NATIONAL COMPANY LAW APPELLATE TRIBUNAL,

PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Ins) No. 161 of 2021

In the matter of:

Edelweiss Asset Reconstruction Company Ltd.
(acting in its capacity as trustee of EARC SC Trust 233)
Having its registered office at
Edelweiss House, Off C.S.T Road,
Kalina, Mumbai-400 098. **.... Appellant**

Vs.

Peter Beck and Peter Vermoegensverwaltung Ltd.
Having its office at
Alleenster, 126, 73230 Kircheim under
Tech Baden-Wuttemberg, Germany. ...**Respondent No. 1**

EY Restructuring LLP,
Having its office at
17th Floor, The Ruby, Senapati Bapat Marg,
Dadar (West), Mumbai City.
Maharashtra-400028.
As the Monitoring Agency constituted under the
Approved Resolution Plan, and Acting through
Mr. Dinkar Venkatsubramanian **...Respondent No. 2**

Present

For Appellant: **Mr. R.P. Agrawal, Ms. Manisha Agarwal and Ms. Vidhisha Haritwal, Advocates.**

For Respondents: **Mr. Ankur Kashyap, Mr. Ajith Ranganathan, Mr. Rohit Rajershi and Mr. Abhay Singh, Mr. Aman Bajaj, Advocates for R-1. Mr. Yashish Chandra, Advocate for R-2.**

With

Company Appeal (AT) (Ins) No. 169 of 2021

In the matter of:

State Bank of India
A body corporate constituted under the
State Bank of India Ct, 1955 having its
Corporate Centre at State Bank Bhavan,
Madame Cama Road, Mumbai-400021,
Maharashtra, India and acting through
Its office located at Stressed Assets Management
Branch – 1, Mumbai, "The Arcade", 2nd Floor,
World Trade Centre, Cuffe Parade, Colaba,
Mumbai-400005 and also at Stressed Asset
Management Branch I, 12th Floor, Jawahar
Vyapar Bhawan, STC Building, 1 Tolstoy Marg,
Janpath, New Delhi-110001. **.... Appellant**

Vs.

Peter Beck and Peter Vermoegensverwaltung Ltd.
Having its office at
Alleenster, 126, 73230 Kircheim under
Tech Baden-Wuttemberg, Germany. **...Respondent No. 1**

Insolvency and Bankruptcy Board of India
2nd Floor, Jeevan Vihar Building,
Parliament Street,
New Delhi-110001 ... **Proforma Respondent No. 2**

Ministry of Corporate Affairs
Through its Secretary, Union of India,
A-Wing, Shastri Bhawan,
Rajendra Prasad Road,
New Delhi-110001. **... Proforma Respondent No. 3**

EY Restructuring LLP,
Monitoring Agency of
Sharon Bio Medicine Ltd. through
Mr. Dinkar Venkatsubramanian
Having its office at
17th Floor, The Ruby, Senapati Bapat Marg,
Dadar (West), Mumbai City.
Maharashtra-400028. **... Proforma Respondent No. 4**

Present

For Appellant:	**Mr. Ramji Srinivasan, Sr. Advocate with Mr. Bishwajit Dubey, Mr. Madhav V. Kanoria, Ms. Srideepa Bhattacharyya and Ms. Neha Shivhare, Advocates.**
For Respondents:	**Mr. Ankur Kashyap, Mr. Ajith Ranganathan, Mr. Rohit Rajershi and Mr. Abhay Singh, Mr. Aman Bajaj, Advocates for R-1. Mr. Yashish Chandra, Advocate for R-2. Mr. Abhishek Kumar (IBBI, R2)**

JUDGMENT
(Date: 05.01.2022)
(Through Virtual Mode)

{Per.: Dr. Alok Srivastava, Member (Technical)}

This judgment relates to Company Appeal (AT) (Ins) No. 161 of 2021[Edelweiss Asset Reconstruction Company Ltd.(acting in its capacity as trustee of EARC SC Trust 233) vs. Peter Beck and Peter Vermoegensverwaltung Ltd. & Anr.] and Company Appeal (AT) (Ins) No. 169 of 2021 [State Bank of India vs. Peter Beck and Peter Vermoegensverwaltung Ltd. & Anr.], which were filed against Order dated 2.2.2021 (hereafter called "Impugned Order") passed by the Adjudicating Authority(National Company Law Tribunal, Mumbai Bench) in

I.A No. 4003 of 2019 and in I.A No. 2220 of 2020 in CP (IB) No. 246 (MB) 2017. In CA (AT) (Ins) No. 169/2021, State Bank of India has been authorized by other financial creditors to file the appeal on their behalf.

