NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 839 of 2023

(Arising out of Order dated 17.04.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench-IV in MA 23/MB-IV/2019 in CP(IB) No.197/MB/2018)

IN THE MATTER OF:

Mehul Parekh & Ors. ... Appellants

Vs

Unimark Remedies
Represented by Successful Resolution
Applicant & Ors. ... Respondents

Present:

For Appellant: **Mr. S.R. Jariwala, FCA, Ms. Purti Gupta, Ms. Henna George, Advocates.**

For Respondent: **Mr. Abhijeet Sinha, Mr. Dhrupad Vaghani, Mr. J. Rajesh, Mr. Jaitegan Singh Khurana, Mr. Aditya, Mr. Tushar Goel (SRA) for R-18.**

Mr. Arpan Behl, Mr. Ishan, Mr. Kaustubh Singh Advocates for SRA.

Ms. Pooja Mahajan, Ms. Mahima Singh, Ms. Shreya, Ms. Arveena Sharma, Advocates for R-2.

Ms. Sanjana Pandey for R-3,8,11,15.

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal by Suspended Directors of the Corporate Debtor has been filed challenging the order dated 17.04.2023 passed by the National Company Law Tribunal, Mumbai Bench-IV in MB-23/MB-IV-2019 approving the Resolution Plan submitted by Successful Resolution Applicant. The Adjudicating Authority in its order dated 17.04.2023 while

approving the Resolution Plan has also issued certain directions. The Appellant feeling aggrieved by few directions issued by the Adjudicating Authority in the impugned order has come up in this Appeal.

2. The brief facts of the case giving rise to this Appeal are:

(i) On an Application filed by ICICI Bank under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "**Code**"), Corporate Insolvency Resolution Process ("**CIRP**") against the Corporate Debtor Unimark Remedies Ltd. commenced vide order dated 03.04.2018.

(ii) The Resolution Plan submitted by consortium of asset Recovery Company (India Ltd., Intas Pharmaceuticals Ltd. and Shamrock Pharmachemi P Ltd. was approved by the Committee of Creditors ("**CoC**") by 72.25% vote share. On the basis of e-voting held between 24th December, 2018 and 26th December, 2018, Resolution Plan was approved.

(iii) The Resolution Professional filed IA. No.23/MB-IV/2019 for approval of the Resolution Plan, which Application came to be allowed by the order impugned. Aggrieved by which order this Appeal has been filed.

3. The reliefs sought in the Appeal are stated in paragraph 21, which are as follows:

"21. Reliefs sought

In view of the facts mentioned in para 7 above, points in dispute and question of law set out in Para 8, the appellant prays for the following relief(s):

a) *That the Hon'ble Appellate Tribunal may allow the instant appeal;*
b) *That the Hon'ble Appellate Tribunal may quash & set aside the following para contained in the impugned order dated 17.04.2023 passed by the Ld. Adjudicating Authority Mumba in CP (IB) 197 (MB)/2018 and remand the matter to AA with following directions*

No.	*Para of Order dated 17.04.2023*	*Particulars of deletions sought*	*Directions prayed*
1.	*6.1.3*	*It was submitted by them on 03.02.2023 that the classification is not discriminatory as most of the ineligible employees are either promoters of KMPs who are responsible for the position of Corporate Debtor, in which it is. However, the Counsel for the RA fairly submitted that RA is not ready to enhance the total plan value for taking into account claims of employees but it has allocated a sum of Rs.5 crores towards their claims which is enough to cover their claim in accordance with provisions of Section 53 of the Code and dues.*	*To be deleted*
2.	*6.2*	*We find that exorbitant increase in CIRP cost is attributable to monthly losses in the manufacturing operations*	*To be deleted*

