IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH

MA 24, 80 & 110/2018
In C.P. No. 43/I&BP/2017

Under section 30, 60 of the IBC, 2016

In the matter of

Gupta Energy Pvt. Ltd. ... Corporate Debtor

Through

1. T. Sathisan (MA 24/2018)
   Resolution Professional ... Applicant

2. JM Financials Asset Reconstruction Co. Ltd.
   (MA 80/2018 & MA 110/2018) ... Applicant

Order delivered on 20.02.2018

Coram: Hon'ble B. S. V. Prakash Kumar, Member (Judicial)
Hon'ble V. Nallasenapathy, Member (Technical)

For the Applicant :Ms. Khushboo Shah Rajani i/b MDP & Partners,

Mr. Ashish Pyasi a/w Mr. Umang Thakar
i/b Dhir & Dhir Associates –Counsel for
erstwhile management of Corporate Debtor
Mr. Ratnanko Banerji, Sr. Adv., a/w
Mr. Arunabha Deb., Ms. Radhika Nair
i/b Jayakat & Partners

Per B. S. V. Prakash Kumar, Member (Judicial)

ORDER

Order pronounced on 20.02.2018

MA 24/2018

It's an Application moved by the Resolution Professional on behalf of the Committee of Creditors u/s 30 of Insolvency & Bankruptcy Code, 2016 r/w Regulation 39 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 submitting Resolution Plan of the Resolution Applicant and intimation of the decision of the Committee of Creditors in respect to the Resolution Plan seeking necessary orders because at the time

when the Resolution Plan was placed before Committee of Creditors on 03.01.2018, it was put to e-voting held between 4.1.2018 (12.00 noon) till 5.1.2018 (12.00 noon),wherein it has not been approved by the Committee of Creditors with 75% majority, henceforth sought necessary orders against this Corporate Debtor in the manner as prescribed under the Code and the Regulations thereto.

2. On perusal of this Application, though full information not provided, it appears that claims of the creditors were collated, thereafter Information Memorandum was taken out as mentioned u/s 29 of the Code, upon which, the Resolution Professional submitted the resolution plan in compliance of Section 30(2) of the Code, upon which 72.68% votes have been cast in favor of the Resolution Plan, whereas 27.32% voted against the resolution plan resulting into short of approval to the resolution plan as envisaged under this Code, i.e. not less than 75% voting share of the Committee of Creditors.

3. Of Course, this applicant/Resolution Professional has categorically mentioned that he was appointed as Resolution Professional only on 168th day of the period of 180 days of CIRP, therefore, only 13 days left to him post appointment, thereby requested for extension of period of CIRP u/s 12 of the Code, in pursuance thereof, this Bench extended CIRP period for 90 days in addition to 180 days already provided from 18.09.2017, the extended period was also over by 16.12.2017.

4. This is the broad picture given by the Resolution Professional in his application seeking necessary instructions for further follow up in respect to this case.

MA 80/2018

5. This applicant is one of the Financial Creditors namely JM Financials Asset Reconstruction Co. Ltd. having 24.2% voting rights filed this MA u/s 60 (5) of the Code seeking necessary clarification as to, (i) whether for

approval of resolution plan not less than 75% of the voting share of the financial creditors as prescribed under Section 30 (4) of the Code is mandatory or not, (ii) whether revival of stressed asset by acceptance of a resolution plan has been given primacy over liquidation of such stressed asset under the Code and (iii) whether the "financial creditors" can use their voting powers in the CoC to stall the revival of the stressed asset. Apart from this, the applicant has also asked for direction to the Resolution Professional to place on record the resolution plan submitted by Resolution Applicant /IPCL on 16.12.2017 before this Bench for approval.

6. On perusal of this application, it appears that this applicant is one of the members voted in favor of the resolution plan resulting into 72.68% approval, now it says since the resolution plan voted with 72.68% is able to raise ₹122.63crores as against the liquidation value of ₹112.43crores, this applicant would have got more money if the company is revived by allowing this resolution accepted by 72.68% voting. It says for its economic interest being affected, it has filed this MA stating that this Bench though passed admission order on 21.3.2017, it was only uploaded on 10.4.2017 for the same being lately uploaded, IRP made public announcement for submission of claims only on 12.4.2017, in view of this delay, IRP filed its Report to the Registrar, NCLT on 15.5.2017 in terms of Regulation 17(1) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 though his tenure would come to end on completion of 30 days from the date of his appointment as mentioned u/s 16(5) of the Code. It further says, first Committee of Creditors meeting was held on 12.5.2017 voting against continuation of IRP as Resolution Professional, thereafter, some Financial Creditors, instead of holding another Committee of Creditors meeting proposing another Resolution Professional, filed an MA for appointment of Mr. Rajan Wadhwan as the Resolution Professional, but this Bench, having noticed that this proposal was not supported by the approval of the Committee of Creditors, suggested them to hold Committee of Creditors meeting on 3.7.2017 to propose the name of Resolution Professional. In pursuance of which, on 3.7.2017, Second CoC meeting was held, wherein Mr. T. Sathisan was proposed to be appointed as Resolution Professional with more than 75% voting, following it, another MA came before this Bench

on 25.7.2017 u/s 22(3)(b) of the Code for appointment of Mr. T. Sathisan as Resolution Professional. On having such MA filed on the very next day, i.e. 26.7.2017, this Bench forwarded the name of Mr. Sathisan to IBBI for confirmation, on having confirmation come on 4.9.2017, this Bench immediately appointed Mr. Sathisan as Resolution Professional, then 4th Committee of Creditors meeting was held on 11.9.2017, wherein charge was handed over to the RP. Since the period of 180 days for completing the Corporate Insolvency Resolution process as mandated u/s 12(1) of the Code was getting over by 18.9.2017, on an application filed by RP on 15.9.2017, this Bench extended another 90 days as mentioned u/s 12 of the Code.

