THE KARAD URBAN COOPERATIVE BANK LTD. A

V.

SWWAPNIL BHINGARDEVAY & ORS.

(Civil Appeal No. 2955 of 2020)

SEPTEMBER 04, 2020 B

[S. A. BOBDE, CJI, A. S. BOPANNA AND V. RAMASUBRAMANIAN, JJ.]

Insolvency and Bankruptcy Code, 2016: Appellant financial creditor filed s.7 application before NCLT against corporate debtor – Committee of Creditors (CoC) resolved to approve the Resolution Plan submitted by one M/s Sai Agro – On the basis of approval of Resolution Plan, Resolution Professional moved an application before NCLT – At this stage, the Director/Promoter of corporate debtor also came up with an application seeking permission to file Resolution Plan – NCLT rejected the application of corporate debtor and approved Resolution Plan submitted by M/s Sai Agro – Thus, M/s Sai Agro became Successful Resolution Applicant (SRA) – Director/Promoter of corporate debtor filed appeal before NCLAT against the approval of the Resolution Plan of SRA – NCLAT allowed the appeal and remanded the matter back to NCLT with direction to send back the Resolution Plan to the CoC – Order of NCLT was challenged on the ground inter alia that the Resolution Plan suffered from issues of viability and feasibility and that the Resolution Plan did not take note of important fact that the ethanol plant and machinery shown as part of the assets of the corporate debtor, actually belonged to another company by name, Sarvadnya Industries Private Ltd. (SIPL) and that a bank by name, Janata Sahkari Bank Ltd. had taken possession of the same under the SARFAESI Act – Financial creditor and Resolution Professional both filed separate appeals respectively – Held: It is not the case of corporate debtor or its promoter/Director or anyone else that some of the factors which were crucial for taking a decision regarding viability and feasibility were not placed before the CoC or the Resolution Professional – The only basis for the corporate debtor to raise the issue of viability and feasibility was that the ownership and possession of the ethanol plant and machinery was the subject C D E F G H

matter of another dispute and that the Resolution Plan did not take care of the contingency where the said plant and machinery may not eventually be available to SRA – However, records very clearly show that SRA, Resolution Professional and financial creditor were fully aware of the said issue – The order passed by the NCLAT showed that the possession of the ethanol plant and machinery was restored to SIPL, in the appeal to which SRA was also a party – SRA also appeared to have offered to Janata Sahkari Bank to purchase the said plant and machinery – In the appeal before the NCLAT out of which these appeals arose, SIPL which claimed ownership of the ethanol plant and machinery, was also a party – In any case, the Resolution Professional took a specific plea in his grounds of appeal before this Court, that SRA was itself into the ethanol manufacturing business and that they had sufficient ethanol production capacity required to fulfil their Resolution Plan – Therefore, the fact that there was an issue with regard to the ethanol plant and machinery, had been taken note of by Resolution Professional, CoC and SRA – Since all these three parties took note of the said fact and took a conscious decision to go ahead with the Resolution Plan, it cannot be stated that the question of viability and feasibility was not examined in the proper perspective – Therefore, the main ground on which NCLAT interfered with the decision of the NCLT to approve the Resolution Plan, was wholly untenable, misconceived and unjustified.

Allowing the appeals, the Court

HELD: 1.1 If all the factors that need to be taken into account for determining whether or not the corporate debtor can be kept running as a going concern have been placed before the Committee of Creditors and the CoC has taken a conscious decision to approve the resolution plan, then the adjudicating authority will have to switch over to the hands off mode. It is not the case of the corporate debtor or its promoter/Director or anyone else that some of the factors which are crucial for taking a decision regarding the viability and feasibility, were not placed before the CoC or the Resolution Professional. The only basis for the corporate debtor to raise the issue of viability and

feasibility is that the ownership and possession of the ethanol plant and machinery is the subject matter of another dispute and that the resolution plan does not take care of the contingency where the said plant and machinery may not eventually be available to the Successful Resolution Applicant. [Para 13][477-C-E]

1.2 The records very clearly show that the Successful Resolution Applicant, the Resolution Professional and the financial creditor were fully aware of the said issue. The order passed by the NCLAT passed on 16.12.2019 shows that the possession of the ethanol plant and machinery was restored to Sarvadnya Industries Pvt. Ltd., in the appeal to which the Successful Resolution Applicant was also a party. The Successful Resolution Applicant also appears to have offered to Janata Sahkari Bank to purchase the said plant and machinery. In the appeal before the NCLAT out of which the present Civil Appeals arise, Sarvadnya Industries Pvt. Ltd. which claims ownership of the ethanol plant and machinery, were also a party. In any case, the Resolution Professional has taken a specific plea in his grounds of appeal before this Court, that the Successful Resolution Applicant is itself into the ethanol manufacturing business and that they have sufficient ethanol production capacity required to fulfil their Resolution Plan. Therefore, the fact that there was an issue with regard to the ethanol plant and machinery, had been taken note of by the Resolution Professional, the Committee of Creditors and the Successful Resolution Applicant. Once all these three parties have taken note of the said fact and taken a conscious decision to go ahead with the Resolution Plan, it cannot be stated that the question of viability and feasibility was not examined in the proper perspective. [Paras 14-17][477-F-H; 478-A-B, E-F]

2.1 The second ground on which NCLAT interfered with the decision of the NCLT is the alleged breach of confidentiality. The contention of the Promoter/Director of the corporate debtor is that the liquidation value mentioned in the Resolution Plan submitted by the SRA exactly tallied with the liquidation value obtained by the Resolution Professional and that the whole