		of the Corporate Debtor during the CIRP period due to low capacity utilization and high employee costs. We clarify that our observation in relation to CIRP cost should not be taken as our approval of CIRP cost claimed by the Resolution Professional in the submissions before us and CoC shall be competent to determine the quantum of CIRP cost payable under the Plan.	
3.	*6.5*	*We clarify that the Resolution Professional shall ensure that no claim in relation to avoidance transaction, where any of promoters/ KMPs falling under employees category, is pending for adjudication before the Adjudicating Authority before releasing the amount payable to such promoters/ KMPs under the plan. The amounts so detained shall be subject to appropriation towards amount found recoverable from such promoter/ KMP in accordance with the order passed by the Adjudicating Authority.*	*To be deleted*
4.	*9*	*The MA 269/2019 pertaining to adjudication of avoidance transactions u/s 43, 45, 49 & 66 OF THE Code, pending before the Adjudicating Authority, shall be pursued by Committee of Creditors and the proceeds of recovery in pursuance thereto shall be distributed amongst the Financial Creditor. If*	*To be deleted.*

		any balance is left after satisfaction of their admitted claim the same shall be distributed amongst other creditors in accordance with section 53 of the Code.	

c) That the Hon'ble Appellate Tribunal may, pending consideration and disposal of the present appeal, stay all actions in furtherance of the above clauses in impugned order in respect of Respondent No.1; and

d) Pass such other and/ or further order(s) and /or direction(s) as the facts and circumstances of the case may warrant."

4. From the reliefs as claimed in the above paragraphs, the Appellant prays for deletion of paragraph 6.1.3, 6.2 and 6.5 of the impugned order of the Adjudicating Authority, which are as follows:

*"**6.1.3.** It was submitted by them on 03.02.2023 that the classification is not discriminatory as most of the ineligible employees are either promoters or KMPs, who are responsible for the position of Corporate Debtor, in which it is. However, the Counsel for RA fairly submitted that RA is not ready to enhance the total plan value for taking into account claims of employees but it has allocated a sum of Rs. 5 crores towards their claims which is enough to cover their claim in accordance with provisions of Section 53 of the Code and Hon'ble SC decision in Jet Airways in relation to gratuity du*es.*

***6.2.** We find that exorbitant increase in CIRP cost is attributable to monthly losses in the manufacturing operations of the Corporate Debtor during the CIRP*

period due to low capacity utilisation and high employee costs. We clarify that our observation in relation to CIRP cost should not be taken as our approval of CIRP cost claimed by the Resolution Professional in the submissions before us and the CoC shall be competent to determine the quantum of CIRP cost payable under the Plan.

6.5. *We clarify that the Resolution Professional shall ensure that no claim in relation to avoidance transaction, where any of promoters /KMPs falling under employee category, is pending for adjudication before the Adjudicating Authority before releasing the amount payable to such promoters /KMPs under the plan. The amounts so detained shall be subject to appropriation towards amount found recoverable from such promoter/KMP in accordance with the order passed by the Adjudicating Authority."*

5. We have heard Shri S.R. Jariwala, Fellow Chartered Accountant ("**FCA**") appearing for the Appellant; Ms. Pooja Mahajan, learned Counsel appearing for the Resolution Professional; Shri Abhijeet Sinha, learned Counsel appearing for Successful Resolution Applicant as well as learned Counsel appearing for the Financial Creditors.

6. The Appellant submits that Adjudicating Authority committed error in issuing direction to CoC to redetermine CIRP cost after approval of Resolution Plan, which is not sustainable in law. The Resolution Plan having been approved, the determination of CIRP cost is to be done by the Resolution Professional, which has already been determined by the

