REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE/ORIGINAL JURISDICTION

CIVIL APPEAL NO.8430 OF 2018

VIJAY KUMAR JAIN … APPELLANT(S)

VERSUS

STANDARD CHARTERED BANK & ORS. … RESPONDENT(S)

WITH

WRIT PETITION (CIVIL) NO.1266 OF 2018

JUDGMENT

R.F. NARIMAN, J.

1. The present appeal arises out of an Appellate Tribunal's judgment rejecting the appellant's prayer for directions to the resolution professional to provide all relevant documents including the insolvency resolution plans in question to members of the suspended Board of Directors of the corporate debtor in each case

so that they may meaningfully participate in meetings held by the committee of creditors ["**CoC**"].

2. We may take the facts of Civil Appeal No.8430 of 2018. Ruchi Soya Industries Ltd. – the corporate debtor, was incorporated on 06.01.1986. It is said to be a profit-making company in the business of processing of oil-seeds and refining crude oil for edible use. In September, 2017, Company Petition Nos.1371 and 1372 were filed by Standard Chartered Bank Ltd. and DBS Bank Ltd., being financial creditors of the aforesaid corporate debtor. These two company petitions were admitted on 8th and 15th December, 2017, respectively, by the National Company Law Tribunal ["**NCLT**"]. One Shri Shailendra Ajmera of Ernst and Young was appointed as the Interim Resolution Professional in both petitions. The CoC was constituted under Section 21 of the Insolvency and Bankruptcy Code, 2016 ["**Insolvency Code**" or "**Code**"], and the appellant being a member of the suspended Board of Directors was given notice and the agenda for the first CoC meeting held on 12.01.2018, and was permitted to attend the aforesaid meeting. He alleges, which is disputed by the respondents, that subsequent meetings of the CoC were held in which he was denied participation. As a result, the

appellant filed Miscellaneous Application No.518 of 2018 on 07.06.2018 before the NCLT in order that the appellant be allowed to effectively participate in these meetings. It is stated before us that in the tenth meeting dated 12.08.2018, the appellant executed a non-disclosure agreement for sharing resolution plans of the corporate debtor. Under the said agreement, the appellant undertook to indemnify the resolution professional and keep information that is received as to the resolution plan strictly confidential.

3. By an order dated 01.08.2018, the NCLT dismissed the application with liberty to the appellant to attend CoC meetings but not to insist upon being provided information considered confidential either by the resolution professional or the committee of creditors. Against this order, the appellant filed an appeal before the Appellate Tribunal which recognized the appellant's right to attend and participate in CoC meetings, but denied the appellant's prayer to access certain documents, most particularly, the resolution plans. Thereafter, an application for modification/clarification of the Appellate Tribunal's order was also dismissed. Aggrieved by the order dated 09.08.2018 of the Appellate Tribunal, the appellants have filed the present appeal. In the meanwhile, on 23.08.2018, the

resolution plan of one Adani Wilmar Limited was approved by majority of 96.86% of the committee of creditors. On 24.08.2018, the resolution professional submitted its resolution plan, as approved by the CoC, to the Adjudicating Authority. On 27.08.2018, this Court, by an interim order, stated, while issuing notice, that the bids will not be finalized by the Adjudicating Authority without the leave of this Court. On 10.09.2018, this Court clarified, in an application filed by the resolution professional, that the Adjudicating Authority could continue with the proceedings but no order could be passed on the same until this Court adjudicates on the present appeal.

4. On behalf of the appellants, we have heard Shri Shyam Divan and Shri Arvind Kumar Gupta. The learned counsel referred to Sections 24, 25, 29 and 31 of the Code together with Regulations made thereunder. According to the learned counsel, under Section 24(3), the resolution professional has to give notice of each meeting of the committee of creditors to the members of the suspended Board of Directors, and under Regulation 21, the notice of these meetings shall not only contain an agenda of the meetings but shall also contain copies of all documents relevant to the matters to be discussed and issues to be voted upon at the meeting. This

necessarily means that access to the resolution plans and other relevant documents under consideration at these meetings must be supplied together with the notice of the meeting to members of suspended Board of Directors. They drew a dichotomy between the committee of creditors and meetings of the committee of creditors and stated that as they are “participants” in the meetings of the committee of creditors, albeit without voting rights, yet, they are persons who, in order to participate effectively, must be given the necessary documents so that their views can also be considered by the committee of creditors. According to them, Section 31(1) of the Code makes it clear that once the resolution plan is passed by the Adjudicating Authority, it shall be binding on the corporate debtor together with guarantors and other stakeholders. This being the case, it is clear that the erstwhile Board of Directors, which consists of persons who may have given personal guarantees for the debts owed by the corporate debtor, will be bound by the resolution plan, and therefore, have a vital stake in what ultimately gets passed by the committee of creditors. Apart from this, under Section 60(5) of the Code, such persons have a right to challenge the terms of a proposed resolution plan before the Tribunal, and under Section 61,

may go further against the Adjudicating Authority's order to the Appellate Tribunal. They relied upon and referred to the Bankruptcy Law Committee Report of 2015 to buttress their submissions.