A **sequence of events would show clearly that there was an attempt to cover up. According to the Director/Promoter of the corporate debtor, the self-declaration signed by the Resolution Applicant, and which forms part of the Resolution Plan, bears the date 9th February 2019. This document mentions the liquidation value as Rs. 13.53 crores. It was the same value as obtained by the Resolution Professional. It is the contention of the Director/ Promoter of the corporate debtor that the Resolution Professional wrote an email on 07.02.2019 itself (2 days before the submission of the Resolution Plan by the SRA), asking for clarification as to how the liquidation value matched. This, according to the Director of the corporate debtor, was proof enough to show that there was not merely a leakage of information, but also an attempt to cover-up. This contention cannot be accepted. The Resolution Plan actually runs to 31 pages. Pages 30 and 31 contain Annexure A, which provides the business plan. Page 29 contains a self-declaration certificate signed by the partners of the SRA. Just below the signatures of the partners at page 29, the date "09th February 2019" is type-written. But the cover page of the entire document contains the date "7th February 2019" as the date of submission of the Resolution Plan. The last date for submission of the resolution plan was 08.02.2019. [Paras 27-30][480-F-H; 481-A-D]**

2.2 Nowhere in the Memorandum of Appeal filed by the Promoter/Director of the corporate debtor before the NCLAT, has he claimed that the Resolution Plan was submitted by the SRA after the last date. We have perused the Memorandum of Appeal filed by the Promoter/Director of the corporate debtor before the NCLAT. It was not his case at all that the Resolution Plan was submitted by the SRA after the last date, but the same was predated by the Resolution Professional acting in collusion. [Para 31][481-E]

2.3 It appears from the impugned order of NCLAT that only in the course of hearing of the appeal, the date "09th February 2019" type-written at the bottom of the self-declaration (page 29 of the Resolution Plan) was sought to be taken advantage of. Since this was not raised as one of the grounds in the Memorandum of Appeal but raised in the course of arguments,

the Resolution Professional could do no more than to file the print-out of the email correspondence between him and the SRA dated 07.02.2019. In the first email dated 07.02.2019, the Resolution Professional had sought a clarification from the SRA as to how they discovered the liquidation value and the source for the same. In response to this mail, the SRA sent a reply email contending that they undertook a due diligence to know the current market value and liquidation value and that what was quoted by them in the Resolution Plan, was something that an independent agency provided to them. Unfortunately, NCLAT rejected the print-out of the email correspondence dated 07.02.2019 on the sole ground that the same was not supported by affidavit and that it was filed after the conclusion of the oral arguments. But NCLAT failed to take note of the fact that the Resolution Professional did not have any alternative except to respond in the manner that he did, to a point raised only in the course of arguments, but not raised in the Memorandum of Appeal. If the Promoter/Director of the corporate debtor had raised the issue of collusion or the submission of the Resolution Plan after the expiry of the last date, even in the Memorandum of Appeal, a duty would have been cast upon the Resolution Professional to respond in an appropriate manner. But that was not the case. [Paras 32, 33, 34][481-F-H; 482-A-C]

2.4 The fact that there was an email correspondence between the Resolution Professional and the SRA on 07.02.2019, touching upon one of the contents of the Resolution Plan, would show (i) that the SRA had submitted the Resolution Plan before the last date and (ii) that the Resolution Professional had obviously scrutinised it, as otherwise he could not have found out the liquidation value mentioned therein matching the confidential information that he had. The liquidation value mentioned in the Resolution Plan of the SRA is Rs. 13.53 crores. But the actual total pay-out as per the Resolution Plan is Rs. 29.74 crores. This meant that the workers and employees of the corporate debtor were to be paid 100% of their dues; that all statutory dues would be cleared 100% and that the financial creditors who constituted

the CoC were to be paid 60% of their dues. It offends common sense to think that a resolution applicant who had the benefit of leakage of information relating to liquidation value would quote a figure of Rs. 29.74 crores as the total pay-out, as against a liquidation value of Rs. 13.53 crores. The question of breach of confidentiality and leakage of confidential information can easily be tested on the touchstone of the benefit that accrued to the party who got the information. In the case on hand, no benefit accrued to the SRA. [Paras 35-38][482-D-H]

2.5 It is obvious from the material on record that the Promoter/Director of the Corporate Debtor has tried to take advantage of two small mistakes on the part of the SRA, one of which was a typographical error mentioning the date "09th February 2019" at the bottom of the self-declaration and the other, which happened as a matter of coincidence. The NCLAT appears to have made a mountain out of a molehill and has recorded a finding even beyond the pleadings in the Memorandum of Appeal. Hence, the second ground on which the NCLAT was convinced to pass the impugned order, is legally and factually untenable. [Para 39][483-A-B]

3. The next ground on which NCLAT proceeded, related to the ethanol plant and machinery. SRA admittedly did not make his Resolution Plan on the strength of the ethanol plant and machinery in question. The threat looming large over the availability of the ethanol plant and machinery has admittedly been taken note of by the SRA and the CoC. The Resolution Plan does not give an indication anywhere that without this plant and machinery the whole resolution plan will fail. In paragraph 8.04 of the Resolution Plan, the SRA has undertaken to continue the operations in the normal course of business. It is a commercial decision that they have taken. The corporate debtor cannot cry wolf over the said decision. Therefore, the third ground on which NCLAT chose to interfere, is also bound to be rejected. [Para 40][483-C-E]

4.1 The last ground revolves around the advertisement issued by the Resolution Professional on 30.03.2018. NCLAT holds that the advertisement was not in conformity with Regulation 36A of The Insolvency and Bankruptcy Board of India

(Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and as per Form G of the Schedule. Regulation 36A was inserted only with effect from 06.02.2018 under Notification No. IBBI/2017-18/GN/REG024 dated 06.02.2018. It underwent a change under Notification No. IBBI/2018-19/GN/REG031 dated 03.07.2018, with effect from 04.07.2018. Regulation 36A, as it stood during the period from 06.02.2018 to 04.07.2018, did not mandate the publication of the invitation of Resolution Plans, either in Form G or otherwise, in newspapers. It is only the amended Regulation 36A, which came into effect from 04.07.2018, that requires the publication of Form G in newspapers. Therefore, the publication in newspapers made by the Resolution Professional, in the case on hand, on 30.03.2018, was something that was statutorily not required of him and hence the Promoter/Director of the corporate debtor cannot take advantage of the amendment that came later, to attack the advertisement. The unamended and amended Regulation 36A are provided in a tabular column for easy comparison and appreciation. The second meeting of the Committee of Creditors was held on 27.03.2018. The advertisement was approved in the said meeting. It was the unamended Regulation 36A that was in force at that time. This has not been appreciated by NCLAT. Therefore, the NCLAT was wrong in its approach even in this regard. [Paras 41, 45, 46][483-E-F; 484-E-H; 487-C-D]

Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta and others **(2019) SCC Online SC 1478;** *K. Sashidhar v. Indian Overseas Bank* **(2019) 12 SCC 150; [2010] 3 SCR 845 – relied on**

Case Law Reference

[2010] 3 SCR 845	**relied on**	**Para 10**

CIVIL APPELLATE JURISDICTION : Civil appeal nos. 2955 of 2020

From the Judgment and Order dated 02.06.2020 of the National Company Law Appellate Tribunal, New Delhi in Company Appeal(AT) (Ins) No. 943 of 2019.

With

Civil Appeal o. 2902 of 2020.

A Siddhartha Dave, Jayant Bhushan, Sr. Advs., Dr. Ravindra Sadanand Chingale, Shikhil Suri, Shiv Kumar Suri, Ms. Shilpa Saini, Ms. Nikita Thapar, Ms. Vinishma Kaul, Ms. Madhu Suri, Ranjit Balasaheb Raut, Bhushan V. Mahadik, Akshat Kumar, Advs. for the appearing parties.

B The Judgment of the Court was delivered by

V. RAMASUBRAMANIAN, J.

1. Challenging an order passed by the National Company Law Appellate Tribunal (hereinafter referred to as 'NCLAT') (i) setting aside the approval granted by the National Company Law Tribunal (hereinafter C referred to as 'NCLT') to a Resolution Plan and (ii) remanding the matter back to the NCLT with a direction to have the Resolution Plan re-submitted before the Committee of Creditors, the financial creditor and the Resolution Professional have come up with these appeals.

2. We have heard learned counsel appearing on both sides.

D 3. The Karad Urban Cooperative Bank Ltd., which is the financial creditor, filed an application on 04.09.2017 under Section 7 of the IBC before the NCLT against M/s. Khandoba Prasanna Sakhar Karkhana Limited, which is the corporate debtor. NCLT admitted the application on 01.01.2018 and an Interim Resolution Professional was appointed. E The first meeting of the Committee of Creditors (hereinafter referred to as 'CoC') took place on 02.03.2018. As per the decision taken therein, one Mr. Jitendra Palande was appointed by the NCLT, by an order dated 06.03.2018, as Resolution Professional.

4. Pursuant to the second meeting of the Committee of Creditors F held on 27.03.2018, the Resolution Professional issued an advertisement on 30.03.2018 inviting Expression of Interest. In the meantime, a Director/ Promoter of the corporate debtor moved the High Court of Judicature at Bombay by way of a writ petition in Writ Petition No.4746 of 2018, challenging the orders of the NCLT dated 01.01.2018 and 06.03.2018. Initially, the High Court granted stay of further proceedings before the G NCLT on 18.04.2018. However, the writ petition was eventually dismissed on 23.08.2018.

5. Several meetings of the Committee of Creditors were held thereafter and eventually the Committee of Creditors, in its 8th Meeting held on 09.02.2019 resolved to approve the Resolution Plan submitted H by one M/s. Sai Agro (India) Chemicals. On the basis of the approval of

the Resolution Plan by the Committee of Creditors, the Resolution Professional moved an application on 15.02.2019 before the NCLT, Mumbai. At this stage, the Director/Promoter of the corporate debtor also came up with an application seeking permission to file a resolution plan. But by a common order dated 01.08.2019, NCLT, Mumbai Bench, rejected the application filed by the Director/Promoter of the corporate debtor and approved the Resolution Plan submitted by M/s. Sai Agro (India) Chemicals. Thus, M/s. Sai Agro (India) Chemicals, have become the Successful Resolution Applicant (hereinafter referred to as the 'SRA').

6. The Director/Promoter of the corporate debtor (who unsuccessfully approached the High Court of Bombay at the earliest point of time), filed an appeal before the NCLAT in Company Appeal (AT) (Ins) No.943 of 2019, as against the order of the NCLT dated 01.08.2019, granting approval of the Resolution Plan of the SRA.