7. Having the RP taken over charge, India Power Corporation Ltd.(IPCL) submitted a Resolution Plan on 27.11.2017 on the Information Memorandum made available, but this Resolution Plan could not get through in the CoC meeting held on 8.12.2017. For the first resolution plan not being approved, second resolution plan was placed by the same applicant before the CoC, it was again asked to be revised on 11.12.2017, thereafter another revised plan i.e., Resolution Plan - 3 was put before CoC on 14.12.2017, but having the CoC expressed its inability to accept the proposal, this applicant again placed Resolution Plan - 4 to mobilize ₹122crores as resolution fund. Upon which, 9thCoC was held on 3.1.2018, when it was put to voting, the Financial Creditors representing 72.68% voted in favor of the resolution plan, whereas remaining voted against the Resolution Plan.

8. Now the grievance of this applicant is, under the Scheme of the Code, since primacy has been given to resolution plan of stressed asset as against liquidation, the plan approved by 72.68% will not only sub-serve the interest of all the financial creditors but also serve the objective thought of the Code. If this plan is approved, it will enable 103 workers eking their livelihood from the functioning of this company by further submitting that the liquidation of the Corporate Debtor will not only result in defraying the assets of the Corporate Debtor but also the workmen living on this company will be put to hardship.

9. On legal front, the Applicant Counsel submits that requirement of 75% voting in favor of Resolution Plan is not mandatory as Section 30(4) of the Code uses the word "may". If it was the intention of the legislature, he says, to make the said provision mandatory, it would have used the word "shall" as has been used in Section 31 of the Code. He says that in the instant case, this plan has been approved by 72.68% of the votes almost close to 75% mandate given u/s 30(4) of the Code, for there being no better alternative to save the corporate debtor as well as the workmen, the Counsel has sought for the approval of this plan u/s 31 of the Code.

10. Apart from this, the Counsel has made another argument saying that if this resolution plan is sent back to the Committee of Creditors for reconsideration, there could be every possibility for getting more than 75% voting in favor of the resolution because most of the CIRP period went in for appointment of Resolution Professional in the place of IRP and by the time Resolution Professional was appointed, 168 days of the CIRP period was over, henceforth no meaningful time was left to the COC to apply its wisdom, thereby the Counsel in the alternative, sought direction to extend CIRP period by deletion of the period that went in obtaining the copy of the admission order and replacement of IRP with Resolution Professional.

MA 110/2018

11. The same applicant has filed another MA for declaring that the period of 150 days after the expiry of the term of IRP should be calculated from the date of assumption of the charge by the Resolution Professional. Since the averments of this application being more or less on the facts mentioned in MA 80/2018, for the sake of brevity, they have not been repeated but the relief sought by the applicant as to deletion of 150 days from the CIRP period is taken into consideration for adjudication.

12. To justify the prayers sought by the applicant Counsel in MA 80/2017 and 110/2018, the Counsel relied upon ***M/s. Surendra Trading Company Vs. M/s. Juggilal Kamlapat Jute Mills Company Limited and Other***

(2017) SCC Online SC 1208 to say that having Hon'ble Supreme Court already considered the timelines in respect to passing orders by NCLT within 14 days as mentioned u/s 7, sub-Section 5 of Section 9 and Section 10 of the Code and seven days' time for rectifying the defects in the respective application as directory, in the same line, for the ends of justice, the Hon'ble Supreme Court having already indicated that the timelines given in the Code are not mandatory but are only directory, for the sake of the company and all its stakeholders, instead of sending this corporate debtor to liquidation, he has sought for revival of the CIRP period by discounting the period which the Resolution Professional could not utilize for carrying the functions that takes place in the CIRP period so as to enable the CoC to reconsider the plan for the benefit of all.

13. The applicant Counsel has specifically relied upon Para 17 and 18 of the case supra so as to apply the same ratio to this case as well. Those Paras are as follows:

"17) On admission of the application, the adjudicating authority is required to appoint an Interim Resolution Professional (for short, 'IRP') in terms of Section 16(1) of the Code. This exercise is to be done by the adjudicating authority within fourteen days from the commencement of the insolvency date. This commencement date is to reckon from the date of the admission of the application. Under sub-section (5) of Section 16, the term of IRP cannot exceed thirty days. Certain functions which are to be performed by the IRP are mentioned in subsequent provisions of the Code, including management of affairs of corporate debtor by IRP as well as duties of IRP so appointed. One of the important functions of the IRP is to invite all claims against the corporate debtor, collate all those claims and determine the financial position of the corporate debtor. After doing that, IRP is to constitute a committee of creditors which shall comprise of financial creditors of the corporate debtor. The first meeting of such a committee of creditors is to be held within seven days of the constitution of the said committee, as provided in Section 22 of the Code. In the said first meeting, the committee of creditors has to take a decision to either appoint IRP as Resolution Professional (RP) or to replace the IRP by another RP. Since term of IRP is thirty days, all the aforesaid steps are to be accomplished within this thirty days period. Thereafter, when RP is appointed, he is to conduct the entire corporate insolvency resolution process and manage the operations of the corporate debtor during said period. It is not necessary to state the further steps which are to be taken by the RP in this behalf. What is important is that the entire corporate insolvency resolution process is to be completed within the period of 180 days from the date of admission of the applicant. This time limit is

provided in Section 12 of the Act. This period of 180 days can be extended, but such extension is capped as extension cannot exceed 90 days. Even such an extension would be given by the adjudicating authority only after recording a satisfaction that the corporate insolvency resolution process cannot be completed within the original stipulated period of 180 days. If the resolution process does not get completed within the aforesaid time limit, serious consequences thereof are provided under Section 33 of the Code. As per that provision, in such a situation, the adjudicating authority is required to pass an order requiring the corporate debtor to be liquidated in the manner as laid down in the said Chapter.

