

**IN THE NATIONAL COMPANY LAW TRIBUNAL
CUTTACK BENCH
CUTTACK**

IA (IB) No. 29/CB/2023

IA (IB) No. 39/CB/2023

IA (IB) No. 55/CB/2023

IA (IB) No. 62/CB/2023

IN

CP (IB) No. 34/CB/2021

IA (IB) No. 29/CB/2023

IN

CP (IB) No. 34/CB/2021

In the matter of:

An Application is filed under Section 30(6) of The Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the National Company Law Tribunal Rules, 2016 by Resolution Professional of the Corporate Debtor, for the approval of Resolution Plan.

-And-

In the matter of:

State Bank of India, a banking company and a body corporate constituted under the State Bank of India Act, 1955, having its Head Office at State Bank Bhavan, Nariman Point, Madame Cama Road, Mumbai 400 021 and one of its branches at SAMB-II, Kolkata, at 1, Middleton Street, Kolkata- 700 071;

... Financial Creditor

-Versus-

In the matter of:

ARSS Infrastructure Projects Limited, having [CIN: L14103OR2000PLC006230], a company incorporated under the provisions of Companies Act, 1956, and a company within the meaning of the Companies Act, 2013 having its Registered Office at Plot No. 38, Sector A Zone-A, Mancheswar Industrial Estate, Bhubaneswar- 751 010, Odisha.

... Corporate Debtor

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IA (IB) No. 62/CB/2023 IN CP (IB) No. 34/CB/2021
In Res: State Bank of India -Vs- ARSS Infrastructure Projects Ltd.

-And-

Mr. UDAY NARAYAN MITRA, Resolution Professional of ARSS Infrastructure Projects. Ltd., having Registered office address at: 72/1, Dawnagazi Road, Bally, Howrah – 711 201, West Bengal;

... Resolution Professional/ Applicant

Appearances of Counsels: -

For the Applicant/R.P.

Mr. Joy Saha, Sr. Adv. for
Mr. Sahasransu Sourav, Adv.
Mr. Subrat Mishra, Adv.

For Successful Resolution Applicant

Mr. Jishnu Chowdhury, Adv.
Mr. Ramashish Acharya, Adv.
Mr. Shantanu Das, Adv.

**Order reserved on: 14.02.2023
Order Pronounced on: 18.04.2023**

**IA (IB) No. 39 /CB/2023
IN
CP (IB) No. 34/CB/2021**

An application filed under Section 60 (5) (c) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of National Company Law Tribunal Rules, 2016 by dissenting financial creditor to reject the resolution plan and for an order of liquidation of corporate debtor.

In the matter of:

Punjab National Bank, having Corporate Office situated at Plot No-4, Sector-10, Dwarka, New Delhi-110075 and an officer at Zonal Sastra Centre, Pokhariput, Plot No-J/3, Revenue Plot No.-1152, Jagamara, Bhubaneswar-751 030;

... Applicant

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In Res: State Bank of India -Vs- ARSS Infrastructure Projects Ltd.

-Versus-

1. **Mr. UDAY NARAYAN MITRA**, Resolution Professional (Reg. No. IBBI/IPA-001/IP-P00793/2017-18/11360) of ARSS Infrastructure Projects Ltd., having Registered office address at: 72/1, Dawnagazi Road, Bally, Howrah – 711 201, West Bengal; acting as Resolution Professional in the matter of ARSS Infrastructure Projects Limited, having CIN: L14103OR2000PLC0062301, Email: udaynarayanmitra@yahoo.co.uk.

2. **State Bank of India**, a member of the Committee of Creditors, assenting the Resolution Plan in the matter of ARSS Infrastructure Projects Limited, the Corporate Debtor. Email: agm1infra2.sarg@sbi.in; clo3.samb2kol@sbi.co.in

3. **ICICI Bank Ltd**, a member of the Committee of Creditors, assenting the Resolution Plan in the matter of ARSS Infrastructure Projects Limited, the Corporate Debtor. Email: rajendra.sharma@icicibank.com, y.sriramkumar@icicibank.com

4. **IDBI Bank Limited**, a member of the Committee of Creditors, assenting the Resolution Plan in the matter of ARSS Infrastructure Projects Limited, the Corporate Debtor. Email: sunit.pandey@idbi.co.in; fm.adhikari@idbi.co.in.

5. **Edelweiss Asset Reconstruction Company**, a member of the Committee of Creditors, assenting the Resolution Plan in the matter of ARSS Infrastructure Projects Limited, the Corporate Debtor. Email: Venkatesh.chandrasekhar@edelweissfin; pranay.prateek@edelweissarc.in.

... Respondents

Appearances of Counsels: -

For the Applicant

Mr. Saradindu Jena, CS

For the 1st Respondent/R.P.

Mr. Joy Saha, Sr. Adv. for
Mr. Sahasransu Sourav, Adv.

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For the Respondents 2 to 5
Assenting Members of CoC

Mr. Subrat Mishra, Adv.

For the Resolution Applicant

Mr. Jishnu Chowdhury, Adv.
Mr. Ramashish Acharya, Adv.
Mr. Shantanu Das, Adv.