7. By an order dated 02.06.2020, NCLAT allowed the appeal and remanded the matter back to the adjudicating authority, with a direction to send back the Resolution Plan to the Committee of Creditors. The operative portion of the order of NCLAT dated 02.06.2020 reads as follows:-

> "The Appeal is allowed. For the above reasons, we set aside the Impugned Order and remit the matter back to the Adjudicating Authority with a direction to send back the Resolution Plan to the Committee of Creditors to resubmit the Plan taking into consideration observations made above and after satisfying the parameters as laid down by the Hon'ble Supreme Court in the Judgment in the matter of "Essar Steel" referred (supra) and IBC. The Adjudicating Authority may give specific time period to the Resolution Professional to place matter before Committee of Creditors for resubmitting the Resolution Plan taking into consideration observations made above and after satisfying the parameters laid down by the Hon'ble Supreme Court and IBC. Further incidental Orders may also be passed.
>
> On resubmission of the Resolution Plan, the Adjudicating Authority will deal with the same in accordance with law.
>
> The Appeal is disposed accordingly. No costs."

A 8. It is against the aforesaid order of remand passed by NCLAT that the financial creditor has come up with one appeal and the Resolution Professional has come up with another appeal.

9. It is seen from the order of the NCLAT that the Appellate Tribunal was convinced to interfere with the order of NCLT granting B approval of the Resolution Plan, on four grounds. They are:-

(i) That the Resolution Plan suffers from issues of viability and feasibility;

(ii) That in as much as the liquidation value mentioned by the Successful Resolution Applicant in its Resolution Plan tallied C exactly with the liquidation value obtained by the Resolution Professional, there appears to have been a breach of confidentiality, violating Regulation 35(2);

(iii) That the Resolution Plan does not take note of one important fact namely, that the ethanol plant and machinery shown as D part of the assets of the corporate debtor, actually belonged to another company by name, Sarvadnya Industries Private Limited, and that a bank by name, Janata Sahkari Bank Limited, Pune had taken possession of the same under the SARFAESI Act; and

E (iv) That even the advertisement issued by the Resolution Professional on 30.03.2018 inviting Expression of Interest, was vitiated in as much as the invitation contained therein was for outright sale of the Company as a going concern, and was in violation of Regulation 36A.

F 10. The order of the NCLAT is assailed by the appellants on the ground, *inter alia*, (i) that the question of viability and feasibility, is to be left to the commercial wisdom of the CoC and the same cannot be lightly interfered with by the Tribunal, in view of the law laid down by this court in ***Essar Steel India Ltd.***[1] and ***K. Sashidhar***;[2] (ii) that a G mere suspicion that there was breach of confidentiality cannot take the place of proof; (iii) that once the Successful Resolution Applicant has taken note of the issue relating to the ethanol plant and machinery and submitted a resolution plan, the Director/Promoter of the corporate debtor

[1] Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta and others, (2019) SCC OnLine SC 1478

H [2] K. Sashidhar vs. Indian Overseas Bank, (2019) 12 SCC 150

cannot make an issue out of it, and (iv) that the advertisement issued was actually in tune with the regulations, including Regulation 36A.

11. Supporting the order of the NCLAT, it is contended by Mr. Jayant Bhushan, learned Senior Counsel, (i) that the Resolution Plan proceeds on the basis as though the ethanol plant, owned by a third party, is part and parcel of the assets of the corporate debtor and hence, the examination of the viability and feasibility on the basis of such wrong notion stands vitiated; (ii) that the very self-declaration accompanying the Resolution Plan bears the date 09.02.2019, but the email exchanged between the Resolution Professional and the Successful Resolution Applicant, on the question of leakage of information relating to the liquidation value is dated 07.02.2019, showing thereby that there was collusion between the Resolution Professional and the Successful Resolution Applicant; (iii) that the issue relating to legal possession of the ethanol plant and machinery had already been left open by NCLAT in a collateral proceeding between its legal owner namely, Sarvadnya Industries Pvt. Ltd. and its banker, Janata Sahkari Bank Ltd. and hence, this machinery could not have formed part of the assets of the corporate debtor to enable the Successful Resolution Applicant to take over the corporate debtor as a going concern and run it; and (iv) that the very fact that the Successful Resolution Applicant was the only person who submitted a bid in response to the advertisement and the fact that the Resolution Plan was approved within 2-3 hours in the 8th meeting of the CoC in a hasty manner, would show that the Resolution Plan was tainted, and that therefore, NCLAT was justified in setting aside the approval granted by the NCLT to the Resolution Plan.

12. We have carefully considered the rival submissions. On the first question regarding the viability and feasibility of a resolution plan, the law is now well-settled. In ***K. Sashidhar*** (supra), it was held as follows:

(i) "There is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan…The opinion on the subject matter expressed by them after due deliberations in the CoC meetings through voting, as per voting shares, is a collective business decision. The legislature, consciously, has not provided any ground to challenge the "commercial wisdom" of the individual

A financial creditors or their collective decision before the adjudicating authority. That is made nonjusticiable." *(paragraph 52)*

(ii) "The provisions investing jurisdiction and authority in NCLT or NCLAT as noticed earlier, have not made the commercial B decision exercised by CoC of not approving the resolution plan or rejecting the same, justiciable. This position is reinforced from the limited grounds specified for instituting an appeal that too against an order "approving a resolution plan" under Section 31." *(paragraph 57)*

C (iii) "Further, the jurisdiction bestowed upon the appellate authority (NCLAT) is also expressly circumscribed. It can examine the challenge only in relation to the grounds specified in Section 61(3) of the I&B Code, which is limited to matters "other than" enquiry into the autonomy or commercial wisdom of the dissenting financial creditors." D *(paragraph 58)*