18) The aforesaid statutory scheme laying down time limits sends a clear message, as rightly held by the NCLAT also, that time is the essence of the Code. Notwithstanding this salutary theme and spirit behind the Code, the NCLAT has concluded that as far as fourteen days' time provided to the adjudicating authority for admitting or rejecting the application for initiation of insolvency resolution process is concerned, this period is not mandatory.

For arriving at such a conclusion, the NCLAT has discussed the law laid down by this Court in some judgments. Therefore, we deem it proper to reproduce the discussion of the NCLAT itself in this behalf:

"32. In ***P.T. Rajan Vs. T.P.M. Sahir and Ors. (2003) 8 SCC 498, the Hon'ble Supreme Court observed that where Adjudicating Authority has to perform a statutory function like admitting or rejecting an application within a time period prescribed, the time period would have to held to be directory and not mandatory. In the said case, Hon'ble Apex Court observed:***

"48. It is well-settled principle of law that where a statutory functionary is asked to perform a statutory duty within the time prescribed therefor, the same would be directory and not mandatory. (See Shiveshwar Prasad Sinha v. The District Magistrate of Monghur&Anr. AIR (1966) Patna 144, Nomita Chowdhury v. The State of West Bengal &Ors. (1999) CLJ 21 and Garbari Union Co-operative Agricultural Credit Society Limited &Anr. V. Swapan Kumar Jana &Ors. (1997) 1 CHN 189).

49. Furthermore, a provision in a statute which is procedural in nature although employs the word "shall" may not be held to be mandatory if thereby no prejudice is caused."

14. The applicant Counsel has further relied upon the same judgment that rejection of an application or a petition on the footing that it has not been

adhered to the timelines given could not be treated as rejecting the application on merits therefore, when any procedural curtailment takes away the right of the party to be heard on merits, such curtailment need not be considered as mandatory.

15. Since the discussion has been elaborately made in the case supra, it will become trite if the same is repeated but as to the points raised by the Applicant Counsel, it is relevant to answer his queries in the shortest way possible.

16. Of course, it is true that the admission order has been uploaded almost after one month from the date of order, but it is also true that most of the time gone for appointment of Resolution professional owing to non-utilization of the time by CoC, it is the CoC timely not proposed the name of the Resolution Professional, therefore the time gone for appointment of Resolution Professional cannot be attributed as delay on the part of this Adjudicating Authority.

17. However, the fact of the matter is, whatever actions that need to be performed in the CIRP period have successfully performed in the present case – claims were collated, Information memorandum taken out, basing on which, the resolution plan has come. The Resolution Plan applicant made a bargain at his best by first filing one Resolution Plan when it was not agreed, second resolution plan, likewise finally, in Resolution Plan-4, it has come out with a plan to infuse around ₹122crores as against liquidation value of ₹112crores. On face of it, the only difference between the resolution plan and liquidation value is ₹10crores. That being so, there is every possibility of increase in liquidation value at the time of bidding. Moreover, the business wisdom for allowing or disallowing Resolution Plan is completely left to the domain of the Committee of Creditors to decide what is right to their interest. As we said earlier, Code has nowhere said that the Resolution Plan has some primacy over liquidation. It is only said if resolution does not happen within the time prescribed, then it has to go for liquidation. So by seeing the sequence of factual events, it is clear that what all process that has to be complied with, has been complied with in the CIRP period without

any complaint from any quarter, therefore, we could not comprehend today what is left for revival of CIRP period for repetition of the entire process. The Resolution applicant was successful in filing one after another Plan, at the final attempt, it was successful at least putting the COC for voting, there the Resolution Plan applicant failed to get through this Resolution Plan with 75% voting. No other resolution plan is available except this plan.

18. However, we again make it clear that this Authority has neither jurisdiction to question the actions of the Committee of Creditors nor any discretion to examine the resolution plan to dig into, as to whether Resolution Plan is better or the liquidation better. A competent authority, i.e. CoC, as per the statute, having already taken a decision as prescribed under the Code, there is no point in this Bench transgressing into the jurisdiction of Committee of Creditors.