2. By the Impugned Order, the Adjudicating Authority has given an extra period of two weeks to the Successful Resolution Applicant (Respondent No. 1) to deposit Rs. 10 crores even though the Appellant had prayed in I.A. No. 2220 of 2020 that since the Successful Resolution Applicant had failed to implement the Resolution Plan as per its provisions, therefore CIRP should be re-initiated along with reinstating the previous Resolution Professional and 90 days of extra period should be provided in CIRP to invite Expressions of Interest (EOI) for inviting Resolution Plans.

3. In brief the factual matrix of case is that a Resolution Plan in respect of the Corporate Debtor (Sharon Bio Medicine Ltd.) was approved vide Adjudicating Authority's order dated 28.2.2018 and approval of Resolution Plan of Respondent No. 1 was up-held by the Hon'ble Supreme Court. The Appellants in both the appeals have claimed that the Successful Resolution Applicant (Respondent No. 1) has adopted dilatory practices in implementation of the Resolution Plan and, by the Impugned Order, the Adjudicating Authority has given additional time to

infuse funds to the Respondent No. 1 towards the implementation of the Resolution Plan.

4. The Appellant has claimed that even though the Resolution Plan was approved vide order dated 28.2.2018, despite a passage of over 3 years, the Respondent No. 1 has not implemented the Resolution Plan causing financial damage to its stakeholders and financial creditors by not paying them their rightful share after insolvency of the Corporate Debtor Sharon Bio Medicine Ltd, as there have been defaults in payments due in the approved resolution plan and failure to furnish bank guarantee of Rs. 10 crores for the period from plan approval date to the "Effective Date"(on which Respondent No. 1 would be allotted equity shares of the Corporate Debtor as required under the Resolution Plan). It is the claim of the Appellant that the bank guarantee provided by the Appellant was refused to be honoured by Banque De Luxembourg after being invoked by the Appellant State Bank of India. The Respondent No. 1 has not submitted a proper bank guarantee and overlooking many shortcomings in the implementation of the Resolution Plan, the Adjudicating Authority has provided reprieve to Respondent No. 1 by modifying a core requirement of the Resolution Plan and by an order to deposit Rs. 10 crores instead of Bank guarantee, which was mandatory under clause 12 of section 5 of the

Resolution Plan, to be provided till the implementation of the Resolution Plan.

5. The Appellant State Bank of India has stated that Respondent No. 1 provided the bank guarantee given by Banquiers on 29.1.2019 in favour of Appellant State Bank of India, which was renewed on 28.2.2019. Later, when the bank guarantee expired on 14.6.2019, the monitoring agency issued a letter to Respondent No. 1 to renew the bank guarantee or provide a new bank guarantee. On 19.7.2019, the Banque De Luxembourg issued a Bank guarantee in favour of the Appellant State Bank of India, which could not be sent to the Appellant via SWIFT due to certain constraints as claimed by Respondent No. 1. Thereafter, the financial creditors decided in meeting on 28.8.2019 that Respondent No. 1 should infuse additional amount of Rs. 5 crores by 13.8.2019 prior to the expiry of existing Bank on 13.8.2019. Respondent No. 1 sent an e-mail on 31.8.2019 stating that Rs. 10 crores has been remitted to the bank account of the Corporate Debtor maintained with Abhyudaya Cooperative Bank Limited on 23.8.2019 in lieu of the bank guarantee. On September 11, 2019, the Banque De Luxembourg issued a letter to the Appellant State Bank of India refusing to renew the Bank guarantee or honour its revocation stating that Bank guarantee cannot be considered as valid bank guarantee, but as a "not-effective" one. In September 2019, the

Appellant State Bank of India sent an e-mail to the monitoring agency advising it to ensure the availability of the bank guarantee before the issuance of the shares to the Successful Resolution Applicant (Respondent No. 1). The Appellant again addressed an e-mail on 24.10.2019 to the Respondent No. 1 and the Monitoring Agency asking Respondent No. 1 that an enforceable and valid bank guarantee should be submitted via SWIFT before November 2019 and any failure regarding the same would treated as a default. Thereafter the Respondent No. 1 sent an e-mail on 18.11.2019 to the monitoring agency claiming that Rs. 10 crores, which was deposited in Abhyudaya Cooperative Bank Limited, was in respect of share application money and sought its return as per applicable laws in respect of the share application money.

6. The Appellant filed IA No. 4003 of 2019, inter alia, requesting the Adjudicating Authority to allow a fresh process of resolution for the Corporate Debtor and to annul declaration of Respondent No. 1 as the Successful Resolution Applicant. The Appellant filed another I.A. No. 1453 of 2020 for the Adjudicating Authority requesting for urgent listing of earlier IA No. 4003 of 2020 for hearing.