Order reserved on: 14.02.2023
Order Pronounced on: 18.04.2023

IA (IB) No. 55/CB/2023
IN
CP (IB) No. 34/CB/2021

An application under Section 60 (5) (c) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of National Company Law Tribunal Rules, 2016 by dissenting financial creditor to reject the resolution plan and for an order of liquidation of corporate debtor.

In the matter of:

Bank of India, having Corporate Office situated at Star House, C-5, G-Block, Bandra-kurla Complex, Bandra (East), Mumbai-400051 and a Branch office at Star House, 1/1D Nayapalli, Bhubaneswar – 751 015;

... Applicant

-Versus-

1. Mr. UDAY NARAYAN MITRA, Resolution Professional (Reg. No. IBBI/IPA-001/IP-P00793/2017-18/11360) of ARSS Infrastructure Projects Ltd., having Registered office address at: 72/1, Dawnagazi Road, Bally, Howrah – 711 201, West Bengal; acting as Resolution Professional in the matter of ARSS Infrastructure Projects Limited, having CIN: L14103OR2000PLC0062301, Email: udaynarayanmitra@yahoo.co.uk.

2. State Bank of India, a member of the Committee of Creditors, assenting the Resolution Plan in the matter of ARSS Infrastructure Projects

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Limited, the Corporate Debtor. Email: agm1infra2.sarg@sbi.in,
clo3.samb2kol@sbi.co.in

3. **ICICI Bank Ltd**, a member of the Committee of Creditors, assenting the Resolution Plan in the matter of ARSS Infrastructure Projects Limited, the Corporate Debtor. Email: rajendra.sharma@icicibank.com,
y.sriramkumar@icicibank.com

4. **IDBI Bank Limited**, a member of the Committee of Creditors, assenting the Resolution Plan in the matter of ARSS Infrastructure Projects Limited, the Corporate Debtor. Email: sunit.pandey@idbi.co.in;
fm.adhikari@idbi.co.in.

5. **Edelweiss Asset Reconstruction Company**, a member of the Committee of Creditors, assenting the Resolution Plan in the matter of ARSS Infrastructure Projects Limited, the Corporate Debtor. Email:
Venkatesh.chandrasekhar@edelweissfin; pranay.prateek@edelweissarc.in.

... Respondents

Appearances of Counsels: -

For the Applicant	Mr. Saradindu Jena, CS
For the 1 st Respondent/R.P.	Mr. Joy Saha, Sr. Adv. for Mr. Sahasransu Sourav, Adv.
For the Respondents 2 to 5 Assenting Members of CoC	Mr. Subrat Mishra, Adv.
For the Resolution Applicant	Mr. Jishnu Chowdhury, Adv. Mr. Ramashish Acharya, Adv. Mr. Shantanu Das, Adv.

Order reserved on: 14.02.2023
Order Pronounced on: 18.04.2023

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IA (IB) No. 62/CB/2023 IN CP (IB) No. 34/CB/2021
In Res: State Bank of India -Vs- ARSS Infrastructure Projects Ltd.

An application under Section 60 (5) (c) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of National Company Law Tribunal Rules, 2016 by dissenting financial creditor to reject the resolution plan and for an order of liquidation of corporate debtor

In the matter of:

Kotak Mahindra Bank Ltd, having its registered office at 27BKC, G Block, Bandra Kurla Complex, Bandra (East), Mumbai - 400 051 and branch office at 1st Floor, Plot No. 461, Lewis Road, Bhubaneswar, 751 016;

... Applicant

-Versus-

Mr. UDAY NARAYAN MITRA, Resolution Professional (Reg. No. IBBI/IPA-001/IP-P00793/2017-18/11360) of ARSS Infrastructure Projects Ltd., having Registered office address at: 72/1, Dawnagazi Road, Bally, Howrah – 711 201, West Bengal; acting as Resolution Professional in the matter of ARSS Infrastructure Projects Limited, having CIN: L14103OR2000PLC0062301, Email: udaynarayanmitra@yahoo.co.uk.

... Respondent

Appearances of Counsels: -

For the Applicant	Mr. Ramachandra Panigrahy, Adv.
For the 1 st Respondent/R.P.	Mr. Joy Saha, Sr. Adv. for Mr. Sahasransu Sourav, Adv.
For the Respondents 2 to 5 Assenting Members of CoC For Successful Resolution Applicant	Mr. Subrat Mishra, Adv. Mr. Jishnu Chowdhury, Adv. Mr. Ramashish Acharya, Adv. Mr. Shantanu Das, Adv.

**Order reserved on: 28.02.2023
Order Pronounced on: 18.04.2023**

Coram:

Shri P. Mohan Raj
Shri Satya Ranjan Prasad

Member (Judicial)
Member (Technical)

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In Res: State Bank of India -Vs- ARSS Infrastructure Projects Ltd.