Resolution Professional, there was no occasion to issue a direction to the CoC to redetermine the CIRP Cost. It is contended that CoC has already approved the salary without any upper limit in its Meeting held on 03.05.2018. It is contended that CoC under the garb of redetermination of CIRP cost cannot reverse its own decision for its unfair gain. The expenses incurred by the RP for running the business of Corporate Debtor as a going concern being CIRP cost within the meaning of Section 5(13)(c) of the Code has to be paid first before any payment made to any other creditor. The Adjudicating Authority exceeded its authority in modifying the Resolution Plan approved by the CoC insofar as it issued directions for redetermination of the CIRP cost by the CoC. It is submitted that Resolution Plan insofar it discriminate between employees who have dues of more than INR 10 lacs and those who have dues of less than 10 lacs is contrary to Section 30,sub-section (2) (b) of the Code. The direction of the Adjudicating Authority to impose new condition in paragraph 6.5 that the Resolution Professional shall ensure that no claim in relation to avoidance transaction, where any of the promoters/ KMPs falling under employee category, is pending for adjudication before the Adjudicating Authority before releasing the amount payable to such promoters/ KMPs under the Plan. The amounts so detained shall be subject to appropriation towards amount found recoverable from such promoter/ KMP in accordance with the order passed by the Adjudicating Authority. This direction made by the Adjudicating Authority is violative of Section 30, sub-section (2)(a) of the Code, insofar as CIRP cost has to be paid before payment to any other

creditors. It is further submitted that the Adjudicating Authority has directed that CoC shall continue to pursue the avoidance application after approving of the Resolution Plan, which is legally unsustainable. It is submitted that while issuing above directions the Adjudicating Authority has not given any cogent reason. Hence, the order of the Adjudicating Authority is untenable.

7. The learned Counsel appearing for Resolution Professional refuting the submission of the Appellant, submits that order of the Adjudicating Authority approving the Resolution Plan does not suffer from any error, nor it violates any provisions of Section 30, sub-section (2) (b). It is submitted that Resolution Plan complies with minimum requirements of Section 30, sub-section (2) of the Code. It is submitted that no workmen claim has been received by the Resolution Professional and the liquidation value payable to the employees is 'NIL'. The amount which was proposed for payment to the employees under Clause 3.3 of the Resolution Plan, does not violate any provision of law. The liquidation value of the employees being 'NIL', no objection can be taken to the amount proposed in the Resolution Plan to the employees, which was maximum of INR 5 crores as was earmarked in the Plan. It is submitted that Appellants are not merely Operational Creditors, but also 'related party' to the Corporate Debtor. Hence, the Resolution Plan can provide for a differential treatment as against other Operational Creditors (employees and workmen). The Appellants belong to a class distinct from other employees. The contention of the Appellants claiming parity in treatment with the employees and

workmen is misconceived and legally untenable. The learned Counsel, however, submits that Appellants were the employees of the Corporate Debtor and were assisting in the operations of the Corporate Debtor during the CIRP period. The CoC has already approved the dues of the Appellants during the CIRP period in the first CoC Meeting held on 3rd May, 2018. However, pursuant to the impugned order, the Resolution Professional has not distributed the unpaid dues towards the CIRP period. It is submitted that Resolution Professional has already filed an Application for avoidance of fraudulent transactions against the Promoters/ Key Managerial Personnel ("**KMPs**"), which is pending adjudication before Adjudicating Authority. The dues of Promoters/ KMPs are liable to be set-off against the amounts recoverable from them under the avoidance applications. The Resolution Professional has submitted estimates of the CIRP costs before the Adjudicating Authority from time to time. The Resolution Professional to conduct detailed audit of the CIRP cost has appointed N.V. Dand & Associates, who have submitted their Report. The Report of Audit, as submitted by N.V. Dand & Associates has also been approved by the CoC in its meeting dated 16.06.2022 to the extent of Rs.92.41 crores as CIRP cost.

8. The learned Counsel for the CoC and Financial Creditors have also supported the impugned order and submit that order passed by the Adjudicating Authority is neither discriminatory, nor in conflict with provisions of the Code. It is submitted that classification made in the Resolution Plan in paragraph 3.3.2 is reasonable as held by the

Adjudicating Authority vide order dated 17.04.2023 passed in M.A. No.933 of 2019, which order has not been challenged by the Appellant. The salaries allegedly payable to the Appellants have not been incurred in order to keep the Corporate Debtor running as a going concern. Hence, they are not required to be paid as CIRP cost under the Code. Salaries were infact never specifically approved by the CoC.

