial Creditor, had not unduly enriched itself. It is further reiterated that no amount has been credited towards the loan account of the Corporate Debtor, and the debits are relating to the payment made to the supplier/vendor /beneficiary of LC/BG. Therefore, it is incorrect to say

that the appellants have made a recovery of ₹ 33.34 Cr. On the contrary, the said LCs/BGs have been issued during the CIRP period, and the same ought to have been considered the CIRP cost because the Corporate Debtor had received the goods under the said LCs and BGs during the CIRP period. Therefore, the Corporate Debtor is liable to pay the suppliers under IBC 2016.

h) The averment made by Respondent No.1 is bald, unsupported and on the face of it unsustainable. It is submitted that in case of the festive season which is during October/November in any given year, for the sales to be successful the raw material required by the Automobile companies are always supplied well in advance or a few months in advance to the festive season and not at the time of the season. Moreover, the admission on the part of the respondent in availing working capital, not treating the same as preferential debt, non-arranging the appropriate action in raising the fund and denial of making payment to suppliers during the CIRP period by the Respondent No.1 itself shows the cause for the hardship allegedly faced by the Corporate Debtor.

i) It is specifically averred that the discussion between Appellant and Respondent No.1 was neither affirmed nor concluded. It is further submitted that the Reply of Respondent No.1 clearly states that the issues discussed in the Email dated 21.11.2018 were to be further deliberated, and various banking norms were to be complied such as LC/BG charges, the procedure for an amendment to LC, etc., before

agreeing to extend any NFB facility that could be provided afresh. The fundamental principle of the issuance of LC is to make payment to the supplier as and when the goods are received. The objections raised by the respondent for making the payment to the supplier from whom the goods have been acquired during the CIRP period and further requesting for issuance of fresh LCs without addressing the crystalised LCs itself establishes the ignorance of fundamental principles of selecting the LCs.

j) That the contents of para 3 (1) of the Preliminary Objections are wrong, incorrect and denied. It is denied that the Appellant, without any communication to Respondent No.1, arbitrarily withdrew the NFB Facility granted to the Corporate Debtor. In fact, the Appellant vide its letter dated 24.10.2018 mentioned that the competent authority had permitted for providing NFB limit of ₹ 43 crores subject to compliance with the following condition:

> "the resolution of NFB limits as proposed will be accepted subject to a cover of an equivalent amount from a scheduled Commercial Bank". Copy of the Letter dated 24.10.2018 is marked and annexed in the Appeal as Annexure A-6 (Page149 to Pg. 150).

k) Respondent No. 1 is put to the strict proof on the averment that there has been an unjust enrichment by the Appellant or undue burden on the Corporate Debtor during the already uncertain times, to change the collection account with 43 domestic and international customers.

The availing of the LC[8] facility during the CIRP period, not considering the same as preferential debt, not- making/objecting for making payment to the supplier under the LC during the CIRP period, and the admission on the part of Respondent No. 1 in shifting the collection account to another Bank, i.e. Axis Bank to avoid payment to the supplier under the LCs from whom the goods have been received during CIRP period, processed and sold to its customer is establishing an act of diversion of the fund and unlawful enrichment of corporate debtor is not paying the goods supplied during the CIRP for the reasons best known to Respondent No. 1 despite acting against the provisions of the Code and causing loss to the Appellant.

l) The Appellant further denied that the actions of recovery of ₹ 33.34 crores by the Appellant is unjust enrichment of ₹ 33.34 crores from the Corporate Debtor during the CIRP and is contrary to the mandate under Section 17 and 14 of the IBC and reiterated and reaffirmed that the payments were made directly to the vendors. No amount was appropriated or adjusted by the Appellant towards any outstanding claim under CIRP.

m) Respondent No. 1 further contends it had never objected to alleged illegal recovery for more than one year before any of the CoC until the 31st CoC dated 7.2.2020. Respondent No. 1, without placing all the facts and records before the CoC, particularly his various