IA (IB) No. 29/CB/2023 is an application filed by Resolution Professional under Section 30(6) IBC for approval of Resolution Plan. IA (IB) No. 39/CB/2023 IA (IB) No. 55/CB/2023 and IA (IB) No. 62/CB/2023 are filed under Section 60(5) IBC, 2016 by dissenting financial creditors to reject the Resolution Plan submitted by Resolution Professional and for an order of liquidation of Corporate Debtor. The applications are inter connected with another, the points to be decided are same, hence it is decided to pass this: -

COMMON ORDER

Per: P. Mohan Raj, Member (Judicial)

Brief contents of IA (IB) No. 29/CB/2023 are as follows: -

1. The Corporate Insolvency Resolution Process under the Insolvency and Bankruptcy Code, 2016 commenced against the Corporate Debtor vide order dated 30.11.2021 passed by this Adjudicating Authority. In terms of the order, Mr. Uday Narayan Mitra was appointed as the Interim Resolution Professional ("the IRP). The IRP, upon having been appointed, made the Public Announcement on 04.12.2021 through widely circulated newspapers i.e., Business Standard (English) and Prati Din (Oriya). In the Third meeting of the Committee of Creditors held on 09.02.2023 the Applicant, IRP was confirmed as Resolution Professional.

2. Upon confirmation of appointment of the Applicant as Resolution Professional, the Applicant appointed Transaction Auditors, M/S. Mazars Business Solutions Private Limited to identify the nature of transaction entered into by the management of the Corporate Debtor prior to the CIRP initiation date involving preferential, undervalued and exorbitant credit transactions. The Applicant has further appointed two valuers for each class of assets like Plant & Machinery, Land & building and Securities or Financial Assets. The Applicant published FORM G on 13.04.2022 in all India editions of Business Standard

(English) and Oriya Bhaskar (Oriya Edition published in Bhubaneswar) and Dainik Bhaskar, in Hindi covering editions published in various states in India.

3. Meanwhile, the CoC members have duly approved EOI Process document, the Evaluation Matrix basis as well as Request for Resolution Plan (RFRP) which the Applicant has prepared for circulation amongst the final list of prospective Resolution Applicants.

4. The statutory period of 180 days from the order of admission dated 30.11.2021 was expired on 29.05.2022. Thereafter, this Hon'ble Adjudicating Authority vide orders dated 15.05.2022 and 26.08.2022 granted extension of CIRP till 26.10.2022. Thereafter, vide orders dated 14.11.2022 and 22.11.2022, this Hon'ble Adjudicating granted extension of 75 days in total, thereby extending the CIRP period till 08.01.2023.

5. As required under Section 30(6) of the Insolvency and Bankruptcy Code, 2016 read with Regulation 39(4) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 for Approval of Resolution Plan by Adjudicating Authority as approved by CoC with 76.67% voting which is more than the required voting share of 66%, the resolution professional under this Regulation, is submitting this application to the Hon'ble Tribunal for such approval.

6. The brief contents of the plan submitted for approval runs as follows: -

Mr. Uday Narayan Mitra having Reg. No. IBBI/IPA-001/IP-P00793/2017-18/11360 was appointed as the Resolution Professional. The Resolution Professional has started that a total of sixteen meetings of the Committee of Creditors ("CoC") have been held during the CIRP period which were convened by the Resolution Professional on the following dates:-

Particulars	Date of CoC Meeting
1 st CoC Meeting	03.01.2022

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2 nd CoC Meeting	31.01.2022
3 rd CoC Meeting	09.02.2022
4 th CoC Meeting	07.03.2022
5 th CoC Meeting	29.03.2022
6 th CoC Meeting	23.05.2022
7 th CoC Meeting	22.06.2022
8 th CoC Meeting	29.06.2022
9 th CoC Meeting	05.08.2022
10 th CoC Meeting	19.09.2022
11 th CoC Meeting	29.09.2022
12 th CoC Meeting	10.10.2022
13 th CoC Meeting	16.11.2022
14 th CoC Meeting	25.11.2022
15 th CoC Meeting	08.12.2022
16 th CoC Meeting	28.12.2022

7. The Resolution Professional submits that CoC was informed about the Fair Market Value and Liquidation Value of the Corporate Debtor as per the Valuation Report which are as follows:-

Valuer	Category	Fair Market Value (Rs. Cr.)	Liquidation Value (Rs. Cr.)
RBSA Valuation Advisors LLP	Total Assets	235.56	147.11
Resolute Valuers & Consultants Pvt. Ltd.	Total Assets	199.81	168.02
Bidhu Bhushan Rath	Land & Building	9.35	7.92

8. As per record, basing on the aforesaid valuation reports, in terms of Regulation 35 of CIRP Regulations, the Liquidation Value of the Corporate

Debtor has been arrived at Rs. 147.11 Crores, which is duly reflected in the Form H.

9. The Resolution Professional had issued invitations for Expression of Interest (“EOI”) from potential Resolution Applicants on 13.04.2022, with the last dates for submission of the EOIs on 28.04.2022. For submission of Resolution Plan for the Corporate Debtor, in terms of the provisions of Section 25(2)(h) of the Code read with Regulation 36A of the CIRP Regulations. The notice was also published on the website of the IBBI.

10. The initial CIRP period of 180 days ended on 29.05.2022. Thereafter, the same was extended from time to time with approval of this Tribunal as follows:-

A. IA (IB) No. 103/CB/2022- Vide order dated 10.05.2022, extension of 90 days was granted. As a result, CIRP period was extended upto 27.08.2022.

B. IA (IB) No. 227/CB/2022- Vide order dated 26.08.2022, extension of 60 days was granted. As a result, CIRP period was extended upto 26.10.2022.

C. IA (IB) No. 284/CB/2022- Vide order dated 14.11.2022, extension of 30 days was granted. As a result, CIRP Period was extended upto 25.11.2022.