9. We have considered the submissions of learned Counsel for the parties and have perused the record.

10. From the submission of learned Counsel for the parties and material on record, following are the issues, which arise for consideration in the present Appeal:

(I) Whether classification as made in paragraph 3.3.2 of the Resolution Plan between payment to employees, is discriminatory and violative of provisions of Section 30, sub-section (2) of the Code?

(II) Whether the Adjudicating Authority erred in issuing directions for redetermination of the CIRP cost by the CoC?

(III) Whether the direction of Adjudicating Authority to withhold the payment of CIRP cost to the Appellant, which payment was directed subject to appropriation towards amount found recoverable from such promoters/ KMPs in avoidance

application, is violative of Section 30, sub-section (2) of the Code and unsustainable?

(IV) Whether the Adjudicating Authority erred in issuing direction to CoC to pursue the avoidance application pending for adjudication before the Adjudicating Authority?

11. The first question to be answered as to whether there is any discrimination in Resolution Plan in making payments to employees of the Corporate Debtor differently from those whose dues are upto Rs.10 lakhs and those whose dues are more than Rs.10 lakhs. The Resolution Professional has filed reply in the Appeal and has given the details of claims submitted in CIRP of the Corporate Debtor and claims admitted. It has been pleaded by the Resolution Professional that no claim of workmen was received by the Resolution Professional. In paragraph 4.9 and 4.10 of the reply, following have been stated:

> *"**4.9.** It may be noted that during the corporate insolvency resolution process ("CIRP") of the Corporate Debtor, the Answering Respondent received a total claim of INR 11.05 Crores from the employees of the Corporate Debtor. This comprises an amount of INR 7.36 Crores towards salary and other dues, INR 2.28 Crores towards gratuity dues and INR 0.81 Crores towards leave encashment dues. The entire amount of INR 11.05 Crores of employee claim has been admitted by the Answering Respondent. It may also be noted that the liquidation value payable to the employees is*

'nil' and no workmen claims have been received by the Answering Respondent.

4.10 Clause 3.3 of the Resolution Plan deals with payment towards workmen and employee dues and provides for payment of INR 5 Crores towards workmen and employee claims in the following manner:

a) First, towards full discharge of dues/wages of workmen of the Corporate Debtor for the period of 24 months preceding the insolvency commencement date, if any;

b) Second, towards full/ proportionate discharge of the liability of the Corporate Debtor for gratuity and leave encashment accrued till the 'Transfer Date' of the employees which have resigned from/ discontinued with Corporate Debtor;

c) Third, towards full/ proportionate discharge of liability of the Corporate Debtor liability for outstanding amounts of wages and salaries of (a) the continuing workmen, if any; and (b) continuing employees of the Corporate Debtor (who have not resigned from/ discontinued their employment with the Corporate Debtor) where each of the total dues of such employees are upto INR 10 lakh. If any of the continuing employees of Corporate Debtor have total dues more than INR 10 lakh, such employees shall not be paid anything and all liabilities of Corporate

Debtor towards such employees' claims shall stand waived and extinguished."

d) *In the event, the amount payable to workmen and employees, as contemplated above, is lower than INR 5 Crores, the excess amount out of this allocated amount shall be added to the payment to the financial creditors."*

12. The learned Counsel for the Resolution Professional and Successful Resolution Applicant have relied on the judgment of the Hon'ble Supreme Court in ***M.K. Rajagopalan vs. Dr. Periasamy Palani Gounder and Anr – (2023) SCC OnLine 574***, to support his submission that payment to related parties under the Resolution Plan can be different from payment to other similarly situated creditors. The Hon'ble Supreme Court in the above judgment under "Point E – The matter concerning related party" has examined the said submission and in paragraphs 198 to 203 laid down following:

*"**198.** Another factor taken into consideration by the Appellate Tribunal has been in relation to the so-called discrimination in the resolution plan in relation to a related party of the corporate debtor.*