5. As against this, Dr. Abhishek Manu Singhvi, and Mr. Raunak Dhillon, appearing on behalf of the resolution professional, relied strongly on Section 30(3) of the Code and Regulation 39(2) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ["**CIRP Regulations**"] which made it clear that resolution plans were only to be given to the committee of creditors for its consideration. They further argued that the terms "committee" and "participant" are differently defined under the Regulations and that participants are expressly excluded by Regulation 39. They also argued, that if any of the Regulations go beyond the provisions of the Code, they must be struck down as *ultra vires,* as under Section 30(3) of the Code, the resolution professional is required to present resolution plans only to the committee of creditors. They relied upon the Notes on Clauses to Section 24 of the Code, which, according to them, made it clear that the reason for the participation of the erstwhile Board of Directors in meetings of the committee of creditors is so that they

may give information to assess the financial position of the corporate debtor. They are not in the position, therefore, of other creditors, who may go into merits and demerits of resolution plans as such resolution plans affect creditors only and not such persons. They relied upon this Court's judgment in **Mobilox Innovations Private Limited v. Kirusa Software Private Limited,** (2018) 1 SCC 353 ["**Mobilox Innovations**"], for the proposition that Notes on Clauses are important parliamentary material that may be relied upon to understand the object of the Section in question. They also relied strongly upon Regulation 7(2)(h) of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016, read with the First Schedule thereto, which made it clear that confidential information can only be shared with the consent of the relevant parties. Further, the confidential information contained in proposed resolution plans can only be shared with members of the committee of creditors after receiving an undertaking from them under the Regulations. They further argued that persons such as the appellant are not persons aggrieved and since no prejudice is caused to them, do not have a right to file any application under Section 60(5) of the

Code or appeals to the Appellate Tribunal from orders of the Adjudicating Authority under Section 61.

6. Shri Krishnan Venugopal and Shri Nakul Sachdeva, learned counsel appearing on behalf of the committee of creditors, argued that the expressions “information memorandum” and “resolution plan” are separately defined and a specific procedure has been laid down in the Code and Regulations dealing with them. They cannot therefore be said to be “documents” within the meaning of Regulation 21. They also strongly relied upon the Notes on Clauses and stated that the role of members of the suspended Board of Directors is that of information givers and not information seekers. They further relied upon the proviso to Section 21(2) which, according to them, made it clear that a director, who is also a financial creditor, has no right to participate in a meeting of the committee of creditors. Thus, a harmonious construction of the various provisions of the Code would lead to the anomaly that a director *simplicitor* would have the right to get documents but a director who is a financial creditor would have no such right. They also adverted to the expression “participant” as opposed to the expression “committee” and stated that the legislature, in its wisdom,

created a differentiation between the two. They also stated that the confidentiality requirement would be breached if a copy of the resolution plan were to be given to the members of the suspended Board of Directors and added that it would be in the interest of some members of the suspended Board who may attempt to sabotage the corporate insolvency resolution process, for which reason also, resolution plans should be kept hidden from them. They argued that the "persons aggrieved" in Section 61 would necessarily refer to persons aggrieved for the purpose of Section 60(5) also, and as members of the ex-Board of Directors cannot be said to be persons aggrieved, they cannot possibly approach the Adjudicating Authority under Section 60(5) or the Appellate Tribunal under Section 61.

7. Having heard learned counsel for all parties, it is important to first advert to the relevant provisions of the Code and the Regulations made thereunder. The relevant provisions of the Code are here in below:

> "**5. Definitions**.—In this Part, unless the context otherwise requires,—
>
> xxx xxx xxx

(10) "information memorandum" means a memorandum prepared by resolution professional under sub-section (1) of Section 29;
xxx xxx xxx
(26) "resolution plan" means a plan proposed by resolution applicant for insolvency resolution of the corporate debtor as a going concern in accordance with Part II;
xxx xxx xxx"

"**21. Committee of creditors**.—(1) The interim resolution professional shall after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor, constitute a committee of creditors.

(2) The committee of creditors shall comprise all financial creditors of the corporate debtor:

Provided that a financial creditor or the authorised representative of the financial creditor referred to in sub-section (6) or sub-section (6-A) or sub-section (5) of Section 24, if it is a related party of the corporate debtor, shall not have any right of representation, participation or voting in a meeting of the committee of creditors:

Provided further that the first proviso shall not apply to a financial creditor, regulated by a financial sector regulator, if it is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date.

(3) Subject to sub-sections (6) and (6-A), where the corporate debtor owes financial debts to two or more financial creditors as part of a consortium or agreement, each such financial creditor shall be part of the committee of creditors and their voting share shall be determined on the basis of the financial debts owed to them.

(4) Where any person is a financial creditor as well as an operational creditor,—

(*a*) such person shall be a financial creditor to the extent of the financial debt owed by the corporate debtor, and shall be included in the committee of creditors, with voting share proportionate to the extent of financial debts owed to such creditor;

(*b*) such person shall be considered to be an operational creditor to the extent of the operational debt owed by the corporate debtor to such creditor.

(5) Where an operational creditor has assigned or legally transferred any operational debt to a financial creditor, the assignee or transferee shall be considered as an operational creditor to the extent of such assignment or legal transfer.

(6) Where the terms of the financial debt extended as part of a consortium arrangement or syndicated facility provide for a single trustee or agent to act for all financial creditors, each financial creditor may—

(*a*) authorise the trustee or agent to act on his behalf in the committee of creditors to the extent of his voting share;

(*b*) represent himself in the committee of creditors to the extent of his voting share;

(*c*) appoint an insolvency professional (other than the resolution professional) at his own cost to represent himself in the committee of creditors to the extent of his voting share; or (*d*) exercise his right to vote to the extent of his voting share with one or more financial creditors jointly or severally.