19. As the Counsel has raised a point that substantial justice will have primacy over procedural justice, therefore, timelines in the Code should not be taken into consideration in the light of case *M/s. Surendra Trading Company (supra).* Since this decision has been pronounced subsequent to the liquidation order passed by this Bench in ***ICICI Bank Ltd vs. Innoventive Industries Ltd. (MA 557, 530, 529 & 590/2017, IA 72/2017 in C.P. 01/I&BP/2016 dated 08.12.2017 – NCLT, Mumbai, Bench-1),*** we must revisit our earlier order supra to ascertain as to whether our order is in adherence to the judgment of Hon'ble Supreme Court passed in M/s. Surendra Trading Company, the facts noticed in M/s Surendra case (supra) are as follows:

20. It is an Appeal filed against the order passed by Hon'ble NCLAT holding that prescription of 14 days for passing order by the adjudicating authority u/s 9(5) of the Code is directory and the time of seven days for rectification of the defects in section 9 Application mentioned in the proviso to section 9(5) is mandatory, when it came before Hon'ble Supreme Court, it has held that the timeline of seven days given in the proviso for removing the defects in the Application is directory and not mandatory in nature with a caveat that the Hon'ble Supreme Court is also conscious of the fact that sometimes

applicants or their counsel may show laxity by not removing the objections within the time given and take it granted that they would be given unlimited time for such a purpose. In such cases, the Hon'ble Supreme Court has held that balanced approach is to be applied to consider it only when sufficient cause has been shown as to why the Applicant could not remove the objections within seven days. In a situation like this, it says, it would be for the Adjudicating Authority to decide as to whether sufficient cause is shown in not removing the defects beyond the period of seven days, only then, Adjudicating Authority will entertain the application on merit, otherwise, it will have a right to dismiss the application.

21. Since it is of great relevance to going to the observations made by Hon'ble Supreme Court in the case supra to arrive to a conclusion that the facts and reliefs sought by the Financial Creditor (Applicant in MA 80 & 110 of 2018) are diagonally opposite to the facts and reliefs of that case. By looking into the text of the Hon'ble Supreme Court judgment, what we have noticed is, whenever a statutory functionary is asked to perform a duty within the time prescribed, the same would be directory and not mandatory and in a situation like that, when a provision in a statute is procedural in nature although employs the word "shall", such employment by itself may not be held to be mandatory provided it does not cause prejudice to the parties. On this point, Hon'ble Supreme Court in M/s. Surendra's case (supra) held as below:

> *"34. Further, Hon'ble Supreme Court in the matter of Smt. Rani Kusum vs. Smt. Kanchan Devi (2005) 6 SCC 705, concurring with the ratio laid down in Kailash Versus Nanhku (supra) held that:*
>
> *"10. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice.* ***In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation.*** *Unless compelled by express and specific language of the statute, the provisions of CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice.*
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> *11. The mortality of justice at the hands of law troubles a judge's conscience and points an angry interrogation at the law reformer.*

12. The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in the judges to act ex debito justitiae where the tragic sequel otherwise would be wholly inequitable. Justice is the goal of jurisprudence, processual, as much as substantive.(See Sushil Kumar Sen v. State of Bihar [(1975) 1 SCC 774].

13. ***No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner for the time being by or for the court in which the case is pending, and if, by an Act of Parliament the mode of procedure is altered, he has no other right than to proceed according to the altered mode.***

(See Blyth v. Blyth [(1966) 1 All ER 524 :
1966 AC 643: (1966) 2 WLR 634 (HL)] .) A procedural law should not ordinarily be construed as mandatory; the procedural law is always subservient to and is in aid to justice. Any interpretation which eludes or frustrates the recipient of justice is not to be followed. (See Shreenath v. Rajesh [(1998) 4 SCC 543 : AIR 1998 SC 1827].

14. Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice."

22. On reading the entire judgment, it is pertinent to mention that the Hon'ble Supreme Court highlighted that whenever any procedure is to be followed by any court of law or statutory functionary in discharging its functions in accordance with the timelines given in the statute, as long as such timeline does not affect the vested rights of any person, it could be, depending on the context, taken as directory. The Hon'ble Supreme Court being conscious of the significance of timelines given to be followed by the statutory authority, it has also been held that adjudicating authority should be satisfied with sufficient cause shown by the applicant as to why the applicant could not remove the objections within seven days.

23. For saying it is directory, two points were considered by Honorable Supreme Court, one – it is procedural, two – for condoning delay sufficient cause shall be shown.

24. Now this applicant counsel has tried to impress upon this Bench to apply the ratio decided by the Hon'ble Supreme Court in respect to seven days' time to remove defects u/s 9 to the CIRP period given under the Code. Since the Hon'ble Supreme Court has held that timeline of seven days is procedural in nature, for this applicant having asked to apply the same ratio to CIRP period as well, it is invariably to be answered as to this 180/270 days CIRP period is processual in nature or substantive in nature in the light of the ratio decided in M/s. Surendra's case to this case.

25. According to the ratio supra, to say mandate of the Statute is procedural, two elements are requisite as stated in Surendra as well as Rajan cases, one – the timelines are in respect to the functions to be discharged by the statutory authority or by court of law, two – that mandate should not have any bearing on the vested rights of the parties.

26. If you see point No. 1, it is evident that Committee of Creditors (CoC) is not a statutory authority; it is only a decision taking body, like general body of company, in respect to a corporate debtor that is owed to pay money to them.

27. This period of 180 days or 270 days has not come just like that; there is a historical background for giving certain period for completion of corporate Insolvency Resolution Process. Why has Insolvency & Bankruptcy Code come into existence? Is it that Insolvency laws were not in vogue earlier, is it that liquidation laws were not in vogue earlier, is it that laws having regard to restructuring of debts of companies were not in vogue earlier? They were all there, but what warranted the legislature to bring in this new Law into existence?

28. On having experienced companies lying for years before BIFR under the caption of Sick Industry, likewise matters remained pending for years in winding up process, by the time orders passed, the substratum of the companies remained completely eroded. Even after these unfortunate creditors remained waiting for years, finally nothing used to come to them, which finally started adversely effecting lending market and credit remained

locked up in court proceedings. When State has experienced that lenders were not even able to recover 20% of value of debt, a question arose what was to be done to the problem. To bail out from this recovery problem, the state has come forward with this consolidated legislation with a paradigm shift in resolving this problem by bringing speed as essence for the working of the bankruptcy Code making it into two phases, first is – calm period i.e. Corporate Insolvency Resolution Process and second is – Liquidation.