***199.** Learned counsel for the appellant in Civil Appeal No. 1827 of 2022 has referred to several decided cases to submit that therein, even when certain dues of related parties were admitted, the resolution plans not providing for any payment to such related parties were upheld by this Court; and that the principles of non-discrimination would not be applicable to the decision of CoC. It has*

been argued on behalf of the resolution professional that none of the statutory requirements are of any mandate that a provision has to be made in the resolution plan for payment to the related parties. According to the learned counsel, the need is, essentially, to ensure that the plan provides for payment to financial creditors (including dissenting financial creditors) entitled to vote. Thus, the plan in question cannot be said to be standing in contravention of any mandatory requirements. Per contra, the learned counsel appearing for the related party would submit that even when related party is to be treated as a separate class in terms of the principles laid down by this Court in Phoenix ARC (supra), so as to be excluded from CoC, there is no reason that they be treated as separate class when it comes to payment of dues under the resolution plan. It is submitted that failure to provide for discharge of debt of the related party is in violation of Section 30(2)(b), (e) and (f) of the Code. The submissions made on behalf of the related party and the observations of the Appellate Tribunal are difficult to be accepted.

200. *The lengthy discussion of Appellate Tribunal in regard to the related party (the parts whereof have been reproduced in paragraph 19.7 hereinabove) depict rather unsure and irreconcilable observations of the Appellate Tribunal.*

201. *After taking note of the fact that related party is prohibited to be a part of CoC and is further prohibited to be a resolution applicant or an authorized representative etc., the Appellate Tribunal has rightly observed that involvement of a related party in CIRP in any capacity was seen as giving unfair benefit to the corporate debtor;*

and that the statutory recognition of related party as a different class would apply even to resolution plan when CoC would decide whether in its commercial wisdom it should pay to related party at all because that would mean paying to the same persons who are behind the corporate debtor. However, thereafter the Appellate Tribunal proceeded to observe that related party was required to be equated with the promoters as equity share-holders and then, further made certain observations about discrimination between related party unsecured financial creditor and other unsecured financial creditors as also between related party operational creditor and other operational creditors. Such far-stretched observations of the Appellate Tribunal are difficult to be reconciled with the operation of the statutory provisions.

202. *It has rightly been argued on behalf of the appellants and had rightly been observed by the Adjudicating Authority (vide extraction in paragraph 15.4.1 hereinabove) that there was no provision in the Code which mandates that the related party should be paid in parity with the unrelated party. So long as the provisions of Code and CIRP Regulations are met, any proposition of differential payment to different class of creditors in the resolution plan is, ultimately, subject to the commercial wisdom of CoC and no fault can be attached to the resolution plan merely for not making the provisions for related party.*

203. *On the facts of the present case, we find no reason to discuss this matter any further when it is noticed that the promoter and erstwhile director, the contesting respondent before us, has been holding the position of*

Chairman of the said related party. Suffice it would be to observe for the present purpose that the Appellate Tribunal has erred in applying the principles of non-discrimination and thereby holding against the resolution plan in question for want of provision for related party."

13. The above judgment fully supports the contention of Respondent that with regard to payment to 'related party' there can be no discrimination nor any parity can be claimed by the 'related party' with regard to similar category creditors. The above judgment makes it clear that distinction between payment to 'related party', i.e., Appellants before us, cannot be found fault with. It is to be noted that it is the only 'related party' that has come up in this Appeal and we need to examine their claim of payments only.

14. It has been pleaded that liquidation value for payment to employees being 'NIL', they were not entitled for any more payment as has been proposed under Section 30,sub-section (2) (b) of the Code. The payments to Operational Creditors has to be as per Section 30, sub-section (2), which is as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15. It is not the case of the Appellant that amount proposed to the Operational Creditor in the category of employees is less than the amount, which they would have received in event of liquidation of the Corporate Debtor. Hence, we do not find any error in the distinction of payment as contained in paragraph 3.3.2 of the Resolution Plan. The distribution to the employees, whose liquidation value was 'NIL' falls within the commercial wisdom of the CoC and the said clause of Resolution Plan cannot be impugned on the said ground, nor the said proposal for payment is violative of Section 30, sub-section (2) (b) of the Code.