D. IA (IB) No. 315/CB/ 2022- Vide order dated 22.11.2022, extension of 45 days was granted. As a result, CIRP period was extended upto 08.01.2023.

11. The Resolution Professional has submitted that he received 1 Resolution Plan from Ocean Capital Market Limited as Resolution Applicant.

Evaluation of Voting

12. The Resolution Professional conducted the 7th CoC Meeting on 22.06.2022 wherein the Resolution Plan was opened in the presence of the Resolution Applicant and the financial officer of Resolution Applicant was tabled.

13. Thereafter, Ocean Capital Market Limited being the sole Resolution Applicant, the members of CoC further negotiated with the Sole Resolution Applicant i.e., Ocean Capital Market Limited who agreed to revise the offer to

Rs. 180 crores as all upfront within 90 days from the date of approval of Resolution Plan by this Adjudicating Authority. Further, Rs. 10 crores would be paid towards share of Arbitration Receipts at the end of the first year from the effective date.

14. The Resolution Professional placed before the members of CoC the Sole Resolution Plan for consideration and the Resolution Plan having been found viable and feasible was approved the Resolution Plan submitted by Ocean Capital Market which was passed with 76.66% majority voting share.

Salient features of the approved Resolution Plan

15. The Resolution Applicant has provided for payment of CIRP cost and other stakeholders of the Corporate Debtor as per the provisions of the Code.

16. The Resolution Professional has also placed the relevant extracts of the valuation report on record. The liquidation value of corporate debtor is Rs. 147.11 crores. The amount being paid through the Resolution Plan is INR 432.90 cores higher than the average liquidation value. Hence, the plan to be approved.

Brief contents of IA (IB) No. 39/CB/2023, IA (IB) No. 55/CB/2023 and IA (IB) No. 62/CB/2023 are as follows: -

17. The Corporate Debtor ARRS Infrastructure Projects Limited, having CIN- L14103OR2000PLC006230, was admitted into Corporate Insolvency Resolution Process (CIRP) vide order Dt. 30.11.2021 of this Adjudicating Authority (NCLT), Cuttack Bench. In pursuance of CIRP Order Mr. Uday Narayan Mitra having registration number: IBBI/IPA-001/IP-P00793/2017-18/11360 was appointed as the Interim Resolution Professional (IR) to carry out the function and he was subsequently appointed as Resolution Professional. The Applicant in IA No. 39/CB /2023 Punjab National Bank was categorized as a Financial Creditor (FC) and admitted as a member of the Committee of Creditors (CoC) with a voting capacity of 16.47%. The Applicant in IA No. 55/CB/2023 Bank of India categorized as a financial creditor and admitted as member of committee of creditors with having right of 3.16%. The applicant in IA

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No.62/CB/2023 Kotak Mahindra Bank Ltd. categorized as a financial creditor with voting right of 0.64%. Ocean Capital Market Limited, hereinafter referred to as “Resolution Applicant”, participated in the bid process of the Corporate Debtor. There were no other bidders who participated in the bidding process. The Resolution Professional put the Resolution Plan to vote without giving clarification on various issues sought by the members of the Committee of Creditors. The Resolution Professional has not examined the Resolution Plan to confirm that the Resolution is in compliance with the Law. The Resolution Plan has been approved by the Committee of Creditors with 76.67% votes in favor and 17.11% votes against the Resolution Plan. Two Financial Creditors with 6.22% votes remained absent from voting. The Resolution Plan contemplates the assignment of the entire debt to the Resolution Applicant. Hence entire security interest shall be transferred to the assignee. Upon upfront payment to Financial Creditors, the financial creditors shall severally and/or jointly assign the entire security interest including personal guarantee, corporate guarantee, and other security interests to the Resolution Applicant. The Financial Creditor shall assign all original guarantee deeds and all other relevant security documents including title deeds, Hypothecation and Pledge Agreements, share certificates, and/or any other security documents whatsoever under the said personal and Corporate Guarantees to the Resolution Applicant (RA). The Financial Creditors shall immediately on approval of the Resolution Plan by the Adjudicating Authority withdraw all legal suits with any Court of Law, Debt Recovery Tribunal or any other authority whatsoever. This is not as per law because dissenting Financial Creditors cannot be compelled to release third-party guarantees & third-party collaterals in the Resolution Process of the Corporate Debtor. Without making any valuation, the transfer of such guarantees by way of assignment is arbitrary and is beyond the commercial wisdom of the Committee of Creditors.

18. The Resolution Plan contemplates an investment of Rs. 133.33 Crore in Working Capital and Rs. 45.00 Crore in plant and machineries. The infusion

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of Working Capital and Capital Expenditure is at the sole discretion of the Resolution Applicant. That means there is no commitment on the part of the Resolution Applicant to infuse such funds in the Corporate Debtor.

19. From the Resolution Plan, it is understood that on approval of the Resolution Plan, the Resolution Applicant shall replace the existing promotor group, and the shareholding of the existing promotor group shall become zero. But at the same time, the Resolution Applicant mentions that the capital reduction of the existing promotor group to zero is optional and at the sole discretion of the Resolution Applicant. Hence, this Resolution Plan is not a definitive one.