[8] Letter of credit facility

requests for debiting the current account of Corporate Debtor or issuing fresh LC/BG[9], misinformed the CoC about the correct fact. Thus, having misled the CoC, Respondent No.1 is foisting their illegal action on the CoC members. The Appellant further denied that no reservation was shown or recorded in the CoC minutes on behalf of the Appellant. The CoC meeting dated 07.02.2020 records the objections raised by the Appellant at para (n) of the CoC meeting. On the contrary, Respondent No. 1, in a malafide and violation of the principles of IBC, misrepresented to the CoC by giving it a colour of recovery of LCs made by Appellant from the corporate debtor during CIRP and to accord interim finance status to ₹ 34 Crores towards the rejected LC directly paid from the current account of the Corporate Debtor, and fresh LC/BG were issued for the freed limit under the instructions of Respondent No. 1. The Appellant further submitted that vide its letter dated 20.02.2020, it had objected to the acts of Respondent No. 1. made it clear that the LCs availed by the Corporate Debtor were like a contingent liability. The amounts were being paid directly to the vendors/suppliers of the Corporate Debtor by the Appellant. They reiterated that no payment was appropriated or adjusted by the Appellant towards any outstanding claim under CIRP.

n) The IA. No. 222/2020, filed by the Appellant, was to seek direction to the IRP not to form or illegally suggest to the COC to deduct the amount of Rs. Thirty-four crores from the total amount allocated in

[9] Bank Guarantee

the Resolution Plan towards payment to the Appellant as per the allocation sheet. It is submitted that the Appellant is one of the dissenting Secured Creditors who has been allotted the 'Liquidation value' as per the allocation sheet and, therefore, approved by the CoC. The IRP rejected the claim amount of ₹ 39.61 crores only because the same was not crystallised.

o) The observations of the Hon'ble NCLT in the Order dated 09.07.2020 are contrary to records and erroneous to the extent that the Appellant consented to deduction of the amount of ₹ 33.34 crores, and the Appellant nowhere disputed the distribution of amounts payable to the Appellant being a dissenting creditor under the terms of the Resolution Plan of Respondent No. 2 and 3. The Appellant raised objections against the rejection of ₹ 34 Crores by the IRP in the 31st CoC meeting and the Email dated 20.02.2020 as mentioned in the preceding paragraphs.

10. **ANALYSIS**

10.1 Admittedly IA 222/2020 was filed u/s 60 (5) of the IB Code before the Adjudicating Authority to modify the Resolution Plan, which the Committee of Creditors approved with more than the required percentage, i.e. 70.07% of vote share, wherein the Appellant was also a member. However, it dissented with the said approval.

10.2 The Appellant contends that the Resolution Plan of 'DVI' does not comply with Regulations 42 and 44 of the Insolvency and Bankruptcy Board (Liquidation Process) Regulations 2016.

10.3 Appellant contends that the payment by honouring LCs was to the vendors of the CD[10], who happened to be the ultimate beneficiaries. As such, when the bills became due after debiting the current account of the Corporate Debtor amounting to ₹ 34 crores, the said action cannot be treated as recovery by the Applicant and cannot be deducted from the final payment to be made to the Applicant as per the scheme of distribution of amount under the Resolution Plan. It is further stated that the amounts of ₹ 6,22,58,072.64 towards LCs payment and ₹ 61,39,000 towards Bank Guarantee payment are to be included in the total admitted claim of the Applicant.

10.4 The learned Adjudicating Authority has rejected the Application with the following observation;

> "*the decision of the COC passed with the required majority percent is as per the Code, are binding on all the stakeholders, including the dissenting members of the Committee of creditors, if any. No member of the Committee of creditors, after a resolution plan was approved by the Committee of creditors with the required majority percentage, on one ground or other, cannot challenge the said decision of the Committee of creditors. It is for the Adjudicating Authority to apply its judicious mind whether a particular plan submitted for its approval is in compliance of the provisions of the Code and the Regulations made thereunder. The Applicant even in its*

[10] Corporate debtor

rejoinder, to the Reply filed by the resolution professional, has not denied the fact of deliberations and acceptance of the action of the resolution professional for deducting the amount of ₹ 34 crores and further distribution of amount payable to the Applicant under the resolution plan of DVI, by the Committee of creditors, wherein the Applicant is a member."

10.5 ₹ ₹ Before proceeding further, it is necessary to go through the provisions Regulations 42 and 44 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations 2016 along with Section 53 of the I & B Code, which is given below for ready reference;

The Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations 2016

***42. Distribution**.—(1) Subject to the provisions of Section 53, the liquidator shall not commence distribution before the list of stakeholders and the asset memorandum has been filed with the Adjudicating Authority.*

(2) The liquidator shall distribute the proceeds from realisation within [ninety days] from the receipt of the amount to the stakeholders.