7. Since the implementation of the approved Resolution Plan was quite delayed, the monitoring agency wrote to Respondent

No. 1 on 27.8.2020 requesting for step-wise timeline for implementation of the Resolution Plan, whereupon Respondent No. 1 vide e-mail dated 1.9.2020 informed that the implementation was estimated to take atleast two more months without give a step-wise timeline for implementation. Again in a meeting of the Financial Creditors, it was decided by them that a final opportunity would be provided to Respondent No. 1 to implement the Resolution Plan with strict timeline of 45 days i.e. up to 7.11.2020, and Respondent No. 1 was informed accordingly vide e-mail dated 23.9.2020.Since Respondent No. 1 was not taking interest in implementing the Resolution Plan, the monitoring agency again sent an e-mail to Respondent No. 1 on 28.10.2020 a stepwise action plan for implementation of the Resolution Plan by 7.11.2020. In all this string of communications, the Financial Creditors took a decision on 10.11.2020 by majority for not providing any additional time to Respondent No. 1 for implementation of the Plan and on 30.11.2020, the monitoring agency requested Respondent No. 1 to stop implementation of the Plan since last opportunity given had lapsed and Respondent No. 1 had failed to provide any definite timeline for resolution plan implementation. The I.A. No. 4003/2019 was heard after notice to Respondent No. 1 on 2.2.2021, whereupon the Impugned Order was passed.

8. In the appeal filed by Edelweiss Asset Reconstruction Company Ltd. (CA (AT) (Ins) No. 161 of 2021), the course of events as mentioned by the Appellant SBI have been stated and it is prayed that the Impugned Order dated 2.2.2021 passed by the Adjudicating Authority be set aside and in accordance with prayer in I.A. No. CA (AT)(Ins.) 2220 of 2020, order for re-instating the Committee of Creditors and erstwhile Resolution Professional after allowing extension of 90 days in CIRP for inviting fresh EOIs has been prayed for.

9. The Impugned Order of the Adjudicating Authority dated 2.2. 2021 records as follows:

> *"Counsel for the Resolution Applicant further submitted that the Bank guarantee has been issued for Rs. 10 crores from the Banque De Luxembourg Bank. When the CoC invoked the Bank guarantee, the issuing bank, i.e. Banque De Luxembourg Bank informed the CoC that it is a non-enforceable guarantee. Since Resolution Applicant has already deposited Rs. 10,000,000 in lieu of the Bank guarantee. The Counsel for the RA also submitted that the approval from the Regulatory Authorities were obtained and they are ready to implement the plan as approved by this bench.*
>
> *The Resolution Applicant assures that the balance sum of Rs. 10 crores will be infused within 2 weeks. No fruitful purpose presently will be served by invoking the Bank guarantee. Since an amount of Rs.10 crores has already been deposited the Bank guarantee, the CoC (State Bank of India) is directed to write to the Bank which has issued the Bank guarantee for Rs. 10 crores releasing the Bank guarantee."*

10. The Learned Senior Counsel for Appellant SBI (in

Company Appeal No. 169 of 2021) has argued that providing a valid and subsisting bank guarantee to the implementation of the resolution plan is a core requirement under the Approved Resolution Plan which cannot be overlooked. He has pointed out to the binding obligation of successful resolution applicant under clause 12 of section 5 of the resolution plan (attached at Appeal paperbook Vol-1, pp. 155 – 160) to claim that a bank guarantee for Rs. 10 crores from the date of approval of the resolution plan by the COC until the "Effective Date" (which is the date the equity the shares of the Corporate Debtor are allotted to Respondent No.1) is a necessary and binding condition in the resolution plan. He has also argued that when Respondent No.1 furnished the bank guarantee for Rs. 10 crores, then upon Respondent No.1's failure to comply with the plans binding obligations, the Appellant sought to invoke the bank guarantee issued by Banque De Luxembourg. The Banque De Luxembourg declared the bank guarantee as "non effective" on September 11, 2019. He has claimed that this shows unreliability of Respondent No.1 as also illegal and malafide action of Banque De Luxembourg. The Learned Senior Counsel has also pointed out certain key steps in the resolution plan that have not been complied with by Respondent No.1, which are as follows (attached at pg. 8 of Appeal Paperbook in IA No. 161 of 2021):-