20. From the Resolution Plan, it is understood that on approval of the Resolution Plan, the dissenting members shall be paid on the basis of liquidation value only. But when the Resolution value is more than the liquidation value then some of the Financial Creditors cannot be discriminated against because of their dissent and voting against the Resolution Plan. This clarification is not there in the Resolution Plan. The dissenting financial creditors in short challenged the plan on the following three grounds viz:-

- i. That all Financial Creditors are required to assign their debts payable by the Corporate Debtor to a NBFC (which has not been named) alongwith the guarantee(s) on the approval of the plan;
- ii. The amounts payable to each of the Financial Creditors as a % age of their admitted claim amount varies amongst the Financial Creditor though all are in the same category/class; and
- iii. There is an arbitrary amount ascertained as receivable from the Awards obtained by the Corporate Debtor from various entities as also the treatment of the receivables from such Awards.
- iv. That, the RP without providing clarification on the above issues proceeded with the approval process and filed the application before this Hon'ble Tribunal being IA 29 of 2023. Hence, the

present application is filed with a prayer to reject the Resolution Plan.

Brief contents of Reply of Respondent/RP to IA (IB) No. 62/CB/2023 are as follows:-

21. The present application has been filed with mala fide intention and ulterior motive. The Kotak Mahindra Bank limited with a total exposure of 0.64% is seeking to act contrary to the commercial wisdom of the majority members of the CoC. It is manifest that the stated objective of Kotak Mahindra Bank limited is to send the Corporate Debtor into liquidation which is against the objectives of the Code. Consequently, the present petition application, being completely opposed to the objective of the Code is liable to be dismissed. As against a liquidation value of around Rs. 140 crores the present plan size is of Rs. 432.90 crores.

22. The Applicant has filed the present application as an afterthought to derail the Corporate Insolvency Resolution Process ("CIRP") of the Corporate Debtor, when the Resolution Plan of the Corporate Debtor was approved on 04.01.2013 with a majority of 76.67% vote by the CoC, after the dissent by the Applicant.

23. That the RP and the CoC have examined the Plan submitted by the Resolution Applicant and have found that the said plan is not contrary to the prevailing laws, moreover, the plan is feasible & viable in accordance with Section 30(4) of Insolvency and Bankruptcy Code, 2016 ("the Code"). Further, there is no instance of any illegality or any kind of laches in the plan submitted by the Resolution Applicant. That with regard to withdrawal of all legal suits and other recovery proceedings against the third-party guarantee, it is submitted that as per the plan it is an assignment of debt onto the Resolution Applicant upon approval of the plan which cannot be said to be contrary to the provisions of the Code. It is not a case where the guarantees are being extinguished, but rather, the

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same are being assigned to the Resolution Applicant. Moreover, the Resolution Applicant vide an Affidavit dated 20.02.2023 submitted before this Hon'ble Tribunal have relinquished its rights of assignment of the third-party guarantees by virtue of which there is no further impediment on the Applicant to continue with the third- party guarantees against the respective guarantors.

24. That it is further pertinent to note that throughout the duration of the CIRP period, i.e. from 30.11.2021 till the approval of the Resolution Plan by the CoC on 04.01.2023, the Applicant itself chose to attend only 7 out of total 16 CoC meetings.

25. That the objection to the payment from arbitration proceeds and equity upside only to assenting Financial Creditors is in terms of sec. 30(2) (b) of the code, where the dissenting creditors are only entitled to the liquidation value and the present Applicant being a dissenting financial creditor cannot be concerned with any other payment or disbursement or benefit drawn under the same Resolution Plan that it has voted against.

26. In the event the Plan of OCML is rejected and the Corporate Debtor is pushed to liquidation, the assets and properties of the Corporate Debtor are likely to be sold at the liquidation value of merely around Rs. 140 Cr. Instead of the plan size of 432.90 Cr. The Corporate Debtor has a large number of ongoing projects which have been kept alive by the RP. In respect of such ongoing projects the Corporate Debtor company has given live Bank Guarantees to the extent of Rs. 62.60 Crores. The Resolution Applicant, in the Resolution Plan has agreed to assume the responsibility of getting the said Bank Guarantees discharged or in the alternative of making payment of any Bank Guarantee which may be invoked. In the event the plan of the Resolution Applicant is rejected and the Corporate Debtor goes into liquidation, the said Bank Guarantees will be automatically invoked thereby increasing the existing liability of the lenders by at least Rs. 62.60 Crores. Thus, explaining the baseless objections of the Applicant herein holding a

small voting share of 0.64%. It is a settled position of law that liquidation is the last resort and every endeavour should be made to avoid liquidation.

27. That the present application should not be allowed as the result would be that rather than insolvency resolution and maximisation of the value of assets of the corporate Debtor, the processes would lead to liquidation despite approval of the Plan by 76.67% of voting. Such prayers of the applicant would defeat the very purpose envisaged by the Code.

On the basis of above pleadings, the following points are framed for determination: -

1. Whether the resolution plan of ARSS Infrastructure Projects Limited submitted by OCML is hit by Section 128 of Indian Contract Act 1872?

2. whether the corporate is order to be liquidated?