(6-A) Where a financial debt—

(*a*) is in the form of securities or deposits and the terms of the financial debt provide for appointment of a trustee or agent to act as authorised representative for all the financial creditors, such trustee or agent shall act on behalf of such financial creditors;

(*b*) is owed to a class of creditors exceeding the number as may be specified, other than the

creditors covered under clause (*a*) or sub-section (6), the interim resolution professional shall make an application to the Adjudicating Authority along with the list of all financial creditors, containing the name of an insolvency professional, other than the interim resolution professional, to act as their authorised representative who shall be appointed by the Adjudicating Authority prior to the first meeting of the committee of creditors;

(*c*) is represented by a guardian, executor or administrator, such person shall act as authorised representative on behalf of such financial creditors,

and such authorised representative under clause (*a*) or clause (*b*) or clause (*c*) shall attend the meetings of the committee of creditors, and vote on behalf of each financial creditor to the extent of his voting share.

(6-B) The remuneration payable to the authorised representative—

(*i*) under clauses (*a*) and (*c*) of sub-section (6-A), if any, shall be as per the terms of the financial debt or the relevant documentation; and

(*ii*) under clause (*b*) of sub-section (6-A) shall be as specified which shall form part of the insolvency resolution process costs.

(7) The Board may specify the manner of voting and the determining of the voting share in respect of financial debts covered under sub-sections (6) and (6-A).

(8) Save as otherwise provided in this Code, all decisions of the committee of creditors shall be taken by a vote of not less than fifty-one per cent of voting share of the financial creditors:

Provided that where a corporate debtor does not have any financial creditors, the committee of creditors shall be constituted and shall comprise of such persons to exercise such functions in such manner as may be specified.

(9) The committee of creditors shall have the right to require the resolution professional to furnish any financial information in relation to the corporate debtor at any time during the corporate insolvency resolution process.
(10) The resolution professional shall make available any financial information so required by the committee of creditors under sub-section (9) within a period of seven days of such requisition."

24. Meeting of committee of creditors.—(1) The members of the committee of creditors may meet in person or by such electronic means as may be specified.
(2) All meetings of the committee of creditors shall be conducted by the resolution professional.
(3) The resolution professional shall give notice of each meeting of the committee of creditors to—

(*a*) members of committee of creditors, including the authorised representatives referred to in sub-sections (6) and (6-A) of Section 21 and sub-section (5);

(*b*) members of the suspended Board of Directors or the partners of the corporate persons, as the case may be;

(*c*) operational creditors or their representatives if the amount of their aggregate dues is not less than ten per cent of the debt.

(4) The directors, partners and one representative of operational creditors, as referred to in sub-section (3), may attend the meetings of committee of creditors, but shall not have any right to vote in such meetings:

Provided that the absence of any such director, partner or representative of operational creditors, as the case may be, shall not invalidate proceedings of such meeting.
(5) Subject to sub-sections (6), (6-A) and (6-B) of Section 21, any creditor who is a member of the committee of creditors may appoint an insolvency professional other than the resolution professional to represent such creditor in a meeting of the committee of creditors:

Provided that the fees payable to such insolvency professional representing any individual creditor will be borne by such creditor.

(6) Each creditor shall vote in accordance with the voting share assigned to him based on the financial debts owed to such creditor.

(7) The resolution professional shall determine the voting share to be assigned to each creditor in the manner specified by the Board.

(8) The meetings of the committee of creditors shall be conducted in such manner as may be specified."

(emphasis supplied)

"**25. Duties of resolution professional**.—(1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.

(2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely—

(*a*) take immediate custody and control of all the assets of the corporate debtor, including the business records of the corporate debtor;

(*b*) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings;

(*c*) raise interim finances subject to the approval of the committee of creditors under Section 28; (*d*) appoint accountants, legal or other professionals in the manner as specified by Board;

(*e*) maintain an updated list of claims;

(*f*) convene and attend all meetings of the committee of creditors;

(*g*) prepare the information memorandum in accordance with Section 29;

(*h*) invite prospective resolution applicants, who fulfil such criteria as may be laid down by him

with the approval of committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Board, to submit a resolution plan or plans;

(*i*) present all resolution plans at the meetings of the committee of creditors;

(*j*) file application for avoidance of transactions in accordance with Chapter III, if any; and

(*k*) such other actions as may be specified by the Board."

(emphasis supplied)

"**29. Preparation of information memorandum**.—(1) The resolution professional shall prepare an information memorandum in such form and manner containing such relevant information as may be specified by the Board for formulating a resolution plan.

(2) The resolution professional shall provide to the resolution applicant access to all relevant information in physical and electronic form, provided such resolution applicant undertakes—

(*a*) to comply with provisions of law for the time being in force relating to confidentiality and insider trading;

(*b*) to protect any intellectual property of the corporate debtor it may have access to; and (*c*) not to share relevant information with third parties unless clauses (*a*) and (*b*) of this sub-section are complied with.

Explanation.—For the purposes of this section, "relevant information" means the information required by the resolution applicant to make the resolution plan for the corporate debtor, which shall include the financial position of the corporate debtor, all information related to disputes by or against the corporate debtor and any other matter pertaining to the corporate debtor as may be specified."