C.	**Indicative timeline of events for implementation of Proposed Plan**		
	Phase I. Approval Process of the Proposed Plan.		
1.	Approval by NCLT	Z (Zero Date)	18.2.2018
	Phase II. Implementation of Proposed Plan		
8.	Execution of material agreements giving effect to the proposed plan	Z+180	Pending
9.	Increase in authorized share capital, conversion of debt to equity by secured lenders, issuance of RTS and CCES to secure lenders and capital reduction.	Z+180	Pending
10.	Purchase of equity share by Resolution Applicant and inclusion of funds towards Resolution Applicant debt	Z+180	Pending
11.	Conversion of CCPS held by secured lenders, FCCB holders into equity shares	Z+180	Pending
12.	Change in Memorandum and Articles of Association and other documentation, if required under the proposed Plan	Z+180	Pending
13.	Management of Company – (i) Formation of Board (ii) Appointment of key managerial employees of the Company (iii) Appointment of current and statutory auditors	Z+180	Pending

11. The Learned Senior Counsel for SBI further claimed that certain payment obligations such as equity capital infusion [in accordance with section 4 clause 3(a)] of Rs. 5 crores to be done

within 180 days of the zero date, payment of insolvency process cost (in accordance with section 5, clause 1.1) of Rs. 5 crores to be paid within 30 days of the approval of the resolution plan, upfront payment [in accordance with section 5, clause 1.2(A)] of Rs. 10 crores within 15 days of regulatory approval by Authorities or 45 days from effective date, whichever is later, and providing bank guarantee (in accordance with section 5, clause 12) of Rs.10 crores from the date of approval of resolution plan by COC till "Effective Date" were not complied with.

12. The Learned Senior Counsel for Appellant SBI has further argued that the Adjudicating Authority has erroneously accepted the submission of Respondent No.1 that remittance of an amount of Rs. 10 crores by Respondent No.1 is in lieu of bank guarantee and therefore satisfactory, is in reality a deviation from the Approved Resolution Plan. He has cited the judgment of the Hon'ble Supreme Court in **Rahul Jain versus Rave Scans Private Limited (2019 10 SCC 548)** wherein it is held that after a resolution plan has been approved by the Authorities, no directions modifying the plan can be given. He has also cited the judgment of this Tribunal in **QVC Exports Private Limited versus United Tradico FZC (2020 SCC Online NCLAT 555)** wherein it is held that Learned Adjudicating Authority has no jurisdiction to allow rectification

of an Approved Resolution Plan. Furthermore, in the matter of **Jaypee Kensington Boulevard Apartments Welfare Association and Others versus NBCC (India) Ltd. and Others (Civil Appeal No.3395 of 2020)**, it is held that even at the stage of plan approval, the Learned Adjudicating Authority can only remand back to the CoC for modifications and cannot alter/modify terms by itself.

13. The Learned Senior Counsel for the Appellant SBI has finally urged that this Tribunal has the inherent power under rule 11 of NCLAT Rules, 2016 to pass orders necessary for meeting the ends of justice. He has claimed that since the previously Approved Resolution Plan has failed, the company under insolvency resolution should not be allowed to go into liquidation which would mean corporate death of the company and therefore, in the interest of fairness and justice to stakeholders of the Corporate Debtor, this Tribunal has the power to direct re-initiating the insolvency resolution process of Corporate Debtor after setting aside the order dated 2.2.2021 of the Adjudicating Authority, with a further period of 90 days provided to there-instated Resolution Professional to invite EOIs and complete the insolvency resolution process of the Corporate Debtor.

14. The Learned Sr. Counsel for the Appellant Edelweiss

Asset Reconstruction Company Limited(in short EARC)(in Company Appeal No. 161 of 2021) has argued that Respondent No.1 has not adhered to the provisions and timelines given in the Approved Resolution Plan by not complying with the following conditions: –

(i) Non-payment of CIRP costs of Rs. 5 crores within 30 days from the date of approval of the resolution plan i.e. 28.2.2018 (Appeal paper book, Company Appeal No. 161/2021, page 86).

(ii) Non-payment of workers' dues of Rs. 0.16crore within 30 days from the date approval of the plan (attached at pg. 86 of Appeal paperbook, Company Appeal No. 161 of 2021).

(iii) Failure to provide valid bank guarantee in terms of section 5 clause 12 (ii) of the Approved Resolution Plan as, the bank guarantee submitted on 19.7.2019 was not via SWIFT mode and therefore not enforceable. No valid bank guarantee was given for the period 1.4.2018 to 28.1.2019.

(iv) Failure to deposit Rs. 5 crores towards equity capital infusion in terms of section 4 clause 3 (A) of Approved Resolution Plan (pg.85 of Appeal paperbook, in Company Appeal No. 161 of 2021).