(iv) "At best, the adjudicating authority (NCLT) may cause an enquiry into the "approved" resolution plan on limited grounds referred to in Section 30(2) read with Section 31(1) of the I&B Code. It cannot make any other inquiry nor is E competent to issue any direction in relation to the exercise of commercial wisdom of the financial creditors — be it for approving, rejecting or abstaining, as the case may be. Even the inquiry before the appellate authority (NCLAT) is limited to the grounds under Section 61(3) of the I&B Code. F It does not postulate jurisdiction to undertake scrutiny of the justness of the opinion expressed by financial creditors at the time of voting." *(paragraph 64)*

Thereafter, in ***Essar Steel India Ltd.*** (supra), this Court held:

(i) "Thus, it is clear that the limited judicial review available, G which can in no circumstance trespass upon a business decision of the majority of the Committee of Creditors, has to be within the four corners of Section 30(2) of the Code, insofar as the Adjudicating Authority is concerned, and Section 32 read with Section 61(3) of the Code, insofar as the Appellate Tribunal is concerned." *(paragraph 48)* H

(iv) "Thus, while the Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of Creditors, the limited judicial review available is to see that the Committee of Creditors has taken into account the fact that the corporate debtor needs to keep going as a going concern during the insolvency resolution process; that it needs to maximise the value of its assets; and that the interests of all stakeholders including operational creditors has been taken care of." *(paragraph 54)*

13. The principles laid down in the aforesaid decisions, make one thing very clear. If all the factors that need to be taken into account for determining whether or not the corporate debtor can be kept running as a going concern have been placed before the Committee of Creditors and the CoC has taken a conscious decision to approve the resolution plan, then the adjudicating authority will have to switch over to the hands off mode. It is not the case of the corporate debtor or its promoter/ Director or anyone else that some of the factors which are crucial for taking a decision regarding the viability and feasibility, were not placed before the CoC or the Resolution Professional. The only basis for the corporate debtor to raise the issue of viability and feasibility is that the ownership and possession of the ethanol plant and machinery is the subject matter of another dispute and that the resolution plan does not take care of the contingency where the said plant and machinery may not eventually be available to the Successful Resolution Applicant.

14. But the aforesaid argument, coming as it does from the Promoter/Director of the corporate debtor is like the wolf shedding tears for the lamb getting drenched in rain. The records very clearly show that the Successful Resolution Applicant, the Resolution Professional and the financial creditor were fully aware of the said issue. The order passed by the NCLAT in Company Appeal (AT) (Insolvency) No.897 of 2019 on 16.12.2019 shows that the possession of the ethanol plant and machinery was restored to Sarvadnya Industries Pvt. Ltd., in the appeal to which the Successful Resolution Applicant was also a party. The Successful Resolution Applicant also appears to have offered to Janata Sahkari Bank to purchase the said plant and machinery. In the appeal before the NCLAT out of which the present Civil Appeals arise, Sarvadnya Industries Pvt. Ltd. which claims ownership of the ethanol plant and machinery, were also a party.

15. In any case, the Resolution Professional has taken a specific plea in his grounds of appeal before this Court, that the Successful Resolution Applicant is itself into the ethanol manufacturing business and that they have sufficient ethanol production capacity required to fulfil their Resolution Plan. In paragraph 4.P of -the Civil Appeal filed by the Resolution Professional, he has stated as follows:

> "Further, the said Ethanol Plant was functional only between April 2016 and August 2016. That Respondent No. 3/SRA is itself into the ethanol manufacturing business and has sufficient ethanol production capacity required to fulfil its resolution plan. Additionally, there is a provision for capital expenditure in the approved plan of SRA which includes the cost of a new ethanol facility, if required. Additionally, Janata Bank Pune, which holds symbolic possession of the ethanol plant, had approached Respondent No. 3/ Successful Resolution Applicant for the sale of the said ethanol plant to the said SRA. That further the Respondent No. 3/ successful resolution applicant was planning to expand and integrate other facilities with the distillery plant of the Corporate Debtor which was functional since 2007;"

16. Therefore, the fact that there was an issue with regard to the ethanol plant and machinery, had been taken note of by the Resolution Professional, the Committee of Creditors and the Successful Resolution Applicant. Once all these three parties have taken note of the said fact and taken a conscious decision to go ahead with the Resolution Plan, it cannot be stated that the question of viability and feasibility was not examined in the proper perspective.

17. Therefore, the first ground and actually the main ground on which NCLAT interfered with the decision of the NCLT to approve the Resolution Plan, is wholly untenable, misconceived and unjustified.

18. In fact, our discussion could have ended here without going into the other grounds, for one simple reason. Though the Director/ Promoter of the corporate debtor, who was the appellant before the NCLAT, raised other grounds apart from viability and feasibility, NCLAT issued limited notice in the appeal, on 12.09.2019, only with regard to viability and feasibility. Even in the impugned order dated 02.06.2020, it is made clear in the last sentence of paragraph 1 that *"this appeal on 12.09.2019 was admitted to limited extent of examining viability and feasibility of the Plan"*.

19. It is true that in the last paragraph of the impugned order, namely paragraph 14, the Appellate Tribunal holds that the CIRP suffered from material irregularities and the Resolution Plan approved suffers from feasibility and viability. But then the operative portion of the impugned order does not take the findings on other issues to their logical end. For instance, the Tribunal holds that the advertisement inviting Expression of Interest itself was defective and that there was breach of confidentiality in as much as the liquidation value appears to have been leaked out. These findings should have taken the Appellate Tribunal to the point of setting aside the entire process and directing the Resolution Professional to start the process all over again from the stage of issue of a fresh advertisement. The NCLAT did not do so. In the operative portion, NCLAT merely remanded the matter back to the Adjudicating Authority with a direction to send back the Resolution Plan to the Committee of Creditors to **resubmit the plan** after taking into consideration the law laid down by this Court.