"**30. Submission of resolution plan**.—(1) A resolution applicant may submit a resolution plan along with an affidavit stating that he is eligible under Section 29-A to the resolution professional prepared on the basis of the information memorandum.

(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan—

(*a*) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor;

(*b*) provides for the payment of the debts of operational creditors in such manner as may be specified by the Board which shall not be less than the amount to be paid to the operational creditors in the event of a liquidation of the corporate debtor under Section 53;

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

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

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

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

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

(3) The resolution professional shall present to the committee of creditors for its approval such resolution plans which confirm the conditions referred to in sub-section (2).

(4) The committee of creditors may approve a resolution plan by a vote of not less than sixty-six per cent of voting

share of the financial creditors, after considering its feasibility and viability, and such other requirements as may be specified by the Board:

Provided that the committee of creditors shall not approve a resolution plan, submitted before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017, where the resolution applicant is ineligible under Section 29-A and may require the resolution professional to invite a fresh resolution plan where no other resolution plan is available with it:

Provided further that where the resolution applicant referred to in the first proviso is ineligible under clause (*c*) of Section 29-A, the resolution applicant shall be allowed by the committee of creditors such period, not exceeding thirty days, to make payment of overdue amounts in accordance with the proviso to clause (*c*) of Section 29-A:

Provided also that nothing in the second proviso shall be construed as extension of period for the purposes of the proviso to sub-section (3) of Section 12, and the corporate insolvency resolution process shall be completed within the period specified in that sub-section.

Provided also that the eligibility criteria in Section 29-A as amended by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 (Ord. 6 of 2018) shall apply to the resolution applicant who has not submitted resolution plan as on the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018.

(5) The resolution applicant may attend the meeting of the committee of creditors in which the resolution plan of the applicant is considered:

Provided that the resolution applicant shall not have a right to vote at the meeting of the committee of creditors unless such resolution applicant is also a financial creditor.

(6) The resolution professional shall submit the resolution plan as approved by the committee of creditors to the Adjudicating Authority."

"**31. Approval of resolution plan** .—(1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of Section 30 meets the requirements as referred to in sub-section (2) of Section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan:

Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this sub-section, satisfy that the resolution plan has provisions for its effective implementation.

(2) Where the Adjudicating Authority is satisfied that the resolution plan does not [conform] to the requirements referred to in sub-section (1), it may, by an order, reject the resolution plan.

(3) After the order of approval under sub-section (1),—

(*a*) the moratorium order passed by the Adjudicating Authority under Section 14 shall cease to have effect; and

(*b*) the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its database.

(4) The resolution applicant shall, pursuant to the resolution plan approved under sub-section (1), obtain the necessary approval required under any law for the time being in force within a period of one year from the date of approval of the resolution plan by the Adjudicating Authority under sub-section (1) or within such period as provided for in such law, whichever is later:

Provided that where the resolution plan contains a provision for combination, as referred to in Section 5 of the Competition Act, 2002 (12 of 2003), the resolution applicant shall obtain the approval of the Competition

Commission of India under that Act prior to the approval of such resolution plan by the committee of creditors."

(emphasis supplied)

"**60. Adjudicating Authority for corporate persons**.— xxx xxx xxx

(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of—

(*a*) any application or proceeding by or against the corporate debtor or corporate person;

(*b*) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and

(*c*) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.

xxx xxx xxx"

"**61. Appeals and Appellate Authority**.—(1) Notwithstanding anything to the contrary contained under the Companies Act, 2013 (18 of 2013), any person aggrieved by the order of the Adjudicating Authority under this part may prefer an appeal to the National Company Law Appellate Tribunal. xxx xxx xxx"

"**62. Appeal to Supreme Court**.—(1) Any person aggrieved by an order of the National Company Law Appellate Tribunal may file an appeal to the Supreme Court on a question of law arising out of such order under this Code within forty-five days from the date of receipt of such order.

xxx xxx xxx"

The relevant provisions of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 read as under:

> "**2. Definitions**.— (1) In these Regulations, unless the context otherwise requires—
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> xxx xxx xxx
>
> (*d*) "committee" means a committee of creditors established under Section 21; xxx xxx xxx
>
> (*l*) "participant" means a person entitled to attend a meeting of the committee under Section 24 or any other person authorised by the committee to attend the meeting; xxx xxx xxx"
>
> "**19. Notice for meetings of the committee**.— (1) Subject to this Regulation, a meeting of the committee shall be called by giving not less than five days' notice in writing to every participant, at the address it has provided to the resolution professional and such notice may be sent by hand delivery, or by post but in any event, be served on every participant by electronic means in accordance with Regulation 20.
>
> (2) The committee may reduce the notice period from five days to such other period of not less than twenty-four hours, as it deems fit:
>
> Provided that the committee may reduce the period to such other period of not less than forty-eight hours if there is an authorised representative."
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> "**21. Contents of the notice for meeting**.—(1) The notice shall inform the participants of the venue, the time and date of the meeting and of the option available to them to participate through video conferencing or other audio and visual means, and shall also provide all the

necessary information to enable participation through video conferencing or other audio and visual means.

(2) The notice of the meeting shall provide that a participant may attend and vote in the meeting either in person or through an authorised representative:

Provided that such participant shall inform the resolution professional, in advance of the meeting, of the identity of the authorised representative who will attend and vote at the meeting on its behalf.