(v) Default in cash payment of Rs. 10 crores to secured

creditors in terms of section 5 para (I) (2)(A) of the Approved Resolution Plan (at pg. 86 of Appeal paperbook in Company Appeal No. 161 of 2021).

(vi) Default in restructuring of debt in terms of section 5 para (I)(2)(A) of Approved Resolution Plan (pg. 86 of the Appeal paper book of Company Appeal No. 161 of 2021).

(vii) Default in payment to unsecured creditors and operational creditors in terms of section 5 para 1(2)(B) of Approved Resolution Plan (pg. 86 of Appeal paperbook, Company Appeal No. 161 of 2021).

(viii) Failure to obtain regulatory clearances within the indicated timeline of 120 days in terms of section 6, note 1 of Approved Resolution Plan (pg. 93, of Appeal Paperbook in Company Appeal No. 161 of 2021).

15. The Learned Senior Counsel for EARC has also submitted that the Impugned Order dated 2.2.2021 itself indicates default on the part of Respondent No.1 as the order directs Respondent No.1 to bring in Rs. 5 crores towards CIRP cost and Rs. 5 crores towards issue of shares and these payments were required to be made by Respondent No.1 quite sometime back. Moreover, Respondent No.1 had assured to implement the Approved

Resolution Plan by August 2019 but in its email dated 4.11.2020 (attached at pp.246 – 248 of Appeal paperbook in Company Appeal No. 169/2021) has not given any timelines for its implementation.

16. The Learned Senior Counsel for Appellant EARC has pointed to the letter dated 11.11.2019 of Banque De Luxembourg by which it refused to renew the bank guarantee issued by them, which was only valid till 30.8.2019. Moreover, he has claimed that the amount of Rs. 10 crore deposited by Respondent No.1 in Abhyudaya Cooperative Bank Ltd. on 23.8.2019 was initially claimed by Respondent No.1 to be in lieu of bank guarantee, but subsequently stated by Respondent No.1 that it was share application money. Such a statement of Respondent No.1 itself shows non-compliance in providing Bank guarantee. The Learned Senior Counsel has also referred to numerous opportunities provided by the financial creditors to Respondent No.1for implementation of the resolution plan which are recorded duly in the minutes of meetings dated 3.10.2018, 17.1.2019, 26.2.2019, 26.6.2019, 4.7.2019, 13.8.2019, 28.8.2019, 24.8.2020 and 4.9.2020 which were conveyed to Respondent No.1 by the monitoring agency EY Restructuring LLP and also by SBI vide e-mail dated 12.9.2019.He has claimed that in all, there has been a delay of more than 108 days in implementation of the Approved

Resolution Plan, which is sufficient proof of the time granted to the Successful Resolution Applicant Respondent No. 1 by the financial creditors and the monitoring agency.

17. The Learned Senior Counsel for Appellant EARC has reiterated the argument of the Appellant SBI that the Impugned Order amounts to modification of the Approved Resolution Plan which is not permissible as has been laid down by the Hon'ble Supreme Court in numerous judgments. He has further claimed that since Respondent No. 1 has failed to implement the approved Resolution Plan, the Corporate Debtor should not be sent into liquidation. He has cited the judgment of Hon'ble Supreme Court in the matter of **Swiss Ribbons Pvt. Ltd versus Union of India (2019 4 SCC 17)** wherein it is held that the primary focus of IBC is to ensure revival and continuation of the Corporate Debtor and protecting it from its own management and from corporate death by liquidation. He has also referred to the judgments of Hon'ble Supreme Court in the cases of **CoC of Amtek Auto Limited vs Dinkar T Venkatsubramanian and Others (Civil Appeal No. 6707 of 2019)**,and of NCLAT, Mumbai in **State Bank of India vs Metalyst Forgings Ltd (MA No. 1272 of 2018 and MA No. 956 of 2018**and **Bank of Baroda vs Mandhana Industries Limited (MA No. 2326 of 2019)** wherein fresh bids have been permitted to be invited to avoid liquidation. He has finally urged that this Tribunal has

inherent powers under Rule 11 of NCLAT Rules, 2016 to grant prayer sought in the present appeal and as have been upheld in judgments in **Swadeshi Woolen Mills Pvt. Ltd versus Vinod Krishan (Company Appeal (AT)(Ins.) No. 202 of 2020)** and **Vijaykumar versus Gopalsamy Ganesh Babu and Others (2020 SCC online NCLAT 936)**.