*(3) **The insolvency resolution process costs, if any, and the liquidation costs shall be deducted before such distribution is made.***

***44. Completion of liquidation**.—*

[(1) The liquidator shall liquidate the corporate debtor within a period of one year from the liquidation commencement date, notwithstanding pendency of any application for avoidance of transactions under [* *] Part II of the Code, before the Adjudicating Authority or any action thereof:*

Provided that where the sale is attempted under sub-regulation (1) of Regulation 32-A, the liquidation process may take an additional period up to ninety days.]

(2) If the liquidator fails to liquidate the corporate debtor within [one year], he shall make an application to the Adjudicating Authority to continue such liquidation, along with a report explaining why the liquidation has not been completed and specifying the additional time that shall be required for liquidation.

Section 53 of I & B Code 2016;

53. Distribution of Assets

(1) Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, ***the proceeds from the sale of the liquidation assets shall be distributed in the following Order of priority and within such period and in such manner as may be specified, namely—***

(a) the insolvency resolution process costs and the liquidation costs paid in full;

(b) the following debts which shall rank equally between and among the following—

(i) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and

(ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in Section 52;

(c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;

(d) financial debts owed to unsecured creditors;

(e) the following dues shall rank equally between and among the following:—

(i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;

(ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;

(f) any remaining debts and dues;

(g) preference shareholders, if any; and

(h) equity shareholders or partners, as the case may be.

(2) Any contractual arrangements between recipients under sub-section (1) with equal ranking, if disrupting the Order of priority under that sub-section shall be disregarded by the liquidator.

(3) The fees payable to the liquidator shall be deducted proportionately from the proceeds payable to each class of recipients under sub-section (1), and the proceeds to the relevant recipient shall be distributed after such deduction.

Explanation.—For the purpose of this section—

(i) it is hereby clarified that at each stage of the distribution of proceeds in respect of a class of recipients that rank equally, each of the debts will either be paid in full, or will be paid in equal proportion within the same

class of recipients, if the proceeds are insufficient to meet the debts in full; and

(ii) the term "workmen's dues" shall have the same meaning as assigned to it in Section 326 of the Companies Act, 2013 (18 of 2013).

10.6 In the case of Ghanashyam Mishra & Sons (P) Ltd. v. Edelweiss Asset Reconstruction Co. Ltd., (2021) 9 SCC 657: (2021) 4 SCC (Civ) 638: 2021 SCC OnLine SC 313 at page 698 Hon'ble Supreme Court has held;

65. *Bare reading of Section 31 of the I&B Code would also make it abundantly clear that once the resolution plan is approved by the Adjudicating Authority, after it is satisfied, that the resolution plan as approved by CoC meets the requirements as referred to in sub-section (2) of Section 30, it shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders. Such a provision is necessitated since one of the dominant purposes of the I&B Code is revival of the corporate debtor and to make it a running concern.*

66. *The resolution plan submitted by the successful resolution applicant is required to contain various provisions viz. provision for payment of insolvency resolution process costs, provision for payment of debts of operational creditors, which shall not be less than the amount to be paid to such creditors in the event of liquidation of the corporate debtor under Section 53; or 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. The resolution plan is also required to provide for the payment of debts of financial creditors, who do not vote in*

favour of the resolution plan, which also 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 to clause (b) of sub-section (2) of Section 30 of the I&B Code clarifies for the removal of doubts that a distribution in accordance with the provisions of the said clause shall be fair and equitable to such creditors****. The resolution plan is also required to provide for the management of the affairs of the corporate debtor after approval of the resolution plan and also the implementation and supervision of the resolution plan. Clause (e) of* ***sub-section (2) of Section 30 of the I&B Code also casts a duty on RP to examine that the resolution plan does not contravene any of the provisions of the law for the time being in force.***

****

93. As discussed hereinabove, one of the principal objects of the I&B Code is providing for revival of the corporate debtor and to make it a going concern. *The I&B Code is a complete Code in itself. Upon admission of petition under Section 7 there are various important duties and functions entrusted to RP and CoC. RP is required to issue a publication inviting claims from all the stakeholders.* ***He is required to collate the said information and submit necessary details in the information memorandum. The resolution applicants submit their plans on the basis of the details provided in the information memorandum.*** *The resolution plans undergo deep scrutiny by RP as well as CoC. In the negotiations that may be held between CoC and the resolution applicant, various modifications may be made so as to ensure that while paying part of the dues of financial creditors as well as operational creditors and other stakeholders, the corporate debtor is revived and is made an*

on-going concern. After CoC approves the plan, the adjudicating authority is required to arrive at a subjective satisfaction that the plan conforms to the requirements as are provided in sub-section (2) of Section 30 of the I&B Code. Only thereafter, the adjudicating authority can grant its approval to the plan. It is at this stage that the plan becomes binding on the corporate debtor, its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan. The legislative intent behind this is to freeze all the claims so that the resolution applicant starts on a clean slate and is not flung with any surprise claims. If that is permitted, the very calculations on the basis of which the resolution applicant submits its plans would go haywire and the plan would be unworkable.