(3) The notice of the meeting shall contain the following —

(*i*) a list of the matters to be discussed at the meeting;

(*ii*) a list of the issues to be voted upon at the meeting; and

(*iii*) copies of all documents relevant to the matters to be discussed and the issues to be voted upon at the meeting.

(4) The notice of the meeting shall—

(*a*) state the process and manner for voting by electronic means and the time schedule, including the time period during which the votes may be cast;

(*b*) provide the login ID and the details of a facility for generating password and for keeping security and casting of vote in a secure manner; and

(*c*) provide contact details of the person who will address the queries connected with the electronic voting.

(emphasis supplied)

"**24. Conduct of meeting**.— (1) The resolution professional shall act as the chairperson of the meeting of the committee.

(2) At the commencement of a meeting, the resolution professional shall take a roll call when every participant attending through video conferencing or other audio and visual means shall state, for the record, the following,—

(*a*) his name;

(*b*) whether he is attending in the capacity of a member of the committee or any other participant;

(*c*) whether he is representing a member or group of members;

(*d*) the location from where he is participating;

(*e*) that he has received the agenda and all the relevant material for the meeting; and

(*f*) that no one other than him is attending or has access to the proceedings of the meeting at the location of that person.

(3) After the roll call, the resolution professional shall inform the participants of the names of all persons who are present for the meeting and confirm if the required quorum is complete.

(4) The resolution professional shall ensure that the required quorum is present throughout the meeting.

(5) From the commencement of the meeting till its conclusion, no person other than the participants and any other person whose presence is required by the resolution professional shall be allowed access to the place where meeting is held or to the video conferencing or other audio and visual facility, without the permission of the resolution professional.

(6) The resolution professional shall ensure that minutes are made in relation to each meeting of the committee and such minutes shall disclose the particulars of the participants who attended the meeting in person, through video conferencing, or other audio and visual means.

(7) The resolution professional shall circulate the minutes of the meeting to all participants by electronic means within forty eight hours of the said meeting."

(emphasis supplied)

"**35. Fair value and Liquidation value**.—(1) Fair value and liquidation value shall be determined in the following manner—

(*a*) the two registered valuers appointed under Regulation 27 shall submit to the resolution

professional an estimate of the fair value and the liquidation value computed in accordance with internationally accepted valuation standards, after physical verification of the inventory and fixed assets of the corporate debtor;

(*b*) if in the opinion of the resolution professional, the two estimates of a value are significantly different, he may appoint another registered valuer who shall submit an estimate computed in the same manner; and

(*c*) the average of the two closest estimates shall be considered the fair value or the liquidation value, as the case may be.

(2) After the receipt of resolution plans in accordance with the Code and these regulations, the resolution professional shall provide the fair value and the liquidation value to every member of the committee in electronic form, on receiving an undertaking from the member to the effect that such member shall maintain confidentiality of the fair value and the liquidation value and shall not use such values 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.

(3) The resolution professional and registered valuers shall maintain confidentiality of the fair value and the liquidation value."

"**36. Information memorandum**.— (1) Subject to sub-regulation (4), the resolution professional shall submit the information memorandum in electronic form to each member of the committee within two weeks of his appointment, but not later than fifty-fourth day from the insolvency commencement date, whichever is earlier.

(2) The information memorandum shall contain the following details of the corporate debtor—

(*a*) assets and liabilities, with such description, as on the insolvency commencement date, as

are generally necessary for ascertaining their values.

Explanation.- "Description" includes the details such as date of acquisition, cost of acquisition, remaining useful life, identification number, depreciation charged, book value, and any other relevant details.

(*b*) the latest annual financial statements;

(*c*) audited financial statements of the corporate debtor for the last two financial years and provisional financial statements for the current financial year made up to a date not earlier than fourteen days from the date of the application;

(*d*) a list of creditors containing the names of creditors, the amounts claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims;

(*e*) particulars of a debt due from or to the corporate debtor with respect to related parties;

(*f*) details of guarantees that have been given in relation to the debts of the corporate debtor by other persons, specifying which of the guarantors is a related party;

(*g*) the names and addresses of the members or partners holding at least one per cent stake in the corporate debtor along with the size of stake;

(*h*) details of all material litigation and an ongoing investigation or proceeding initiated by Government and statutory authorities;

(*i*) the number of workers and employees and liabilities of the corporate debtor towards them; and

(*j*) [* * *]

(*k*) [* * *]

(*l*) other information, which the resolution professional deems relevant to the committee.

(3) A member of the committee may request the resolution professional for further information of the nature described in this Regulation and the resolution

professional shall provide such information to all members within reasonable time if such information has a bearing on the resolution plan.

(4) The resolution professional shall share the information memorandum after receiving an undertaking from a member of the committee to the effect that such member or resolution applicant 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."

"**37. Resolution plan** .— A resolution plan shall provide for the measures, as may be necessary, for insolvency resolution of the corporate debtor for maximization of value of its assets, including but not limited to the following—

(*a*) transfer of all or part of the assets of the corporate debtor to one or more persons;

(*b*) sale of all or part of the assets whether subject to any security interest or not;

(*c*) the substantial acquisition of shares of the corporate debtor, or the merger or consolidation of the corporate debtor with one or more persons;

(*ca*) cancellation or delisting of any shares of the corporate debtor, if applicable;

(*d*) satisfaction or modification of any security interest;

(*e*) curing or waiving of any breach of the terms of any debt due from the corporate debtor;

(*f*) reduction in the amount payable to the creditors;

(*g*) extension of a maturity date or a change in interest rate or other terms of a debt due from the corporate debtor;

(*h*) amendment of the constitutional documents of the corporate debtor;

(*i*) issuance of securities of the corporate debtor, for cash, property, securities, or in

exchange for claims or interests, or other appropriate purpose;

(*j*) change in portfolio of goods or services produced or rendered by the corporate debtor;

(*k)* change in technology used by the corporate debtor; and

(*l*) obtaining necessary approvals from the Central and State Governments and other authorities."