18. In his arguments, Learned Counsel for Respondent No. 1 has urged that both the appeals are not maintainable under IBC and the only permissible course of action in a case of non-implementation of Approved Resolution Plan is liquidation as provided under sections 33(3) & 33(4) of the IBC. Such a course of action has been upheld by NCLAT in the case of the **Yavar Dhala versus GM Financial Asset Reconstruction Company Ltd.[Company Appeal (AT) (Ins) No.30 of 2019]**. He has further claimed that the reliance of Learned Senior Counsel of Appellant on the judgment of the Hon'ble Supreme Court in **Committee of Creditors of Amtek Auto Ltd. vs Dinkar T Venkatsubramanian and Others (Civil Appeal No. 6707 of 2019)** are not applicable in the present case because no jurisdiction is conferred upon this Tribunal in the present case as was available to Hon'ble Supreme Court under Article 142 of the Constitution of India whereby the Resolution Applicants were allowed additional time to file resolution plans afresh. Also, in the **CoC of Amtek Auto Ltd.** (supra)the orders dated

24.9.2019 and 2.12.2019 are based on agreement between the parties that fresh offers were allowed to be considered, whereas in the present case the Successful Resolution Applicant did not consent to reinstating the CIRP and calling fresh EOIs.

19. Learned Counsel for Respondent No. 1 has also argued that the *bonafide* of the Successful Resolution Applicant is established because prior to initiation of CIRP, the Respondent No.1 was a Foreign Currency Convertible Bond holder (FCCB holder) of the Corporate Debtor who had invested a sum of approximately Rs.146.08 crores in the Corporate Debtor. He is, therefore, an unsecured lender of the Corporate Debtor and has interest in successful resolution of the Corporate Debtor. He has further claimed that after the approval of the resolution plan by the Learned Adjudicating Authority on 28.2.2018, it was challenged by the former promoters/Directors of the Corporate Debtor right upto Hon'ble Supreme Court and on 5.4.2019, after the Hon. Supreme Court dismissed the appeal preferred by the former promoters/Directors of the Corporate Debtor, Respondent No.1 started to implement the successful resolution plan in the right earnest. Furthermore, the COC allowed the implementation of the resolution plan by giving the Successful Resolution Applicant a fresh time-limit upto November 7, 2020 for its implementation. On 6 November 2020 the Successful Resolution Applicant requested the monitoring

agency to provide bank account for immediate transfer of Rs. 5.00 crores towards implementation but was not provided the bank account details. He has claimed that, therefore, the Appellants are trying to mislead this Hon'ble Tribunal by stating that the resolution plan has not been implemented for three years. He has referred to the judgment of Hon. Supreme Court in **Arcelor Mittal Pvt. Ltd. vs Satish Kumar Gupta [2009 2 SCC]** case wherein it is held that "a reasonable and balanced construction of the statute would, therefore, lead to the result that, where a "Resolution Plan" is upheld by the Appellate Authority either by way of allowing or dismissing an appeal before it, the time taken in litigation ought to be excluded."He has also argued that the Approved Resolution Plan has not been contravened because the "Effective Date" would be triggered only after equity shares were allotted to the Successful Resolution Applicant, and when the Successful Resolution Applicant was ready to infuse Rs. 5 crores towards allotment of equity shares, he was not permitted to do so. He has also claimed that the time required for obtaining statutory approvals for carrying out the steps for conversion of debt into equity and infusion of money for allotment of equity shares are outside the control of the Successful Resolution Applicant and in their absence he has not been able to take positive steps in the resolution plan's implementation.

20. The Learned Counsel for Respondent No.1 has argued that Respondent No. 1 has always complied with the requirement of furnishing bank guarantee and four bank guarantees were issued by two reputed international banks. He has claimed that the COC agreed to infusion of Rs. 10 crores in the Corporate Debtor in lieu of bank guarantee but has later retracted from this agreement and taken the drastic step of directly writing to Banque De Luxembourg seeking renewal/invocation of bank guarantee which has resulted in freezing of Rs. 10 crores of Respondent No. 1.He has claimed that the ulterior motive of the Appellants is to compel the resolution applicant into compensating the lenders for the purported loss of interest due to alleged delay in the implementation of the Approved Resolution Plan, which is not the fault of Respondent No.1, and now the Appellants are arm twisting the Successful Resolution Applicant for appropriation of cash Corporate Debtor and sharing of profits generated by the Corporate Debtor, which is completely outside the terms and conditions of the Approved Resolution Plan and contrary to law.

21. We have heard the oral arguments of the Learned Senior Counsel and Counsel of the Appellants and Respondent No. 1 respectively in both the appeals. We have also considered the pleadings and documents submitted by all the parties.

22. The issues that arise in these appeals are two-fold:

(i) Whether the default of Respondent No. 1 in implementing the successful resolution plan is justified because of appeals in NCLAT and in Hon'ble Supreme Court and the delay because of the time for litigation and in making initial payments as required in the approved Resolution Plan?