16. Now coming to Question No.(II), it is relevant to notice that CIRP cost as defined in Section 5, sub-section (13), which is as follows:

> *"**5(13)** "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;"*

17. As per Section 5, sub-section (13)(c), costs incurred by the Resolution Professional in running the business of the Corporate Debtor as a going concern is part of the CIRP cost.

18. Under Section 28 of the Code, Resolution Professional is required to obtain 'Approval of the Committee of Creditors for certain actions'. Section 28 provides as follows:

> *"**28.** Approval of committee of creditors for certain actions. –*
>
> *(1) Notwithstanding anything contained in any other law for the time being in force, the resolution professional, during the corporate insolvency resolution process, shall*

not take any of the following actions without the prior approval of the committee of creditors namely: -

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

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

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

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

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

(f) undertake any related party transaction;

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

(h) delegate its authority to any other person;

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

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

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

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

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

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

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

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

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

19. In the present case, it has not been shown that CIRP cost, which has been determined by the Resolution Professional for running the business of the Corporate Debtor was required approval of CoC under Section 28 of the Code. The Adjudicating Authority by the impugned order in paragraph

6.2 has held that CoC shall be competent to determine the quantum of CIRP cost payable under the Plan. When the Plan has been approved by the CoC, which included payment of the CIRP cost and it is not shown that CIRP cost determined by the Resolution Professional required any approval under Section 28, we fail to see any reason for redetermination of the CIRP cost by the CoC. The direction to CoC to redetermine the CIRP cost after approval of the Resolution Plan by the CoC is unsustainable. We, thus, accept the submission of the Appellant that direction in paragraph 6.2 deserves to be set aside. We, however, notice the submission of the Resolution Professional that Resolution Professional has obtained Audit Report regarding the CIRP cost and CIRP cost of INR 92.41 crores is now approved. In paragraph 4.26 and 4.27 of the reply of the Resolution Professional, following has been stated:

> "***4.26.*** *It is submitted that for audition the CIRP costs, the Answering Respondent had appointed N.V. Dand & Associates ("N.V. Dand") on 4 January 2023 to conduct a detailed audit of all CIRP cost incurred by the Corporate Debtor during the CIRP period. Notably, initially N.V. Dand had submitted its audit report till 31 December 2022. However, basis request from the CoC members, an updated report was submitted by N.V. Dand on 13 June 2023, auditing the CIRP cost for the entire duration of CIRP. The said report was also shared by the Answering Respondent with the Monitoring Agency on 19 June 2023 and the CoC on 16 June 2023.*
>
> ***4.27.*** *Upon such audit being completed, pursuant to the directions of the Hon'ble Adjudicating Authority in the*

Plan Approval Order, the Answering Respondent duly convened a CoC meeting on 16 June 2023 and placed the audited CIRP costs before the CoC for its consideration. After detailed discussions, the CoC approved the audited CIRP cost to the extent of INR 92.41 Crores (including the amounts payable to the Appellants). Copy of the minutes of the 43rd CoC meeting is annexed as details of the outstanding dues of the Appellants during the CIRP period is annexed as Annexure – R1."

20. The audited Report has also been approved by the CoC towards the CIRP cost to the extent of INR 92.41 crores, as submitted by learned Counsel for the Resolution Professional, we are of the view that no approval of the CoC was required for payment of the said CIRP cost. The audited Report was obtained by Resolution Professional to satisfy himself and to obtain a confirmation of his determination of the CIRP cost by an Auditor, which having been done, no further approval of the CoC was required for payment of CIRP Cost. We, thus, are of the view that directions issued by the Adjudicating Authority in paragraph 6.2, empowering the CoC to redetermine CIRP cost deserves to be set aside and is hereby set aside.

21. Now coming to Question No.(III), by which Adjudicating Authority directed the Resolution Professional not to release the payment of CIRP cost, till the disposal of the avoidance application, and the amount to be detained shall be subject to appropriation towards any amount found recoverable from such promoter/ KMP.