Point No 1

28. In the Resolution Plan clause 2.2 (d) & (e) speaks about the extinguishment of debts of the corporate debtor. As per the plan all debts of the corporate debtor as on the date of initiation of CIRP shall stand extinguished. Further this clause says that upon upfront payment all the financial creditors of the corporate debtor shall jointly and severally assign the entire security Interest to Resolution applicant OCML. This is inclusive of extinguishment of corporate and personnel guarantees of the corporate debtor. In pursuance of this the financial creditors shall assign the personal guarantee, the corporate guarantee and other security interest, the financial creditor shall assign the original guarantee deed and all other relevant security documents, title deeds, hypothecation deeds in favour of Resolution Applicant OCML.

29. The dissenting financial creditors opposed this clause., they submit that the resolution plan impliedly compels them to assign their interest over the corporate and personal guarantors of the corporate debtor. On their support they rely upon the Apex court citations State Bank of India vs Ramakrishnan and

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another and Lalit Kumar Jain vs Union of India & ors. The Apex court made it clear that the financial creditors can independently proceed against the corporate and personal guarantors in spite of pending CIRP proceeding against the principal corporate debtor. The dissenting financial creditors stated that they might have fair chances to recover the dues from the properties of corporate and personal guarantors. They said the plan shall restrict to the assets of the corporate debtor, and not to extend to the property of guarantors when the lenders/Financial creditors reluctant to relinquish their rights over the corporate and personal guarantors.

30. On the Resolution applicant side stated that the value of the properties and assets of the corporate and personal guarantors of the corporate debtor is valued at Rs 45,00,00,000/-and for the same in the plan the upfront cash payment was enhanced from Rs.140 crores to Rs.180 crores, thus a sum of Rs.40,00,00,000/- has been earmarked for an assignment of corporate and personal guarantees, hence there is no prejudice to the dissenting financial creditor in this regard. On the respondent side denies the correctness of the valuation amount mentioned by the Resolution applicant in the plan. The CIRP is in respect of the corporate debtor, when the financial creditors unable to recover the substantial amount loan amount from the principal borrower/corporate debtor, they have every right to proceed against the guarantors to recover the remaining loan amount. This is prerogative of the financial creditors, in the guise of Resolution plan the said rights of the financial creditors cannot be stripped off against their will. The right to proceed against the guarantors by the creditor is a statutory right of the lender under section 128 of Indian Contract Act 1872, so the dissenting creditors have every right to exercise this right and proceed against the properties of guarantors of corporate debtor. On the respondent side rely upon the order of NCLT, Indore Bench, **Naveen Kumar Sood RP/Statec Envir Engineering (India) Pvt Ltd vs Ujaas Energy Ltd**

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and Ors IA No.190/(MP)/2021 in CP(IB) 9 of 2020 dated 06.01.2023. There in a similar situation in para 10 & 11 runs as follows:

Be that as it may we are not going in details of the plan since the said resolution plan contains a relief to extinguish the personal guarantee given to the lenders on the borrowings of the corporate debtor but the same is objected by Bank of Baroda. This Adjudicating Authority vide its order dated. 04.08.2022 released the matter for clarification with respect to the said relief in the plan, however the resolution applicant wish to proceed without amending such reliefs and therefore, such conditional plan without the consent of all the secured financial creditors is not in accordance with the provisions of the Code.

In our considered opinion the CoC can take any commercial decision relating to insolvency of the corporate debtor only, the CoC cannot extinguish right of the particular secured creditor to proceed against the personal guarantor of the corporate debtor under the garb of its commercial wisdom. Such provision in the resolution plan is not only prejudicial to the right of such secured creditor but also against the provisions of law. Hence, we cannot approve such resolution plan as it contravenes the provision of section 30(2)(e) of the Code.

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31. On the dissenting financial creditor side also relied upon the order of NCLAT passed in Company Appeal (AT)(Insolvency)No.257 of 2020, **Nitin Chandrakant Naik & Anr vs Sanidhya Industries LLP & ors**, there the Hon'ble NCLAT held that resolution plan approved by the Adjudicating Authority granting liberty to the financial creditors to proceed against the properties of guarantors is in contravention to section 30(2) of IBC 2016.

32. On the dissenting financial creditor side also stated that the provision made in the resolution plan regarding the distribution of proposed award amount is discriminatory among the similarly placed creditors. The details of receivable Arbitration amount are listed in annexure E (page 813 volume (v) of I.A. No. 29/CB/2023 the total proposed arbitration award amount is Rs.1,373.54 crores. As per clause (iv) of the plan the Successful Resolution Applicant has to share 50% of the value received from the proposed Arbitration Award with the Assenting financial creditors in the event the amount is received within three years. Further this clause states that the Resolution applicant is not liable to make any payment to any one if the award amount is received after three years from an effective date. This clause is contingent in nature and the same is hit under section 32 of Indian Contract Act 1872. There is a possibility of that Resolution applicant wantonly delayed the matter to avoid to make any payment and made the provision as redundant.

33. The applicant in I.A.No.62 of 2023 dissenting financial creditor Kotak Mahindra side also argued that not allotting any amount to the dissenting financial creditors in the proposed Arbitration execution award amount is discriminatory in nature the same is not in accordance with law. This objection is not sustainable because how the dissenting creditor shall be dealt with is explained in section 30(2) of IBC 2016. There it is stated that the amount payable to the dissenting financial creditor shall not be less than the liquidation value. The distribution of assets to the dissenting financial creditor must be determined under section 30(2) R/w 53 of IBC 2016. In these circumstances the provision made in

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the resolution plan regarding proposed arbitration execution amount cannot be considered as a ground for refusal to grant approval.