20. In other words, the reliefs that would normally flow in the light of the findings with regard to breach of confidentiality and defective Invitation to Offer, were not granted by NCLAT. The Director/Promoter of the corporate debtor has not come up with any appeal against the failure of NCLAT to grant appropriate reliefs, connectable to the aforesaid findings. The Director/Promoter of the corporate debtor is obviously happy with the limited relief, if at all it is one, granted to him for the resubmission of the Resolution Plan.

21. It must be pointed out at this stage that the order of the NCLT, Mumbai Bench dated 01.08.2019 became the subject matter of a single appeal before NCLAT. But it was actually a common order passed in three applications namely, MA Nos.1509/2019, 2104/2019 and 662/2019. The details of these applications are as follows:

(i) MA No.1509/2019 was filed by an operational creditor, by name Sarvadnya Industries Pvt. Ltd. (whose ethanol plant and machinery also became a matter of dispute). Their claim was that they had a rental agreement with the corporate debtor with regard to the plant and machinery and that there was default in payment of the rent.

(ii) MA No.2104/2019 was filed by the Director/Promoter of the corporate debtor seeking to submit a resolution plan.

A But it was obviously filed after 270 days and also after the approval of the Resolution Plan by the CoC.

(iii) The third application, MA No.662/2019, was by the Resolution Professional for the approval of the Resolution Plan which was accepted by the CoC.

B 22. By its common order dated 01.08.2019, the NCLT dismissed MA Nos.1509 and 2104 of 2019, filed respectively by the operational creditor (lessor of the ethanol plant) and the Promoter/Director of the corporate debtor. But the application filed by the Resolution Professional was allowed.

C 23. But the Director/Promoter of the corporate debtor filed only one appeal and the Memorandum of Appeal suggests that the Director/ Promoter of the corporate debtor prayed for two reliefs, namely (i) to set aside the approval of the Resolution Plan, and (ii) to consider his own resolution plan.

D 24. By the order impugned in the present Civil Appeals, the NCLAT granted only a limited relief, as can be seen from the operative portion of the order of NCLAT which we have extracted earlier.

25. Therefore, in the light of the above facts, the consideration of all other issues, such as breach of confidentiality and defective Invitation E to Offer would only be academic, as NCLAT did not grant any relief to the Promoter/Director of the corporate debtor, which could logically flow out of those other grounds.

26. But be that as it may, we will still deal with the other three grounds also, as the same would put things in the right perspective and F clear any air of suspicion.

27. The second ground on which NCLAT interfered with the decision of the NCLT is the alleged breach of confidentiality. The contention of the Promoter/Director of the corporate debtor is that the liquidation value mentioned in the Resolution Plan submitted by the SRA G exactly tallied with the liquidation value obtained by the Resolution Professional and that the whole sequence of events would show clearly that there was an attempt to cover up.

28. According to the Director/Promoter of the corporate debtor, the self-declaration signed by the Resolution Applicant, and which forms H part of the Resolution Plan, bears the date 9th February 2019. This

document mentions the liquidation value as Rs. 13.53 crores. It was the same value as obtained by the Resolution Professional. It is the contention of the Director/ Promoter of the corporate debtor that the Resolution Professional wrote an email on 07.02.2019 itself (2 days before the submission of the Resolution Plan by the SRA), asking for clarification as to how the liquidation value matched. This, according to the Director of the corporate debtor, was proof enough to show that there was not merely a leakage of information, but also an attempt to cover-up.

29. But we are unable to accept the above contention. The Resolution Plan actually runs to 31 pages. Pages 30 and 31 contain Annexure A, which provides the business plan. Page 29 contains a self-declaration certificate signed by the partners of the SRA. Just below the signatures of the partners at page 29, the date "09th February 2019" is type-written.

30. But the cover page of the entire document contains the date "7th February 2019" as the date of submission of the Resolution Plan. The last date for submission of the resolution plan was 08.02.2019.

31. Nowhere in the Memorandum of Appeal filed by the Promoter/ Director of the corporate debtor before the NCLAT, has he claimed that the Resolution Plan was submitted by the SRA after the last date. We have perused the Memorandum of Appeal filed by the Promoter/Director of the corporate debtor before the NCLAT. It was not his case at all that the Resolution Plan was submitted by the SRA after the last date, but the same was predated by the Resolution Professional acting in collusion.

32. It appears from the impugned order of NCLAT that only in the course of hearing of the appeal, the date "09th February 2019" type-written at the bottom of the self-declaration (page 29 of the Resolution Plan) was sought to be taken advantage of. Since this was not raised as one of the grounds in the Memorandum of Appeal but raised in the course of arguments, the Resolution Professional could do no more than to file the print-out of the email correspondence between him and the SRA dated 07.02.2019. In the first email dated 07.02.2019, the Resolution Professional had sought a clarification from the SRA as to how they discovered the liquidation value and the source for the same. In response to this mail, the SRA sent a reply email contending that they undertook a due diligence to know the current market value and liquidation value and that what was quoted by them in the Resolution Plan, was something that an independent agency provided to them.

A 33. Unfortunately, NCLAT rejected the print-out of the email correspondence dated 07.02.2019 on the sole ground that the same was not supported by affidavit and that it was filed after the conclusion of the oral arguments.