102.1. *That once a resolution plan is duly approved by the adjudicating authority under sub-section (1) of Section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of resolution plan by the adjudicating authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan.*

10.7 It is important to mention that the resolution professional admits in its Reply that it had suggested the COC two options to either treat the illegal recovery is made by the Appellant as interim finance under the IB Code or sent to deduction of the amount of illegally recovered amount by the Appellant, out of distribution amount payable to the Appellant under the

Resolution Plan. Accordingly, the COC, upon deliberation, consented to deduction of the said amount from the distribution amount owed to the Appellant under the Resolution Plan submitted by Respondents No. 2 & 3 in the 30th and 31st Meeting of the COC held on 5 February 2020 on 7 February 2020 respectively.

10.8 The question as to what may be the interim finance was to be first decided by the Resolution Professional in terms of Section 5 (15) of the IB Code provides that **"interim finance means any financial debt raised by the Resolution Professional during the Insolvency Resolution Process and such other debt as may be notified".**

It is further necessary to see whether the alleged amount could have been treated as 'Insolvency Resolution Process cost' was to be decided in Section 5 (13) of the Insolvency and Bankruptcy Code 2016, which defines the term "Insolvency Resolution Process cost".

> Sec 5 (13) provides that "Insolvency Resolution Process costs" means—
>
> (*a*) **the amount of any interim finance and the costs incurred in raising such finance**;
>
> (*b*) the fees payable to any person acting as a Resolution Professional;
>
> (*c*) **any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern**;
>
> (*d*) any costs incurred at the expense of the Government to facilitate the insolvency resolution process; and
>
> (*e*) any other costs as may be specified by the Board;

10.9 It is further necessary to mention that the Resolution Professional has in its Reply admitted that in terms of duty cost upon him under Sections 20 and 25 of the Code to continue and maintain the business of the Corporate Debtor as a going concern, it had requested the Appellant to continue and sustain the Non-Fund-Based Facility[11] limits at the existing level at being drawn by the Corporate Debtor prior to the insolvency commencement date. The said request was made on account of the business requirement of the Corporate Debtor. The RP further stated that the Corporate Debtor is engaged in the manufacturing, fabrication, and engineering automotive parts. As part of its business, it must purchase various steel and other alloys. As per the existing market practice, the purchase and procurement of steel and alloys are always backed by a Letter of Credit Bank Guarantee issued by the purchaser's Bank in favour of the beneficiary vendor, and thus the continuation of the NBF Facility by the Appellant was very much needed as a lifeline for the continuation of the business of the Corporate Debtor as a going concern.

10.10 After the above statement of the RP in its Reply, it is clear that based on the instructions of the RP given maintaining the business of corporate debtor as a going concern, the continuation of the non-fund-based facility by the Appellant in terms of the letter of credit bank guarantee issued by the appellant bank in favour of the beneficiary vendor was undisputedly Insolvency Resolution Process cost and was extended as interim finance during CIRP.

[11] NBF Facility

10.11 However, the Resolution Professional left it to the discretion of CoC to either treat the alleged amount as an 'interim finance' under the IB Code or deduct that amount out of the distribution amount payable to the Appellant under the Resolution Plan of Respondent No. 2 and 3.

10.12 It is pertinent to mention that Section 25 of the Code provides the duties of the Resolution Professional. Under Section 25(2)(c), the RP must raise interim finance subject to the approval of the Committee of Creditors under Section 28 of the Code. Further, under Section 20 (2) (1) &(2)(c) of the Code, the IRP/RP is duty-bound to make every endeavour to protect and preserve the value of the property of the Corporate Debtor and manage the operations of the Corporate Debtor as a going concern. For this purpose, IRP/RP is entitled to raise interim finance.