34. After hearing the submission of all concerns and perusal records it is concluded that the provision made in the resolution plan clause 2.2 (d) & (e) regarding the extinguishment of corporate and personnel guarantees of the corporate debtor is in contravention of law. In pursuance of this the financial creditors shall assign the personal guarantee, the corporate guarantee and other security interest, the financial creditor shall assign the original guarantee deed and all other relevant security documents, title deeds, hypothecation deeds in favour of Resolution Applicant OCML, this is in contravention of section 128 of Indian Contract Act 1892.

35. On the Resolution Applicant side during the hearing expressed that the Resolution applicant has agreed to modify the plan and not to demand release of the personal and Corporate Guarantees of dissenting and absenting financial creditors viz Punjab National Bank, Bank of India, and Kotak Mahindra, affidavit dated 20.02.2022 also filed in this regard. On the Kotak Mahindra side argued that once the plan is approved by COC the Adjudicating authority cannot alter or modify the plan for whatever reason and opposed to act upon the affidavit of Successful Resolution applicant, instead he prayed to send back the plan to COC for considering the revised plan. In the applications I.A. Nos. 39,55 and 62/CB/2023 filed by dissenting financial creditors also prayed for liquidation of corporate debtor.

As already held that the Plan is not in accordance with law, then the what is the next course of action. Whether

1. To Approve the plan after modifying it, accepting the affidavit filed by SRA?
- or
2. To Remit the plan to COC to modify the plan and for resubmission? or
3. To proceed for liquidation?

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36. On the resolution professional side put forth the case that since the Successful resolution applicant itself filed an affidavit dated 20.02.2023 releasing its assignment or its right over the personal and corporate Guarantees of dissenting financial creditors viz Punjab National Bank, Bank of India and Kotak Mahindra, and also agreed to deletion of capital reduction of existing share capital of promoters to Zero at the sole discretion of Resolution Applicant hence made request to approve the plan. The dissenting financial creditor Kotak Mahindra side argued that the COC approved Resolution plan with its commercial wisdom, the said approved plan cannot be altered merely on the basis of an affidavit of Successful Resolution applicant, if any amendment/modification needs to be carried out, the plan should be remitted to the Coc for further consideration and opposed to act upon the affidavit of Resolution applicant. The resolution plan submitted for approval before this Authority was approved by the COC with 76.67% voting. Once the resolution plan is approved by the COC with requisite voting and submitted before the Adjudicating Authority for approval, the Adjudicating Authority either to approve the plan under section 30(1) or reject the plan under section 31(2) of IBC 2016. There is no other alternative to approve the resolution plan with modification. In this regard NCLAT-Delhi in Company Appeal No.202/2021 **Mathura prasad C Pandey and 2 Ors vs Partiv Parikh and anr dated 14.12.2022** in para 22 observed as follows:

On examination of the aforesaid provisions there is no doubt that if a resolution plan is submitted before the Adjudicating Authority which is in compliance with sub-section (1) of Section 31 as well as in consonance with the provisions of Section 30 of the code such resolution plan has to be approved by the Adjudicating Authority since in Section 31 word “shall” has been incorporated

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with proviso that the Adjudicating Authority must be satisfied that the resolution plan has provisions for its effective implementation. Sub-section (2) of Section 31 of the IBC further empowers the Adjudicating Authority to reject the resolution plan, if he is satisfied that resolution plan is not in conformity with the requirements as referred to in sub-section (1) of Section 31 of the IBC. It is clear that mandate of legislation is either to approve the resolution plan or to reject. However, there is no provision for making alteration or modification in the resolution plan. In view of the statutory provisions as contained in Section 31 of the IBC we are satisfied the learned Adjudicating Authority to some extent exceeded its jurisdiction in modifying/altering the conditions in the resolution plan which has been done in para 15 of the impugned order which we have already quoted hereinabove. In such view of the matter the appeal i.e. Company Appeal (AT) (Ins) No. 201/2021 can be allowed and it is held that the condition in para 15 of the impugned order shall not be looked into or may not be taken note of.

The above view is reiterated by Apex court in recent citation **Seri Multiple Asset Investment vs Deccan Chronicle Marketeers** <https://indiankanoon.org/doc/96042552/> dated 17.03. 2023, para 22 runs as follows:

It has not been disputed by learned counsel for the appellant that once the Resolution Plan stands approved, no alterations/modifications are

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permissible. It is either to be approved or disapproved, but any modification after approval of the Resolution Plan by the CoC, based on its commercial wisdom, is not open for judicial review unless it is found to be not in conformity with the mandate of the IBC Code.

In these circumstances it is concluded that there is no scope for this Authority to approve the resolution plan with modifications.