22. The determination of CIRP cost and payment of CIRP cost to those who found entitled to receive the payments is an independent process from any recovery from Promoters/ KMPs, consequent to avoidance application filed by Resolution Professional under the provisions of the Code, including Section 66 of the Code. The directions, which were issued by the Adjudicating Authority in paragraph 6.5 was to withhold the claim of Promoters/ KMPs, falling for adjudication and before releasing the amount payable to such Promoters/ KMPs amount was directed to be detained and was made subject to appropriation towards amount found recoverable from such Promoters/ KMPs towards CIRP cost. The above direction can be sustained subject to a modification, which according to us shall balance the interest of all. We are of the view that Resolution Professional shall determine the amount payable towards the CIRP cost to Promoters/ KMPs and as per his determination, the amount payable to Promoters/ KMPs shall be kept in Fixed Deposit Receipt ("**FDR**"), so as to earn interest, which FDR shall be released to those Promoters/ KMPs only after determination of their liability in the avoidance applications, which are pending adjudication before the Adjudicating Authority. The avoidance applications, which are pending before the Adjudicating Authority may also be expeditiously considered and decided, so as to not withhold the receipt of the payment by such Promoters/ KMPs for a long period. In result, we modify paragraph 6.5 of the Adjudicating Authority in following manner:

(i) The amount of CIRP cost payable to Promoters/ KMPs as determined by Resolution Professional, shall be kept

in FDR in favour of such Promoters or KMPs in any of the nationalized bank by the Resolution Professional.

(ii) The FDR shall be released in favour of Promoters/ KMPs after adjusting any amount, which is found recoverable from such Promoters/ KMPs, consequent to any order passed by the Adjudicating Authority in avoidance applications, which are pending before the Adjudicating Authority under the Code.

(iii) The Adjudicating Authority may expeditiously dispose of the avoidance applications, which are pending against the Promoters/ KMPs as early as possible after receipt of this order.

23. Now coming to the last question, as to whether the Adjudicating Authority committed error in assigning the CoC to pursue the avoidance applications under Section 43, 45, 49 & 66 of the Code in MA 269 of 2019. The direction in this regard, which has been issued in paragraph 9 of the impugned order, is as follows:

> *"**9.** The MA 269/2019 pertaining to adjudication of avoidance transactions u/s 43, 45, 49 & 66 of the Code, pending before the Adjudicating Authority, shall be pursued by Committee of Creditors and the proceeds of recovery in pursuance thereto shall be distributed amongst the Financial Creditor. If any balance is left after satisfaction of their admitted claim the same shall*

be distributed amongst other creditors in accordance with section 53 of the Code."

24. After approval of the Resolution Plan, the Adjudicating Authority is fully empowered to issue any direction, as to how the avoidance applications has to be pursued and direction to pursue the avoidance applications by the CoC as issued therein is fully justifiable and does not warrant any interference at the instance of the Appellant.

25. In view of the foregoing discussions, we partly allow the Appeal in following manner:

(a) Direction contained in paragraph 6.2 of the impugned order is set aside.

(b) Direction contained in paragraph 6.5 is modified in following manner:

(i) The amount of CIRP cost payable to Promoters/ KMPs as determined by Resolution Professional, shall be kept in a FDR in favour of such Promoters or KMPs in any of the nationalized bank by the Resolution Professional.

(ii) The FDR shall be released in favour of Promoters/ KMPs after adjusting any amount, which is found recoverable from such Promoters/ KMPs, consequent to any order passed by the Adjudicating Authority in avoidance

applications, which are pending before the Adjudicating Authority under the Code.

(iii) The Adjudicating Authority may expeditiously dispose of the avoidance applications, which are pending against the Promoters/ KMPs as early as possible after receipt of this order.

(c) The Adjudicating Authority may expeditiously decide M.A. No.269 of 2019, after the receipt of this order.

Parties shall bear their own costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Mr. Arun Baroka]
Member (Technical)

NEW DELHI

19th December, 2023

Ashwani