34. But NCLAT failed to take note of the fact that the Resolution B Professional did not have any alternative except to respond in the manner that he did, to a point raised only in the course of arguments, but not raised in the Memorandum of Appeal. If the Promoter/Director of the corporate debtor had raised the issue of collusion or the submission of the Resolution Plan after the expiry of the last date, even in the Memorandum of Appeal, a duty would have been cast upon the Resolution C Professional to respond in an appropriate manner. But that was not the case. Therefore, we do not approve the manner in which NCLAT rejected the contents of the email correspondence.

35. The fact that there was an email correspondence between the Resolution Professional and the SRA on 07.02.2019, touching upon D one of the contents of the Resolution Plan, would show (i) that the SRA had submitted the Resolution Plan before the last date and (ii) that the Resolution Professional had obviously scrutinised it, as otherwise he could not have found out the liquidation value mentioned therein matching the confidential information that he had.

E 36. In any case, the proof of the pudding is in the eating. The liquidation value mentioned in the Resolution Plan of the SRA is Rs. 13.53 crores. But the actual total pay-out as per the Resolution Plan is Rs. 29.74 crores.

37. This meant that the workers and employees of the corporate F debtor were to be paid 100% of their dues; that all statutory dues would be cleared 100% and that the financial creditors who constituted the CoC were to be paid 60% of their dues.

38. It offends common sense to think that a resolution applicant who had the benefit of leakage of information relating to liquidation value G would quote a figure of Rs. 29.74 crores as the total pay-out, as against a liquidation value of Rs. 13.53 crores. The question of breach of confidentiality and leakage of confidential information can easily be tested on the touchstone of the benefit that accrued to the party who got the information. In the case on hand, no benefit accrued to the SRA.

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39. It is obvious from the material on record that the Promoter/ Director of the Corporate Debtor has tried to take advantage of two small mistakes on the part of the SRA, one of which was a typographical error mentioning the date "09th February 2019" at the bottom of the self-declaration and the other, which happened as a matter of coincidence. The NCLAT appears to have made a mountain out of a molehill and has recorded a finding even beyond the pleadings in the Memorandum of Appeal. Hence, the second ground on which the NCLAT was convinced to pass the impugned order, is legally and factually untenable.

40. The third ground on which NCLAT proceeded, related to the ethanol plant and machinery. We have already dealt with this issue in detail, while dealing with the first issue. As stated therein, the SRA admittedly did not make his Resolution Plan on the strength of the ethanol plant and machinery in question. The threat looming large over the availability of the ethanol plant and machinery has admittedly been taken note of by the SRA and the CoC. The Resolution Plan does not give an indication anywhere that without this plant and machinery the whole resolution plan will fail. In paragraph 8.04 of the Resolution Plan, the SRA has undertaken to continue the operations in the normal course of business. It is a commercial decision that they have taken. The corporate debtor cannot cry wolf over the said decision. Therefore, the third ground on which NCLAT chose to interfere, is also bound to be rejected.

41. The last ground revolves around the advertisement issued by the Resolution Professional on 30.03.2018. NCLAT holds that the advertisement was not in conformity with Regulation 36A of The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and as per Form G of the Schedule.

42. But the conclusions reached by NCLAT in this regard cannot hold water for two reasons. If NCLAT was convinced that the very process of inviting Expression of Interest was vitiated, NCLAT should have issued a direction to start the process afresh all over again by issuing a fresh advertisement. NCLAT did not do this and the person who raised this point is not on appeal.

43. In any case, it does not lie in the mouth of the Promoter/ Director of the corporate debtor to raise any issue in this regard. It is seen from the Minutes of the 2nd Meeting of the Committee of Creditors

A that the Promoter/Director of the corporate debtor attended the meeting held on 27.03.2018. In Item No. 3 of the Agenda for the said meeting, the draft of the Invitation for Expression of Interest was approved. The Promoter/Director did not raise any objections either on 27.03.2018 in the meeting in which the draft was approved or at any time thereafter, until the approval of the Resolution Plan.

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44. The Promoter/Director of the corporate debtor who was the appellant before NCLAT attended the 3rd meeting of the CoC on 15.09.2018, the 4th meeting of the CoC held on 12.10.2018 and the 5th meeting of the CoC held on 26.11.2018. He did not raise any whisper about the contents of the advertisement. Even when the very same C Promoter/Director of the corporate debtor went before the High Court of Judicature at Bombay by way of a writ petition challenging the orders of NCLT dated 01.01.2018 and 06.03.2018, his focus was on his own application under Section 10 of the Insolvency and Bankruptcy Code. His grievance before the High Court was that his own application under D Section 10 was dumped by the NCLT and the application of the financial creditor was admitted thereafter. In fact the conduct of the Promoter/ Director of the corporate debtor came to adverse notice before the Bombay High Court.

45. Regulation 36A was inserted only with effect from 06.02.2018 E under Notification No. IBBI/2017-18/GN/REG024 dated 06.02.2018. It underwent a change under Notification No. IBBI/2018-19/GN/REG031 dated 03.07.2018, with effect from 04.07.2018. Regulation 36A, as it stood during the period from 06.02.2018 to 04.07.2018, did not mandate the publication of the invitation of Resolution Plans, either in Form G or otherwise, in newspapers. It is only the amended Regulation 36A, which F came into effect from 04.07.2018, that requires the publication of Form G in newspapers. Therefore, the publication in newspapers made by the Resolution Professional, in the case on hand, on 30.03.2018, was something that was statutorily not required of him and hence the Promoter/ Director of the corporate debtor cannot take advantage of the amendment G that came later, to attack the advertisement. The unamended and amended Regulation 36A are provided in a tabular column for easy comparison and appreciation.