29. Until before Insolvency & Bankruptcy Code has come into existence, the companies used to remain in the hands of promoters/directors, but now by admission of insolvency petition either u/s 7 or 9 or even 10 of this Code, management of the debtor in the CIRP period shifted from the promoters/directors to the financial creditors, so that the creditors could be in a better position to take a call which way is better for them to realize their money from the company. While doing so, this Code has insulated company from all kinds of credit litigation in the CIRP period enabling the company either for restructuring or for infusion of funds within 180/270 days, failing which, the company has to go into liquidation. A time period being stipulated for CIRP insulating company by imposing moratorium, the creditors could not proceed against the company but entitling them to give a thought process to come out with a better idea for value realization. If CoC feels that a resolution plan will resolve the problem, and get their money back to the extent possible, they are free to do so, if not, they are also free to opt for liquidation so as to arrest the value erosion of the company. After all, it is their money to realize, therefore, they are given chance to decide as to what is best for themselves. In a scenario like this, there cannot be any scope to assume resolution process shall have primacy over liquidation.

30. If we go into BLRC report which is the basis for Insolvency & Bankruptcy Code, it has not been solicited anywhere that first there should be a resolution by way of restructuring, unless it fails, there cannot be liquidation of the corporate debtor. What all, it has been said in the report is to maximize value realization, for which a calm period is given to try for resolution, if the financial creditors feel that the resolution plan will further

frustrate their chance of realization, they have their own discretion not to go for resolution plan.

31. If at all this time constraint of 180/270 days CIRP period as sought by this applicant, is extended, the danger is moratorium period is also to be extended depriving the valuable right to proceed against the Corporate Debtor for fructifying their rights. It is not extension of time for filing written statement or of filing an application curing defects, but it is a curation to do away the inordinate delay in value realization and destabilization of prospective lending in the market. When speed is one of the basic elements for bringing in this legislation, how could we construe it as a procedural timeline? Here, the action in 180 days is directly linked to the economics of the market and the country as well, that is why, in the preamble of the Code, it has been categorically mentioned that Insolvency Resolution of corporate person should be in a time bound manner for maximization of value of assets of such corporate person to promote entrepreneurship, availability of credit and to balance interest of all stakeholders. That being the basic idea of this Code, how could we say 180 days/270 days of corporate insolvency resolution period is a processual norm inserted in the legislation?

32. By diluting the speed envisaged under the code, there is a possibility of adversely affecting the interest of either side. If it is delayed, one is, maximization of value of assets of the corporate debtor will debilitate the realization potential of the creditors. Two is, the promoters of the company, rightly or wrongly remain not discharged from the liability. Three is, the person, who has to proceed against the company, is suspended from exercising his rights for moratorium remains in force as long as CIRP period continuing. By which, there can be myriad implications, chain of actions and reactions, if time specified by the statue is changed in the name of processual justice.

33. Moreover, this Adjudicating authority after all a body given with limited rights specifying under what section what right this Adjudicating Authority has. Assuming this Adjudicating Authority is a Court, and then also Courts

are supposed to declare the rights of the parties, not to create new rights which are not present in the legislation. When no right has been given to this Adjudicating Authority to have a say on CIRP period, this Adjudicating Authority is obviously not supposed to extrapolate its jurisdiction by naming it as processual justice.

34. To say procedural mandate is directory, constitutional Courts always held that this will become directory to the extent that does not affect the rights of the parties. Either way, either by principle or by jurisdictional aspect, this Adjudicating Authority cannot get into to say that 180/270 days' period as procedural, therefore, it has no jurisdiction to trespass into the domain set out for the Committee of Creditors except to the extent mentioned in Sec 31 of the Code.

35. Before closing out this dilemma of "may" versus "shall", it must be imperative to say that "may" used in section 30 (4), is indeed a discretion given to CoC either to reject or accept the Resolution Plan with 75% voting despite the plan in all respects is correct. Such phraseology cannot be misconstrued as requisite of 75% as directory.

36. In view of the reasons given above, the ratio decided in M/s Surendra's case (supra) cannot be extendable to extend/revive time of corporate insolvency resolution process period. In this logic, if M/s. Surendra's case (supra) is seen, the answer to this applicant's query is very much available in that judgment itself. On the top of all, whatever that is to be done in the CIRP period, that has been done without any complaint. And this Resolution Plan, to which this Financial Creditor is vouchsafing, has not been approved by the CoC as envisaged under the Code. Under this statute, this financial creditor either on legal front or on the front of natural justice has no grievance to seek relief for extension or rather revival of CIRP period, therefore, the question of extension will not arise when the period is already completed. The basic reason is, the time period set for completion of CIRP is part of substantive law, not procedural law to say "shall" can be "may", or "mandatory" can be "directory".

37. In view of these reasons, we have not found any merit in asking for revival of CIRP period by discounting the period consumed in appointing the Resolution Professional.