(ii) Whether any more time could be granted as prayed by the Appellants in both the appeals CA No. 161 of 2021 and CA No. 169 of 2021 for extension of CIRP for invitation of fresh EOIs or liquidation of the Corporate Debtor, in the event the Respondent No. 1 is found in default of implementation of the Resolution Plan?

23. The Respondent No. 1 has submitted that the resolution plan, which was approved by the Adjudicating Authority on 28.2.2018,was challenged by the former promoter/directors of the Corporate Debtor upto Hon'ble Supreme Court. He has given the following key dates pertaining to litigation at various levels in this case:

S.No.	Date	Event
1.	11.4.2017	Section 7 proceedings initiated before Adjudicating Authority.
2.	28.2.2018	Adjudicating Authority approves the resolution plan of Respondent No. 1 (Successful Resolution Applicant).
3.	27.4.2018	NCLAT passes a status quo order in appeal preferred by former promoter/directors of the Corporate Debtor against approval of Resolution Plan.
4.	19.12.2018	The appeal before NCLAT is dismissed.
5.	5.4.2019	Hon'ble Supreme Court dismisses appeal preferred by former promoter/director of the Corporate Debtor and the Successful Resolution Plan becomes final.

24. As is seen from the table in the previous paragraph, after the resolution plan submitted by Respondent No. 1 was approved by the Adjudicating Authority on 28.2.2018, there were appeals, first before NCLAT, wherein a status quo order was given on 27.4.2018. Finally, the appeal was dismissed by NCLAT on 19.12.2018, whereafter an appeal against the order of the Appellant Tribunal was preferred before Hon'ble Supreme Court, which was also dismissed on 5.4.2019. Thus, the period from 28.2.2018 till 5.4.2019 was effectively taken up in litigation for which Respondent No. 1 cannot be held responsible. Out of this period, there was a status quo order passed by NCLAT for about eight months between 27.4.2018 and 19.12.2018.

25. Therefore, we are of the opinion that effective implementation of the Successful Resolution Plan started only after 5.4.2019, when Hon'ble Supreme Court dismissed the appeal of former promoter/directors of the Corporate Debtor. It is quite apparent that the bank guarantee submitted by Respondent No. 1 was not enforced properly because it was not submitted in SWIFT mode. Respondent No. 1 has claimed that it is not responsible for non-enforceability of the Bank guarantee because it was due to the international banking practices. While bank guarantees were submitted later, they were not to the satisfaction of monitoring agency. Moreover, Respondent No. 1 failed to take steps towards implementation of the Resolution Plan, which included payment of CIRP costs and workmen dues and infusion of cash. Respondent No. 1 has submitted that CoC agreed to infusion of funds amounting to Rs. 10 crores in the Corporate Debtor in the lieu of bank guarantee, and based on this agreement Respondent No. 1 infused Rs. 10 crores in the Corporate Debtor before the expiry of the bank guarantee and honor its commitment and this amount remains with the Corporate Debtor till date.

26. Thus, the issue of non-adherence of the timelines in accordance with the Approved Resolution Plan is quite apparent. The failure to provide valid bank guarantee in terms of Section 5 clause 12 (ii) of the Approved Resolution Plan to the

satisfaction of the monitoring agency and the financial creditors is also a major default.

27. Both the Appellants in both appeals and Respondent No.1 have prayed for two separate lines of action. The Corporate Debtor, which has performed quite well as a going concern during the CIRP period and as stated by the Learned Counsel for Appellant in written submissions, has a surplus cash of Rs. 17.23 crores as on April 30 2021, and this fact, we feel, should be kept in mind in deciding the next course of action in the case. Since the approved Resolution Plan is under implementation since its approval on 28.2.2018, the moot point is whether the Successful Resolution Applicant is serious about implementation of the plan.

28. The Successful Resolution Applicant has claimed to be unsecured Financial Creditor of the Corporate Debtor, and therefore has interest in maintaining the Corporate Debtor as a going concern. The Appellants Edelweiss and SBI are also interested that the Corporate Debtor continues to be a going concern and have, therefore, urged that its resolution should be attempted rather than put it in liquidation.