(emphasis supplied)

"**38. Mandatory contents of the resolution plan**.— (1) The amount due to the operational creditors under a resolution plan shall be given priority in payment over financial creditors.

(1-A) A resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors, of the corporate debtor.

(2) A resolution plan shall provide:

(*a*) the term of the plan and its implementation schedule;

(*b*) the management and control of the business of the corporate debtor during its term; and

(*c*) adequate means for supervising its implementation.

(3) A resolution plan shall demonstrate that:

(*a*) it addresses the cause of default;

(*b*) it is feasible and viable;

(*c*) it has provisions for its effective implementation;

(*d*) it has provisions for approvals required and the timeline for the same; and

(*e*) the resolution applicant has the capability to implement the resolution plan."

"**39. Approval of resolution plan**.—(1) A prospective resolution applicant in the final list may submit resolution plan or plans in accordance with the Code and these regulations to the resolution professional electronically

within the time given in the request for resolution plans under regulation 36B along with:

(*a*) And affidavit stating that it is eligible under section 29A to submit resolution plans; and

(*b*) [***]

(*c*) An undertaking by the prospective resolution applicant that every information and records provided in connection with or in the resolution plan is true and correct and discovery of false information and record at any time will render the applicant ineligible to continue in the corporate insolvency resolution process, forfeit any refundable deposit, and attract penal action under the Code.

(1A) A resolution plan which does not comply with the provisions of sub-regulation (1) shall be rejected.

(2) The resolution professional shall submit to the committee all resolution plans which comply with the requirements of the Code and regulations made thereunder along with the details of following transactions, if any, observed, found or determined by him:—

(*a*) preferential transactions under Section 43;

(*b*) undervalued transactions under Section 45;

(*c*) extortionate credit transactions under Section 50; and

(*d*) fraudulent transactions under Section 66, and the orders, if any, of the adjudicating authority in respect of such transactions.

(3) The committee shall evaluate the resolution plans received under sub-regulation (1) strictly as per the evaluation matrix to identify the best resolution plan and may approve it with such modifications as it deems fit:

Provided that the committee shall record the reasons for approving or rejecting a resolution plan.

(4) The resolution professional shall endeavour to submit the resolution plan approved by the committee to the Adjudicating Authority at least fifteen days before the maximum period for completion of corporate insolvency

resolution process under section 12, along with a compliance certificate in Form H of the Schedule.

(5) The resolution professional shall forthwith send a copy of the order of the Adjudicating Authority approving or rejecting a resolution plan to the participants and the resolution applicant.

(6) A provision in a resolution plan which would otherwise require the consent of the members or partners of the corporate debtor, as the case may be, under the terms of the constitutional documents of the corporate debtor, shareholders' agreement, joint venture agreement or other document of a similar nature, shall take effect notwithstanding that such consent has not been obtained.

(7) No proceedings shall be initiated against the interim resolution professional or the resolution professional, as the case may be, for any actions of the corporate debtor, prior to the insolvency commencement date.

(8) A person in charge of the management or control of the business and operations of the corporate debtor after a resolution plan is approved by the Adjudicating Authority, may make an application to the Adjudicating Authority for an order seeking the assistance of the local district administration in implementing the terms of a resolution plan."

The relevant provisions of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 read as under:

"**7. Certificate of registration**.—

xxx xxx xxx

(2) The registration shall be subject to the conditions that the insolvency professional shall—

xxx xxx xxx

(*h*) abide by the Code of Conduct specified in the First Schedule to these Regulations; and

xxx xxx xxx"

"FIRST SCHEDULE

[Under Regulation, 7(2)(*h*)]

CODE OF CONDUCT FOR INSOLVENCY PROFESSIONALS

xxx xxx xxx

Confidentiality.

21. An insolvency professional must ensure that confidentiality of the information relating to the insolvency resolution process, liquidation or bankruptcy process, as the case may be, is maintained at all times. However, this shall not prevent him from disclosing any information with the consent of the relevant parties or required by law.

xxx xxx xxx"

8. The statutory scheme of the Code, insofar as the former members of the Board of Directors are concerned, is as follows:

A committee of creditors is first constituted under Section 21 consisting only of all the financial creditors of the corporate debtor. Under Section 24, all meetings of this committee are to be conducted by the resolution professional who, however, does not happen to be part of this committee. Section 24(3)(b) is important in that, the resolution professional has to give notice of each and every meeting of the committee of creditors, *inter alia*, to members of the suspended Board of Directors. Like operational creditors who may

attend and participate in such meetings, provided the aggregate dues owing to them are not less than ten per cent of the total debt, both such operational creditors and erstwhile members of the Board of Directors have no vote. Section 25(2)(f) and (i) are also important in that, once the resolution professional convenes meetings of the committee of creditors, he is to present all resolution plans at these meetings. Under Section 30, the resolution professional shall examine each resolution plan received by him in which he must confirm, *inter alia*, that such plan provides for the repayment of the debts of operational creditors which shall not be less than the amount to be paid to them in the event of liquidation of the corporate debtor. This plan is then submitted to the Adjudicating Authority if it is approved by the requisite majority of the committee of creditors. The Adjudicating Authority under Section 31(1), if satisfied that the plan passes muster, shall then, by order, approve such plan, which shall be binding on all stakeholders involved in the resolution plan, including guarantors.