38. The other point, i.e. Super Majority mandate, this applicant raised is very much answered by this Bench in ***ICICI Bank Ltd Vs. Innoventive Industries Ltd: (MA 557, 530, 529 & 590/2017, IA 72/2017 in C.P. 01/I&BP/2016 dated 08.12.2017 – NCLT, Mumbai Bench-1).***

39. Before going into discussion in respect to the CIRP period mentioned u/s 12 of the Code, having regard to super majority as envisaged under the Code, we believe it is relevant to look into the consistency this Bench has been maintaining all along, to say so, we wish to revisit the order *ICICI Bank Ltd Vs. Innoventive Industries Ltd* (supra) which is as below:

> *"9. On hearing the submissions of this applicant, the moot point to be adjudicated is as to* ***whether this Adjudicating Authority has jurisdiction to exercise over a decision taken by CoC as contemplated in the Code.***
>
> *10. The Code in clear terms has stated that any decision that has been taken by CoC in the Corporate Insolvency Resolution period shall be a resolution with 75% voting shares of CoC. Since this being the conspectus of law, to conceive why any approval of CoC shall be an approval with 75% of the voting shares of the creditors, it is imperative to go through various provisions of this Code, which has dealt with the approval of CoC and the resolution plan.*
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> *The provisions are as follows:*
>
> ***Section 12: Time limit for completion of Insolvency Resolution process***
>
> *1. .....*
>
> ***2.*** *The resolution professional shall file an application to the Adjudicating Authority to extend the period of the Corporate Insolvency Resolution Process beyond 180 days, if instructed to do so,* ***by a resolution at a meeting of the CoC by a vote of 75% of the voting shares.***
>
> *3. .....*

Provided .....

Section 21: <u>All decisions of the CoC shall be taken by a vote of not less than 75% of voting shares of the Financial Creditors.</u>

Provided that where a Corporate Debtor does not have any financial creditors, the CoC shall be constituted and comprised of such persons to exercise such function in such manner as may be specified by the Board.

Section 22: Appointment of Resolution Professional.

1. .....

2. The CoC, may, in the first meeting, ***by a majority vote of not less than 75% of the voting share of the Financial Creditors****, either resolve to a point the interim resolution professional as a Resolution Professional or to replace the Interim Resolution Professional by another Resolution Professional.*

3. .....
4. .....
5. .....

Section 27: Replacement of Resolution Professional by CoC.

1. .....

2. The CoC may, at a meeting, ***by a vote of 75% of voting shares****, propose to replace the Resolution professional appointed under section 22 with another resolution professional.*

3. .....

Section 28: Approval of Committee of Creditors for certain actions*.*

1. .....

2. .....

3. *No action under sub-section (1) shall be approved* ***by the CoC unless approved by a vote of 75% of the voting shares.***

4. .....

Section 30: Submission of Resolution Plan.

1. .....
2. .....
3. .....

4. *The CoC may approve a resolution plan* ***by a vote of not less than 75% of voting share of the financial creditors.***

5. .....
6. .....

11. When it has been replete in the provisions of the Code mandating resolution approved by CoC means a resolution with vote not less than 75% of the voting share of CoC, and when for passing a resolution, a cap is set out as an inbuilt measure in a statute without leaving any ambiguity to the judiciary, will it be open to this Bench to question or to alter the cap given by the legislation? I strongly believe that at least this Adjudicating Authority has no such jurisdiction to venture into. It is also to be kept in mind of us as to whether interpretation of a statute is open to this Authority when legislation in clear terms said what the mandate is. By reading the above provisions, it is ex facie understandable to any layman that a resolution by CoC with less than 75% voting share of CoC is non est in law.

12. In section 21 (8) of the Code, ***it has been mandated that all decisions of the CoC shall be taken by a vote of not less than 75% of voting shares of the Financial Creditors.*** *Neither a proviso, nor is any exception carved out to this section saying this mandate is exempted in so and so situations. Can there be any thing clearer than this?*

13. It goes without saying, if anybody wants to venture into interpretation of a statute, first it has to be ascertained that reading of a section is not giving any meaning or the meaning that comes out of such section is absurd and inconsistent with the remaining part of the legislation. After having come to such conclusion that section is unable to reflect any meaning, then heading of the meaning is to be seen, if the heading of the section is also of no meaning, then to see the heading of the respective chapter, after doing all these exercises, even then also, if one is unable to construct the meaning of the section, then to go to the statement and objects of the statute and then to see Committee reports to find out as to what the intention of the enactment in respect to the section that is unable to give right meaning.

In law, "right meaning" means not the meaning we feel right, it is the meaning contemplated in the statute. Here it is out and out visible that approval of the resolution by CoC means, approval with 75% voting by CoC, not otherwise. Therefore, this Adjudicating Authority cannot put its neck into, to say that approval of CoC with less than 75% amounts to approval of resolution by CoC.

14. In section 21(8) of the Code, in addition to all other sections wherever 75% voting aspect has been mentioned to be given to the resolutions of CoC, it has been categorically mentioned that ***all decisions of CoC shall be passed with vote not less than 75% of voting share of the Financial Creditors.***

15. For the sake of clarity, as against the contentions of the applicant Counsel saying that the primary objects of this enactment is not

liquidation of assets but to save business, let us examine the statements and objects of this Code, which are as follows:

"An Act to consolidate and amend the laws relating to re-organization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and bankruptcy board of India, and for matters connected therewith or incidental thereto".