29. The Appellants have cited judgment of Hon'ble Supreme Court in case of **Committee of Creditors of Amtek Auto**

Limited versus Dinkar T Venkatasubramanian and Others (supra) and **State Bank of India versus Metalyst Forgings Ltd**. **(supra).** In the case of **CoC of Amtek Auto Limited**, all the parties in the matter were agreeable to invitation of fresh resolution plan and hence Hon'ble Supreme Court had directed that one more effort should be made to resolve the issue since expression of interest has already indicated by eight other parties. In the case of **Bank of Baroda vs. Mandhana Industries Limited (supra)**, the order of NCLT was given for invitation of fresh plans in the CIRP after the CIRP had been already restored and the charge of the Corporate Debtor had reverted back in the hands of the Resolution Professional. We do not think that these judgments are in any way directly link to the context of the present case. What is to be noted is that in both the cases, since the Corporate Debtor was a going concern, the liquidation order was sought to be avoided.

30. We feel that the main hindrance in implementation of the approved resolution plan is submission of a proper bank guarantee of Rs. 10 crores and other payments and actions that had to be taken from zero date i.e. 28.2.2018 in accordance with the approved resolution plan. We are, therefore, of the opinion that it would serve the interests of justice if the Corporate Debtor is not sent into liquidation but its insolvency is resolved so that it continues to be a going concern as that

would be in the interest of the Corporate Debtor's stakeholders and creditors. Hon'ble Supreme Court has ruled in the matter of **Swiss Ribbons Private Limited versus Union of India (2019 4 SCC 17)** as follows:-

> *"28. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the Corporate Debtor by protecting the Corporate Debtor from its own management and from a corporate death by liquidation."*

31. In the present case liquidation would follow naturally once the approved Resolution Plan is adjudged as having failed. Under section 33(1) (a) and (b) the following is stipulated:-

> ***33. Initiation of liquidation****- (1) Where the Adjudicating Authority, -*
>
> *(a) before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate insolvency resolution process under section 12 or the fast track corporate insolvency resolution process under section 56, as the case may be, does not receive a resolution plan under sub-section (6) of section 30; or*
>
> *(b) rejects the resolution plan under section 31 for the non-compliance of the requirements specified therein, it shall –*
>
> *(i) pass an order requiring the corporate debtor to be liquidated in the manner as laid down in this Chapter;*
> *(ii) issue a public announcement stating that the corporate*

Debtor is in liquidation; and

(iii) require such order to be sent to the authority with which the corporate debtor is registered."

32. It is laid down in law that liquidation shall follow when no resolution plan under sub-section 6 of section 30 is received or resolution plan is rejected under section 31 for non -compliance of the requirements specified therein that a liquidation order should be given. Moreover, under section 33(2) if the Committee of Creditors approve by not less than 66% of voting share to liquidate the Corporate Debtor, the Adjudicating Authority is obliged to pass a liquidation order. In the present case, no such recommendation for liquidation has been approved by the CoC or the financial creditors. Under section 33(3), where the resolution plan approved by the Adjudicating Authority is contravened by the concerned Corporate Debtor, any person other than the Corporate Debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for liquidation order. In the present case, the Approved Resolution Plan has been alleged to be contravened by the Successful Resolution Applicant and therefore an application could have been made to the Adjudicating Authority for liquidation. In the present case, no such application for liquidation has been made by the Appellants or any other stakeholder, but on the contrary the

Appellants (and also the financial creditors)have sought the re-initiation of CIRP and invitation of fresh EOIs after its (CIRP's) extension by 90 days. There is no express provision regarding re-initiation of CIRP in the IBC. We do not feel that this is a fit case for liquidation of the Corporate Debtor because it is a going concern and all the stakeholders seem to be interested that the Corporate Debtor remains a going concern. It is quite possible that upon liquidation, the Corporate Debtor could be sold as a going concern. If such an event does not happen, the Corporate Debtor would most certainly face corporate death.

33. In view of the impugned order and the respective submissions by the Appellants and Respondent No.1 it is clear that the main issue in question is the submission of an enforceable bank guarantee of Rs. 10 crores by Respondent No.1. The other issues regarding compliance of already overdue provisions in the Approved Resolution Plan have also been raised by the Appellants.

34. Therefore, in light of discussion above, in partial modification of the Impugned Order, we direct that an enforceable bank guarantee of Rs. 10 crores, as is required to be submitted under the Approved Resolution Plan, should be submitted by the Successful Resolution Applicant within 30 days of this order. The payments as are already overdue in the

Approved Resolution Plan should be done by the Successful Resolution Applicant within two months of this order. In case Rs. 10 crores has been deposited with the Corporate Debtor by the Successful Resolution Applicant in lieu of the bank guarantee, that amount will be either adjusted against the pending amounts to be paid by the Successful Resolution Applicant or refunded to him within a period of 30 days.

35. The Appeals are disposed of as indicated above. No order as to costs.

[Justice Jarat Kumar Jain]
Member (Judicial)

[Dr. Alok Srivastava]
Member (Technical)

New Delhi
5th January, 2022

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