37. The next option is to remit the plan to COC for further consideration. In the supra NCLAT citation Company Appeal No.202/2021 Mathura prasad C Pandey and 2 Ors vs Partiv Parikh and anr dated 14.12.2022 it is vividly explained that the Adjudicating Authority either to approve the plan under section 30(1) or reject the plan under section 31(2) of IBC 2016. The Adjudicating Authority has no authority to remit the plan to COC for its reconsideration. The NCLAT – Delhi in Company Appeal No.1155 of 2022 **Express Resorts and Hotels Ltd vs Amit Jain and others dated 09.02.2023** the Appellate Authority deprecated the order of Adjudicating Authority sent back the resolution plan to Coc for its reconsideration. In our case the corporate debtor was admitted into CIRP on 30.11.2021. the resolution period was over long ago and after extension, the extended period also expired on 08.01.2023. The maximization of value of the corporate debtor is admittedly an object of the CIRP, but the said maximization has to be achieved within the timeline provided in the scheme. In this situation there is scope to remit the plan to COC. In a similar situation NCLAT-Delhi Company Appeal No. 257 of 2020 **Mr. Nitin Chandrakant Naik and another vs Sandhya Industries LLP** and others in para 25 observed and directed the Adjudicating Authority to pass an order of liquidation under section 33 of IBC 2016 since the Insolvency Resolution Process period under section 12 of the IBC 2016 is already over.

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38. After perusal of the Resolution plan submitted for approval it is found that clause 2 (d) & (e) of the plan requiring the financial creditors to assign their debts payable by the corporate debtor inclusive of the personal Guarantee, the corporate Guarantee and other security Interests, and surrender the original guarantee deed and all other relevant security documents including title deeds, Hypothecation deeds and pledge Agreements to the Resolution applicant contravene section 128 of Indian Contract Act 1892 and the same is in violation section 30(2)(e) of IBC 2016. Thus, this point is answered. The Resolution plan is not in conformity with the requirements as referred in sub-section (1) of section 31 of the IBC 2016 hence the Resolution plan is hereby **Rejected**.

In the result I.A.(IB) No.29/CB/2023 is dismissed, I.A.(IB) Nos. 39,55, and 62/CB/2023 are Allowed.

Point No. 2

39. In consequence of Rejection of Resolution plan, since the resolution period and extended period were already expired, and more than sixteen months expired from 30.11.2021 the date on which the corporate debtor was admitted into CIRP, the corporate debtor M/s ARSS Infrastructure Projects Limited is ordered to be liquidated under section 33 of IBC 2016. Thus, this point is answered.

40. The Resolution Plan submitted by the Resolution professional Mr. Uday Narayan Mitra is rejected for failure to meet the requirements as mentioned in sub-section (2) of Section 30 of IBC 2016 hence Resolution professional, Mr. Uday Narayan Mitra is replaced/discharged as provided under section 34(4)(a) of IBC 2016.

41. Ms. Payal Agarwal, Insolvency Resolution Professional, having her office at Old College Lane, Nimchouri ,Near Odisha High Court ,Cuttack, Orissa, 753002 with Registration IBBI/IPA-001/IP-P02254/2021-2022/13571 is appointed as Liquidator, of M/s ARSS Infrastructure Projects Limited, corporate

debtor, she has to submit her written consent within a week from this date of order.

42. The Liquidator is directed to forthwith take into her custody all the assets, Properties, equipment, machineries, and actionable claims of the corporate debtor and take necessary steps to ensure preservation, protection security and maintenance of those properties as provided under section 35(1)(b) & (d) of IBC 2016.

43. The Liquidator is directed to adhere to Section 33(1) (ii) & (iii) and discharge his powers and duties as specified under Section 35 to 41 of IBC, 2016 and meticulously adhere to the Rules and Regulations issued by IBBI in this regard from time to time.

44. Public Notice as contemplated under section 33(1) of the Code shall be issued in one morning, English daily and in one morning regional language newspapers.

45. All the powers of the Board of Directors of the Corporate Debtor and of its key managerial personnel, shall cease to exist in accordance with section 34(2) of the Code. These powers shall henceforth vest in the Liquidator. The personnel of the Corporate Debtor shall extend all assistance and cooperation to the Liquidator as may be required by him in the Liquidation process of the Corporate Debtor.

46. On initiation of the Liquidation process but subject to section 52 of the Code, no suit or other legal proceeding shall be instituted by or against the Corporate Debtor, save and except the liberty to the liquidator to institute a suit or other legal proceeding on behalf of the Corporate Debtor with prior approval of this Adjudicating Authority, as provided in section 33(5) of the Code read with its proviso.

47. In accordance with section 33(7) of the Code, this liquidation order shall be deemed to be a notice of discharge to the officers, employees and work

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men of the Corporate Debtor, except to the extent of the business of the Corporate Debtor

continued during the liquidation process by the liquidator.

48. In terms of Section 33(1) (b) (iii), the Liquidator shall file a copy of this Order with the Registrar of Companies, Odisha at Cuttack, within whose jurisdiction the Corporate Debtor is registered.

49. The fee of Liquidator to be determined as provided under Regulation 4 of Insolvency and Bankruptcy Board of India (Liquidation process) Regulation 2016.

50. As per Regulation 13 of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulation, 2016, the liquidator shall submit a preliminary report to the Adjudicating Authority within 75 days from the liquidation commencement date providing various details/information as mentioned in the said regulation.

51. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel and to ROC, Odisha for information and for taking necessary steps,

52. Certified Copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

Satya Ranjan Prasad
Member (Technical)

P. Mohan Raj
Member (Judicial)

Signed on this 18th day of April, 2023.

Kaushal P.S.