16. In this statement, what appears to us is, this is an Act come into force for consolidation of various laws such as repeal of Provincial Insolvency Act and Presidency – Towns Insolvency Act in addition to amendments to Sick Industrial Companies (special provisions) Repeal Act, 2003; Indian Partnership Act, Central Excise Act 1944, the Income Tax Act, the Customs Act, Recovery of Debts due to banks and Financial Institutions Act, the Finance Act, SARFAESI Act, Payment and Settlement Systems Act, 2007, the Limited Liability Partnership Act 2008 and Companies Act 2013, because until before this Act came into force, we did not have single law dealing with insolvency and bankruptcy. Why all these repeals and amendments were taken place is to consolidate the law in respect to insolvency and bankruptcy spread in various enactments and to provide an effective legal framework for timely resolution of insolvency and bankruptcy to support development of credit markets and encourage entrepreneurship. The reason for consolidation is to make insolvency and bankruptcy resolution in a time bound manner for maximization of value of assets of various persons mentioned above to promote entrepreneurship, availability of credit and balance of interests of all stakeholders. The basic idea to bring all at one place is, to avoid answering every time legal issues such as overlapping issues, repugnancy issues, jurisdictional issues, obtaining stays on the ground some other Act is in play, multiplicity of proceedings to achieve the object, like wise plethora of issues. And it was not working also. One answer for all this is single window approach. Had it been the intendment that reorganization or restructuring is the primacy of this Code, there were many for it, SICA, JLF etc. All failed. The only object in leaving everything to the domain of creditors is, because their stake is stuck in the company, so far in our experience, we have seldom come across a company that has assets more than liabilities, means what, what is left in the company is less than the stake of the creditors, therefore they are the right persons to take a decision on their stake. One good thing and warning to the creditors is to attain super majority to take any decision in respect to sacrifice of their rights. It is applied to all decisions, because every decision in one or other way, directly or indirectly is related to the rights of the creditor. So in order to avoid abrasion of the rights of creditors to minimum, it has been asked, not asked indeed, but mandated to take all decisions with super majority, for which, we cannot jump to tweak it by using the interpretations about "may" and "shall" or "and" "or", yes it is true, constitutional courts with power under constitution have decided umpteen times vice-a'-versa, it all depends upon the context involved in that particular case. First, we don't have such constitutional powers, second –

we have to examine it as to whether any such necessity is there for us to go to such an extent, when mandate is clear and language of statute is as clear as sunlight.

17. Before going into the proposition raised by the applicant counsel, it is also necessary to note the Code name itself is Insolvency and Bankruptcy Code applying insolvency to the company and bankruptcy to individuals. That being the case, can it be conceived that insolvency in respect to corporate persons is limited to resolution plan alone ignoring the liquidation process i.e. part and parcel of Part-II of this Code? To our sense, the phrase "insolvency resolution of corporate persons" mentioned in the statement is inclusive of liquidation process, therefore, it is inconceivable to understand that the Code has come into existence for restructuring of the companies alone and not for liquidation. If we see the objects closely, it is also clear a word "reorganization" is included before the phrase "and insolvency resolution of corporate persons", so as to say that the phrase "and insolvency resolution of corporate persons" is not to indicate CIRP alone, strictly speaking the word "reorganization" denotes some arrangement before proposing for liquidation. Had it been for only reconstruction to provide hair cut to save the company notwithstanding the fact about repayment capacity to pay to the creditors, for that purpose SICA was there, CDR mechanism, JLF mechanism were there. We don't think insolvency resolution shall be given priority ignoring the mandate given in law, it is absurd thought. Moreover, that wisdom is not in the realm of this Authority, that Wisdom was already applied by the Parliament - apex policy making body in respect to governance of this Country. Supplementation or tweaking the law is not possible. Here also, no timeline is given to what extent resolution period will continue, the only difference is a "calm period" is set out to enter into a resolution plan with 75% of voting share of CoC. Resolution or no resolution, it is a business decision by CoC with complete authority, this Bench cannot go into the decision of CoC.

18. In report of the bankruptcy law reforms committee, it has been said as follows in respect to primacy of the Code:

The Joint Committee is of the opinion that freedom should be permitted to the overall market to propose solutions for keeping the entity as a going concern. Since the manner and the type of possible solutions are specific to the time and environment in which the insolvency becomes visible, it is expected to evolve over time, and with the development of the market. The Code will be open to all forms of solutions for keeping the entity going without prejudice, within the rest of the constraints of the IRP. ***Therefore, how the insolvency is to be resolved will not be prescribed in the Code. There will be no restriction in the Code on possible ways in which the business model of the entity, or its financial model, or both, can be changed so as to keep the entity as a going concern. The Code will not state that the entity is to be revived, or the debt is to be restructured, or the entity is to be liquidated. This decision will come from the deliberations of the creditors committee in response to the solutions proposed by the market.***

19. As to super majority, the report has categorically mentioned that majority vote requires more than or equal to 75% of the committee by weight of the total financial liability. It has also been said this subject squarely falls in the responsibility of the Creditors' Committee, not in the realm of Adjudicating Authority powers.

20. The creditors committee will have power to decide the final solution by majority vote in the negotiations. ***The majority vote means more than or equal to 75 percent of the creditors committee by weight of the total financial liabilities****. The majority vote will also involve a cram down option on any dissenting creditors once the majority vote is obtained. This is inevitable to arrive to a decision. The Adjudicator enables the RP to clarify matters of business from the creditors committee during the course of the IRP. For example, if the RP needs to raise fresh financing during the IRP, he/she may seek approval from the creditors committee rather than the Adjudicator. The list of these matters, which fall in the responsibility of the creditors committee, are specified in the Code.*

21. In view of the statute mandate and the statements and objects of the enactment and the report of the Committee who drafted the legislation have not minced words in saying that the pre-requisite for approval of the resolution by CoC is 75% majority of the vote shares of the CoC, as against this, I wonder how this Bench could interfere into the wisdom of the CoC to say that less than 75% majority is also a possibility to pass a resolution.