10.13 In the instant case, RP has admitted that it had requested the Appellant to continue and maintain the non-fund-based facility limits under '**The Letter of Credit Bank Guarantee**' at the current level '**as being drawn by the Corporate Debtor prior to the insolvency commencement date'.**

10.14 Therefore, the payment of the said amount to the vendors of the Corporate Debtor on the instructions of the RP against the 'Letter of Credit Bank Guarantee' during CIRP should not have been deducted from out of the payment of the Appellant, which was allotted to it's share under the approved Resolution Plan. **However, this payment was against the 'Letter of Credit Bank Guarantee, to the suppliers of the Corporate Debtor, who continued the supply of goods to the Corporate Debtor to keep the Corporate**

Debtor as going concerned. Therefore, it would have been better if the RP had advised the COC about the correct legal position of the interim finance so that the COC could have taken the proper decision in this regard.

10.15 However, the RP himself concedes that the continuation of the NFB Facility by the Appellant was very much needed as a lifeline for the continuation of the Corporate Debtor's business as a going concern. Still, despite that, **RP asked the COC to decide whether the amount extended to the Corporate Debtor during CIRP to keep it at a going concern should be treated as interim finance or not**.

10.16 It is further made clear that Payment of CIRP cost in priority to other debts is mandatory u/s 53(1) of the Code. Therefore, given Section 30 (4) of the IB Code, COC is empowered to fix the Order of priority amongst creditors as laid down under Section 53 (1). However, permissibility about the deduction of CIRP cost from the amount allotted under the approved Resolution Plan is not covered under Section 30 (4) of the Code.

10.17 In the instant case, Resolution Professional has admitted that it had suggested the COC two options, to either treat the recovery made by the Appellant as interim finance under IB code or deduct the amount illegally recovered by the Appellant, out of distribution amount payable to the Appellant under the Resolution Plan. Thus, it is clear that RP failed to exercise its jurisdiction to decide the issue of CIRP cost and left it to the CoC to decide whether the amount incurred in keeping the Corporate Debtor as a going concern, by the continuation of letter of credit bank guarantee facility during

the CIRP would be treated as interim finance. However, it was the duty of IRP/RP itself to decide the CIRP cost. After that, instead of taking advice from the COC for treating the said expenses as interim finance, he should have obtained sanction from the CoC for making the payment of the expenses incurred during the CIRP. Hence, he should have made the payment of CIRP costs. But, instead of exercising its duty to make payment of the CIRP costs, RP had advised CoC to deduct that amount from out of the payment payable to Appellant under the Approved Resolution Plan.

10.18 The RP has further stated that vide its letter dated 30 October 2018, the Appellant was requested to continue their NFB facility without insisting on the condition as stipulated until the resolution plan of "LHG"[12] is implemented. It was also pointed out that withdrawal of their NFB facility at that stage would cause an adverse impact on the operations of the Corporate Debtor as going concerned. However, without responding to the said request and considering the same in an arbitrary manner by misusing its power and position imposed auto-debit instructions, the Appellant started debiting the collection account of the Corporate Debtor maintained by the Appellant Bank and made recovery of an aggregate amount of ₹ 33.34 crores. However, the appellant Bank withdrew their NFB facility granted by it to the Corporate Debtor while recovering a further amount of ₹ 33.34 crores from the collection account of the Corporate Debtor. Therefore, the said action of the Appellant during the CIRP is contrary to the instructions of the RP is against the mandate of Section 17 (1)(d) of the Code.

[12] LBG- 'Liberty House Group'

10.19 Section 17(1)(d) of the IBC provides that "*the financial institutions maintaining the accounts of the corporate debtor shall act on the instructions of the interim resolution professional in relation to such accounts and furnish all information relating to the corporate debtor available with them to the interim resolution professional".*

10.20 It is pertinent to mention that Section 17 of the Code relates to the management of the affairs of the Corporate Debtor by an Interim Resolution Professional. Therefore, the phrase used in Section 17 (1) (d) of the IBC that financial institution "shall act on the instructions of the IRP" **does not mean that it authorises IRP/RP to compel the financial institution for maintaining the accounts of the CD to continue the NFB facility comforted by Bank Guarantee.** Therefore, non-compliance with such instructions of RP can not be considered a violation of Section 17 (1) (d) of the Code.

10.21 The learned Counsel for the Respondent RP emphasised that Section 30 (4) of the IBC cast a role to supervise distribution amongst all creditors on the COC, and the IRP had no say in that.