9. This statutory scheme, therefore, makes it clear that though the erstwhile Board of Directors are not members of the committee of creditors, yet, they have a right to participate in each and every

meeting held by the committee of creditors, and also have a right to discuss along with members of the committee of creditors all resolution plans that are presented at such meetings under Section 25(2)(i). It cannot be gainsaid that operational creditors, who may participate in such meetings but have no right to vote, are vitally interested in such resolution plans, and must be furnished copies of such plans beforehand if they are to participate effectively in the meeting of the committee of creditors. This is for the reason that under Section 30(2)(b), repayment of their debts is an important part of the resolution plan *qua* them on which they must comment. So the first important thing to notice is that even though persons such as operational creditors have no right to vote but are only participants in meetings of the committee of creditors, yet, they would certainly have a right to be given a copy of the resolution plans before such meetings are held so that they may effectively comment on the same to safeguard their interest.

10. However, it was argued before us that the Notes on Clauses to Section 24 make it clear that the erstwhile members of the Board of Directors are participants in these meetings only so that the committee of creditors and the resolution professional may seek

information from them. The Notes on Clauses, heavily relied upon by learned counsel for the respondents, read as follows:

> "Clause 24 prescribes the modalities for the meeting of the committee of creditors. The meetings are conducted by the resolution professional and may be attended by the members of the board directors or partners of the corporate debtor. This gives an opportunity for the committee of creditors and the resolution professional to seek information that they may require to assess the financial position of the corporate debtor and prepare a resolution plan."
>
> (emphasis supplied)

11. This Court in **Mobilox Innovations** (supra) stated:

> "**27.** The notes on clauses annexed to the Bill are extremely important and read as follows……"
>
> xxx xxx xxx
>
> "**38.** It is, thus, clear that so far as an operational creditor is concerned, a demand notice of an unpaid operational debt or copy of an invoice demanding payment of the amount involved must be delivered in the prescribed form. The corporate debtor is then given a period of 10 days from the receipt of the demand notice or copy of the invoice to bring to the notice of the operational creditor the existence of a dispute, if any. We have also seen the notes on clauses annexed to the Insolvency and Bankruptcy Bill of 2015, in which "the existence of a dispute" alone is mentioned. Even otherwise, the word "and" occurring in Section 8(2)(*a*) must be read as "or" keeping in mind the legislative intent and the fact that an anomalous situation would arise if it is not read as "or"……"

12. There is no doubt whatsoever that Notes on Clauses are an important aid to the construction of Sections of the Code as they show what the Drafting Committee had in mind when such provisions were drafted. However, a closer look at the Notes on Clause 24 makes it clear that the third sentence of the Notes on Clause 24 is itself problematic. First and foremost, it speaks of the resolution professional seeking information. The resolution professional does not seek information at a meeting of the committee of creditors, which is what Section 24 is all about. The resolution professional only seeks information from the erstwhile Board of Directors under Section 29 before preparing an information memorandum, which then includes the financial position of the corporate debtor and information relating to disputes by or against the corporate debtor etc. All this has nothing to do with Section 24 of the Code which deals with meetings of the committee of creditors. Secondly, the resolution professional does not prepare a resolution plan as is mentioned in the Notes on Clause 24; he only prepares an information memorandum which is to be given to the resolution applicants who then submit their resolution plans under Section 30 of the Code. The committee of creditors, in turn, gets information so

that they can assess the financial position of the corporate debtor from various sources before they meet. It is, therefore, difficult to understand the Notes on Clause 24. Even assuming that the Notes on Clause 24 may be read as being a one-way street by which erstwhile members of the Board of Directors are only to provide information, we find that Section 31(1) of the Code would make it clear that such members of the erstwhile Board of Directors, who are often guarantors, are vitally interested in a resolution plan as such resolution plan then binds them. Such plan may scale down the debt of the principal debtor, resulting in scaling down the debt of the guarantor as well, or it may not. The resolution plan may also scale down certain debts and not others, leaving guarantors of the latter kind of debts exposed for the entire amount of the debt. The Regulations also make it clear that these persons are vitally interested in resolution plans as they affect them. Thus, under Regulation 36 of the CIRP Regulations, the information memorandum that is given to each member of the CoC and to any potential resolution applicant, will contain details of guarantees that have been given in relation to the debts of the corporate debtor (*see* Regulation 36(2)(f) of the CIRP Regulations). Also, under Regulation

37(d) of the CIRP Regulations, a resolution plan may provide for satisfaction or modification of any security interest. Security interest is defined by Section 3(31) of the Code as follows:

> "**3. Definitions**.—In this Code, unless the context otherwise requires,—
>
> xxx xxx xxx
>
> (31) "security interest" means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person:
>
> Provided that security interest shall not include a performance guarantee;
>
> xxx xxx xxx"

This would certainly include a guarantor who may be a member of the erstwhile Board of Directors. Further, under Regulation 37(1)(f), a resolution plan may provide for reduction in the amount payable to the creditors, which again vitally impacts the rights of a guarantor. Last but not least, a resolution plan which has been approved or rejected by an order of the Adjudicating Authority, has to be sent to "participants" which would include members of the erstwhile Board of Directors – *vide* Regulation 39(5) of the CIRP Regulations. Obviously, such copy can only be sent to participants because they

are vitally interested in the outcome of such resolution plan, and may, as persons aggrieved, file an appeal from the Adjudicating Authority's order to the Appellate Tribunal under Section 61 of the Code. Quite apart from this, Section 60(5)(c) is also very wide, and a member of the erstwhile Board of Directors also has an independent right to approach the Adjudicating Authority, which must then hear such person before it is satisfied that such resolution plan can pass muster under Section 31 of the Code.