22. This issue has already come before this Bench in the past, it was already held that there could not be any occasion to this Bench to look into a resolution plan that has not been approved by the Committee of Creditors with 75% majority as set out in the Code, because under section 31 of the Code, the Adjudicating Authority is given power to examine as to whether the plan approved by the Committee has complied with section 30(2) of the Code or not, if complied with, it has to be approved by this Authority, if not complied with, to reject the resolution plan approved by the committee with not less than 75% voting share of the company.

By reading this, to invoke the jurisdiction of this Authority, there must be a resolution plan approved by the Committee with 75%. So, there is total prohibition upon this Bench to go into as to whether approval of 75% is required or not and as to whether resolution plan approved by the committee is otherwise correct or not, except as mentioned in section 31 of the Code."

40. So by reading the above observations of this bench in Innoventive (supra), it could be clear that the super majority provided for the decisions taken by CoC is substantive law to achieve the purpose and object of the Code. The purpose of 75% voting approval is to decide 100% creditors' stake as well as other stakeholders' stake, for which the statute set out an approval with not less than 75% voting of the CoC. Here, whatever decision

that has taken with this 75% voting will have bearing over the rights of the Financial Creditors, Operational Creditors, Workmen, Shareholders, and other stakeholders, if any. When these many stakeholders' rights are involved, how a Court could alter the requisite authority mentioned by the statute to take a decision on the rights of the stakeholders? If at all any such alteration is made to the approval of the CoC, two anomalies will come, one is, violation of the law, two is, the alteration of the rights of the stakeholders bereft of statutory approval. In fact, the rights of less than 25% creditors, according to this Code, at times decided against their wish, but they have to oblige to it, because it is the mandate of State. Why it has been made to 75% is, sometimes all may not agree on a point, to avoid it, it has been made 75%. It may be said it could be 50%, but what right anybody has to say so. It is like a special resolution under section 114 of the Companies Act 2013. If anybody ventures to alter this majority means, it is playing with the rights of the parties, for which all we know, courts are meant for declaring the rights of the parties as envisaged under an enactment, not to create or write off the rights of the parties, therefore this Bench has no right to cross that Lakshmana Rekha.

41. To say about the requisition of 75% majority, this super majority mandate has been approved with the imprimatur of sovereignty, when that being so, how such a legislation that reiterated not once four or five times that super majority is a mandate for approval of the CoC can be slighted? Courts are, at best if any ambiguity is there, can interpret the law, but not to make the law when the mandate of law is explicitly clear.

42. In view of these reasons, a resolution plan accepted by voting in CoC with less than 75% cannot even be looked into by this Bench u/s 31 of the Code, henceforth, this Bench has not found any merit in the relief sought by this applicant.

43. Like this, a similar situation is present under Companies Act where a special Resolution is required to be passed, it has to passed with no less than 75% voting of the members attending to the meeting, but so far in this

situation, it has not come across anywhere, courts interfering with to say that it is not mandatory to obtain 75% voting on certain subjects where a special resolution is requisite.

44. For there being no Resolution Plan approved with 75% of the voting of CoC, the sequitur could be liquidation of the company as mentioned u/s 33(1)(a) of the Code.

45. Since the Resolution Applicant has already filed an application stating that CIRP period is commenced vide order dated 21.03.2017 with appointment of Mr. Charudutt Marathe as interim resolution professional consequently, Mr. T. Sathisan i.e. the applicant herein has been appointed as Resolution Professional on 04.09.2017, this Bench has examined this application as well, the observations are as below.

46. When we were about to pass liquidation order, we could not ascertain any requisite information from the application moved by this Resolution Professional except expressing how much delay has been taken place in appointing the Resolution Professional along with copy of invitation for expression of interest to submit Resolution Plan for the Corporate Debtor, the resolution plan, the minutes of 9thCoC meeting, e-voting details, but he has not filed any material disclosing public announcement given u/s 13, list of creditors, valuation given by the valuers, liquidation value. It is intriguing to see a man appointed as Resolution Professional not attaching requisite information to enable this Bench to pass liquidation order. The liquidation value mentioned in this order is taken out from MA 80/2018 and 110/2018 filed by the other Financial Creditor.

47. By going through his application, it appears his major concern is about delay taken place in appointing him as Resolution Professional. For the IRP should have handed over all the functions carried out by him, this RP should have got the liquidation value reports from the valuers, no such material has been annexed to this application. That clearly shows that this Applicant (Resolution Professional) has failed to discharge his duties as mentioned under this Code, whereby this Resolution Professional is hereby directed to

place all the material within seven days hereof, failing which, appropriate observations will be made against him and send the same to IBBI to take necessary action against this Resolution Professional.

48. Another anomaly in this case is, though CIRP period was over by 16.12.2017, this Resolution Professional instead of bringing this fact to the notice of the Bench, allowed COC to cast voting on the resolution placed on 3.1.2018, which is not permissible under law, because the right of COC to hold meetings and pass resolution will come to end once 270 days CIRP period is complete. This is another violation committed by the Resolution Professional herein.

49. In view of the reasons aforesaid, MA 80 and 110 of 2018 filed by the Financial Creditor (JM Financials Asset Reconstruction Co. Ltd.) are hereby **dismissed** as misconceived.

50. As to MA 24/2018, the Resolution Professional is directed to file all the materials as directed above.

Sd/-

V. NALLASENAPATHY
Member (Technical)

Sd/-

B. S.V. PRAKASH KUMAR
Member (Judicial)