10.22 Section 30(4) of IB Code provides that "*the committee of creditors may approve a resolution plan by a vote of not less than sixty-six per cent of voting share of the financial creditors, after considering its feasibility and viability the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of Section 53,*

including the priority and value of the security interest of a secured creditor, and such other requirements as may be specified by the Board"

10.23 Given section 30 (4) of the IB Code, it is clear that the Committee of Creditors may approve a resolution plan with 66% voting share **after considering its feasibility and viability**. T**he manner of distribution proposed** may take into account the Order of priority amongst creditors as laid down under Section 53 (1) of the Code. But for fixing the Order of priority, the COC has to consider the priority given under Section 53 (1) of the Code. **Section 53(1) (a) provides 1st priority for paying Insolvency Resolution Process costs and liquidation costs in full.**

10.24 The respondent RP has admitted that a Letter of Credit Bank Guarantee has been issued favouring the beneficiary/vendor to purchase various steels and other alloys to keep the CD as a going concern. However, the Respondent RP has failed to appreciate that the Corporate Debtor is liable to pay the suppliers/beneficiaries under the LCs/BG during the CIRP period. The payments consequently may be made to beneficiaries by debiting to the Corporate Debtor's account have been misconceived as recovery towards Appellant's dues and thereby caused massive loss to the Appellant / Applicant in denying its claim.

10.25 It is pertinent to mention that the approved Resolution Plan of 'LHG' had a condition that the Resolution Applicant will provide the cover of an equivalent amount from a scheduled bank in the event it intends to avail Non-

Fund Based, LC/BG credit facilities and the same was intimated to the RP on 24 October 2018, which the Resolution Plan failed to fulfil.

10.26 Respondent No. 1, in its Reply, had accepted that NFB limits be subject to covering the limits by the Scheduled Commercial Bank, which is in line with the discussions with the Resolution Applicant and has also been mentioned as a part of the Resolution Plan.

10.27 It is also clear that while honouring the LCs and BGs issued on behalf of the Corporate Debtor, the Appellant being the Financial Creditor, it had not unduly enriched itself. No amount has been credited towards the loan account of the Corporate Debtor, and the debit transactions are related to the payments made to the supplier/vendor/beneficiary of LC/BG. Therefore, it is incorrect to say that the appellants have made a recovery of ₹ 33.34 crores. On the contrary, the said LCs/BCs continued during the CIRP period. The payment was made to the suppliers of the CD on the instructions of the RP to keep the CD as a going concern. Therefore, the same ought to have been considered CIRP cost, and the Corporate Debtor has received the goods under the said LCs and BG's during the CIRP period. Therefore, the corporate Debtor is liable to pay the suppliers under IBC 2016.

10.28 It is necessary to point out that Sec 53(1) of the IBC mandates the priority of payment for the Insolvency Resolution Process Cost and the Liquidation costs. However, in the instant case, IRP/RP firstly insisted the Appellant Bank continue Letter of Credit Bank Guarantee Facility during CIRP at the current level to keep the Corporate Debtor as a going concern.

But after that, RP made an erroneous recommendation to the CoC to either consider payment against LC/BG as CIRP Cost or deduct that amount from out of the amount allotted to the Appellant's share under the Approved Resolution Plan.

10.29 Based on the above, it is clear that the Appellant never recovered any amount from the payment of ₹ 34 crores, as has been misrepresented by Respondent No. 1. The Adjudicating Authority vide its impugned Order observed that the Appellant has not objected to the said actions of Respondent No. 1 in the COC meetings is contrary to the materials placed before the Adjudicating Authority. Furthermore, the Appellant had refuted the actions of respondent No. 1 vide its Email dated 20 February 2020, which the Adjudicating Authority has overlooked. Therefore, the Adjudicating Authority has misconstrued the payment made to the Appellant's beneficiaries/vendors as recovery and dismissed the IA 222 of 2020 in CP (IB) No.42/Chd/Hry/2017.

10.30 In the circumstances stated above, we have concluded unanimously that the Appeal deserves to be partly allowed with the following directions.

ORDER

Company Appeal (AT) (insolvency) No 729 of 2020 is partly allowed. No order as to costs.

We further direct Respondent No. 1, Resolution Professional, not to deduct the amount of ₹ 34 crores, i.e. the amount which has been paid to the vendors of the Corporate Debtor against the 'Letter of Credit Bank Guarantee'

facility, which continued during the corporate insolvency process period, under the instructions of the Respondent No. 1 /Resolution Professional to keep the Corporate Debtor as a going concern, is the CIRP costs. Therefore, it cannot be deducted from the final payment to the Appellant/Applicant as per the scheme of distribution of the amount under the approved Resolution Plan.

No order as to costs.

[Justice M. Venugopal]
Member (Judicial)

[V. P. Singh]
Member (Technical)

[Dr. Alok Srivastava]
Member (Technical)

NEW DELHI
27th January, 2022

pks