13. It is also important to note that every participant is entitled to a notice of every meeting of the committee of creditors. Such notice of meeting must contain an agenda of the meeting, together with the copies of all documents relevant for matters to be discussed and the issues to be voted upon at the meeting *vide* Regulation 21(3)(iii). Obviously, resolution plans are "matters to be discussed" at such meetings, and the erstwhile Board of Directors are "participants" who will discuss these issues. The expression "documents" is a wide expression which would certainly include resolution plans.

14. Under Regulation 24(2)(e), the resolution professional has to take a roll call of every participant attending through video

conferencing or other audio and visual means, and must state for the record that such person has received the agenda and all relevant material for the meeting which would include the resolution plan to be discussed at such meeting. Regulation 35 makes it clear that the resolution professional shall provide fair value and liquidation value to every member of the committee only after receipt of resolution plans in accordance with the Code [*see* regulation 35(2)]. Also, under Regulation 38(1)(a), a resolution plan shall include a statement as to how it has dealt with the interest of all stakeholders, and under sub-clause 3(a), a resolution plan shall demonstrate that it addresses the cause of default. This Regulation also, therefore, recognizes the vital interest of the erstwhile Board of Directors in a resolution plan together with the cause of default. It is here that the erstwhile directors can represent to the committee of creditors that the cause of default is not due to the erstwhile management, but due to other factors which may be beyond their control, which have led to non-payment of the debt. Therefore, a combined reading of the Code as well as the Regulations leads to the conclusion that members of the erstwhile Board of Directors, being vitally interested in resolution plans that may be discussed at

meetings of the committee of creditors, must be given a copy of such plans as part of “documents” that have to be furnished along with the notice of such meetings.

15. As a result of the aforesaid discussion, the arguments of the respondents that “committee” and “participant” are used differently, which would lead to the result that resolution plans need not be furnished to the erstwhile members of the Board of Directors, must be rejected. Equally, the Regulations, far from going beyond the Code, flesh out the true intention of the Code that is achieved by reading the plain language of the Sections that have already been adverted to. So far as confidential information is concerned, it is clear that the resolution professional can take an undertaking from members of the erstwhile Board of Directors, as has been taken in the facts of the present case, to maintain confidentiality. The source of this power is Regulation 7(2)(h) of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016, read with paragraph 21 of the First Schedule thereto. This can be in the form of a non-disclosure agreement in which the resolution professional can be indemnified in case information is not kept strictly confidential.

16. The argument on behalf of the committee of creditors based on the proviso to Section 21(2) is also misconceived. The proviso to Section 21(2) clarifies that a director who is also a financial creditor who is a related party of the corporate debtor shall not have any right of representation, participation, or voting in a meeting of the committee of creditors. Directors, *simplicitor*, are not the subject matter of the proviso to Section 21(2), but only directors who are related parties of the corporate debtor. It is only such persons who do not have any right of representation, participation, or voting in a meeting of the committee of creditors. Therefore, the contention that a director *simplicitor* would have [no?] the right to get documents as against a director who is a financial creditor is not an argument that is based on the proviso to Section 21(2), correctly read, as it refers only to a financial creditor who is a related party of the corporate debtor. For this reason, this argument also must be rejected.

17. We may also mention in passing that the Bankruptcy Law Committee Report of November, 2015 stated:

> "II. *The Code will enable symmetry of information between creditors and debtors.*

5. The law must ensure that information that is essential for the insolvency and the bankruptcy resolution process is created and available when it is required.
6. The law must ensure that access to this information is made available to all creditors to the enterprise, either directly or through the regulated professional.
7. The law must enable access to this information to third parties who can participate in the resolution process, through the regulated professional."

Paragraph II (7) correctly reflects the reason for Section 24(3)(b) of the Code.

18. We may indicate that the time that has been utilized in these proceedings must be excluded from the period of the resolution process of the corporate debtor as has been held in **Arcelormittal India Private Limited v. Satish Kumar Gupta & Ors.**, Civil Appeal Nos. 9402-9405/2018 [decided on 04.10.2018] (at paragraph 83). In each of these cases, the appellants will be given copies of all resolution plans submitted to the CoC within a period of two weeks from the date of this judgment. The resolution applicant in each of these cases will then convene a meeting of the CoC within two weeks thereafter, which will include the appellants as participants. The CoC will then deliberate on the resolution plans afresh and either reject them or approve of them with the requisite majority,

after which, the further procedure detailed in the Code and the Regulations will be followed. For all these reasons, we are of the view that the petition and appeal must be allowed and the NCLAT judgment set aside.

……J.
(R.F. Nariman)

……J.
(Navin Sinha)

New Delhi;
January 31, 2019