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Regulation 36-A before amendment	Regulation 36-A after amendment
36A. Invitation of Resolution Plans. – (1) The resolution professional shall issue an invitation, including evaluation matrix, to the prospective resolution applicants in accordance with clause (h) of sub-section (2) of section 25, to submit resolution plans at least thirty days before the last date of submission of resolution plans.	**36A. Invitation for expression of interest – (1)** The resolution professional shall publish brief particulars of the invitation for expression of interest in Form G of the Schedule at the earliest, not later than seventy-fifth day from the insolvency commencement date, from interested and eligible prospective resolution applicants to submit resolution plans.
(2) Where the invitation does not contain the evaluation matrix, the resolution professional shall issue, with the approval of the committee, the evaluation matrix to the prospective resolution applicants at least fifteen days before the last date for submission of resolution plans.	**(2)** The resolution professional shall publish Form G-
(3) The resolution professional may modify the invitation, the evaluation matrix or both with the approval of the committee within the timelines given under sub-regulation (1) or sub-regulation (2), as the case may be.	(i) in one English and one regional language newspaper with wide circulation at the location of the registered office and principal office, if any, of the corporate debtor and any other location where in the opinion of the resolution professional, the corporate debtor conducts material business operations;
(4) The timelines specified under this regulation shall not apply to an ongoing corporate insolvency resolution process-	(ii) on the website, if any, of the corporate debtor;
(a) where a period of less than thirty-seven days is left for submission of resolution plans under sub-regulation (1);	(iii) on the website, if any, designated by the Board for the purpose; and
(b) where a period of less than eighteen days is left for submission of resolution plans under sub-regulation (2).	(iv) in any other manner as may be decided by the committee.
(5) The resolution professional shall publish brief particulars of the invitation in Form G of the Schedule:	**(3)** The Form G in the Schedule shall -
(a) on the website, if any, of the corporate debtor; and	(a) state where the detailed invitation for expression of interest can be downloaded or obtained from, as the case may be; and
(b) on the website, if any, designated by the Board for the purpose.	(b) provide the last date for submission of expression of interest which shall not be less than fifteen days from the date of issue of detailed invitation.
	(4) The detailed invitation referred to in sub-regulation (3) shall-
	(a) specify the criteria for prospective resolution applicants, as approved by the committee in accordance with clause (h) of sub-section (2) of section 25;
	(b) state the ineligibility norms under section 29A to the extent applicable for prospective resolution applicants;
	(c) provide such basic information about the corporate debtor as may be required by a prospective resolution applicant for expression of interest; and
	(d) not require payment of any fee or any non-refundable deposit for submission of expression of interest.
	(5) A prospective resolution applicant, who meet the requirements of the invitation for expression of interest, may submit expression of interest within the time specified in the invitation under clause (b) of sub-regulation (3).

	(6) The expression of interest received after the time specified in the invitation under clause (b) of sub-regulation (3) shall be rejected. **(7)** An expression of interest shall be unconditional and be accompanied by- (a) an undertaking by the prospective resolution applicant that it meets the criteria specified by the committee under clause (h) of sub-section (2) of section 25; (b) relevant records in evidence of meeting the criteria under clause (a); (c) an undertaking by the prospective resolution applicant that it does not suffer from any ineligibility under section 29A to the extent applicable; (d) relevant information and records to enable an assessment of ineligibility under clause (c); (e) an undertaking by the prospective resolution applicant that it shall intimate the resolution professional forthwith if it becomes ineligible at any time during the corporate insolvency resolution process; (f) an undertaking by the prospective resolution applicant that every information and records provided in expression of interest is true and correct and discovery of any false information or record at any time will render the applicant ineligible to submit resolution plan, forfeit any refundable deposit, and attract penal action under the Code; and (g) an undertaking by the prospective resolution applicant to the effect that it shall maintain confidentiality of the information and shall not use such information to cause an undue gain or undue loss to itself or any other person and comply with the requirements under sub-section (2) of section 29. **(8)** The resolution professional shall conduct due diligence based on the material on record in order to satisfy that the prospective resolution applicant complies with- (a) the provisions of clause (h) of sub-section (2) of section 25; (b) the applicable provisions of section 29A, and (c) other requirements, as specified in the invitation for expression of interest. **(9)** The resolution professional may seek any clarification or additional information or document from the prospective resolution applicant for conducting due diligence under sub-regulation (8). **(10)** The resolution professional shall issue a provisional list of eligible prospective resolution

	applicants within ten days of the last date for submission of expression of interest to the committee and to all prospective resolution applicants who submitted the expression of interest. **(11)** Any objection to inclusion or exclusion of a prospective resolution applicant in the provisional list referred to in sub-regulation (10) may be made with supporting documents within five days from the date of issue of the provisional list. **(12)** On considering the objections received under sub-regulation (11), the resolution professional shall issue the final list of prospective resolution applicants within ten days of the last date for receipt of objections, to the committee.

46. The second meeting of the Committee of Creditors was held on 27.03.2018. The advertisement was approved in the said meeting. It was the unamended Regulation 36A that was in force at that time. This has not been appreciated by NCLAT. Therefore, the NCLAT was wrong in its approach even in this regard.

47. Therefore, in fine, the impugned order of NCLAT is flawed and hence, liable to be set aside. Accordingly, the Civil Appeals are allowed, the impugned order of the NCLAT is set aside and the order of the National Company Law Tribunal, Mumbai Bench dated 01.08.2019 is restored. There will be no order as to costs.

Devika Gujral Appeals allowed