NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1962 & 1963 of 2024
& I.A. No. 7303, 7304 of 2024

[Arising out of Order dated 20.08.2024 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench-1 in IA No.4959 of 2023 & IA No.5023n of 2023]

In the matter of:

State Bank of India & Ors. **...Appellants**

Vs.

Jyoti Structures Ltd. & Ors. **...Respondents**

For Appellant: **Mr. Animesh Bisht, Mr. Aniruddh Gambhir, Mr. Raunak Dhillon, Mr. Anchit Jasuja, Advocates.**

For Respondent: **Mr. Arun Kathpalia, Mr. Abhijeet Sinha, Sr. Advocates with Mr. Malak Bhatt, Ms. Neeha Nagpal, Ms. Samridhi, Advocates for R-1.**

Mr. Gopal Jain, Sr. Advocate with Mr. Anuj Tiwari, Ms. Aroshi Pal, Ms. Bandita, Advocates for R-2 to 12.

J U D G M E N T
(09th December, 2024)

Ashok Bhushan, J.

These two Appeals have been filed by the Financial Creditors challenging common order dated 20.08.2024 passed by the Adjudicating Authority (National Company Law Tribunal) Mumbai Bench-1 in IA No.4959 of 2023 & IA No.5023 of 2023. IA No.4959 of 2023 was filed by the Respondent No.1, the Corporate Debtor/ Company and IA No.5023 of 2023 was filed by Respondent Nos.2 to 12- investors in the company. By the

impugned order, both the applications were partly allowed and disposed of. Aggrieved by the order dated 20.08.2024, these Appeals have been filed.

2. Brief facts of the case necessary to be noticed for deciding these Appeals are:-

2.1. Jyoti Structure Limited an Engineering Procurement Company (EPC) was admitted to Insolvency Resolution Process by order dated 04.07.2017. In the CIRP process of the Corporate Debtor, a Resolution Plan was submitted by one Sharad Sanghi. The Resolution Plan was approved by the CoC which in turn was approved by the Adjudicating Authority vide its order dated 27.03.2019. The Resolution Plan provided for continuance/ roll-over NFB facilities by existing lenders. A Non-Fund Based (NFB) Facility Agreement was executed between Company and the Lenders on 15.09.2021. On 09.11.2021, approved Resolution Plan was implemented achieving the closing date. From 09.11.2021 to 23.11.2022, the company was engaged with NFB lenders for issuance of bank guarantee/ letter of credit under the NFB facilities. NFB lenders expressed their inability to disburse the NFB facilities until completion of certain procedural requirements pertaining to execution of a fresh Tripartite Agreement between Maharashtra Industrial Development Corporation, the Company and SBICAPS Trustee Company Ltd. On 23.11.2022, Tripartite Agreement was executed and completed as requested in the Joint Lenders Meeting held on 11.10.2022. The company had been engaged with the State Bank of India and other lenders for issuance of bank guarantee. Company filed IA No.1094 of 2023 before the Adjudicating Authority seeking exclusion of time period from commencement of the repayment timeline for the year 1 payment i.e.

09.11.2021 until 23.11.2022, when Tripartite Agreement was executed. The exclusion application which was initially rejected by the NCLT on 16.06.2023 was ultimately allowed by this Tribunal vide order dated 02.08.2023. Exclusion of time period commencing from repayment timeline stipulated in the approved Resolution Plan upto the date when Tripartite Agreement was executed i.e. 23.11.2022 was allowed subject to no modification of final timeline of four years for repayment. Several joint lenders meeting took place between the parties where company impressed upon disbursement on NFB limits.

2.2. On 27.10.2023, Company filed an IA No.4959 of 2023 seeking direction to the NFB lenders to release the NFB limits. Investors also filed a similar IA No.5023 of 2023. Joint Lenders Meeting was held on 17.11.2023 which recorded that proposal of sanction of NFB limits is under process. On 14.12.2023, one of the lenders namely— 'Bank of Baroda' issued the bank guarantee. Adjudicating Authority heard both the IAs and passed an order on 20.08.2024 which is impugned in the Appeal. Subsequent to the order dated 20.08.2024, a Joint Lenders Meeting was held on 26.09.2024 where the issue of release of the NFB limits was deliberated. Some of the lenders flagged the issue of non-release of NFB limits may jeopardize the operations of the company and impact its ability to make payments under the approved Resolution Plan. These Appeals have been filed by the Appellant on 21.10.2024.

2.3. The Appellant in the Appeal has challenged the impugned order to the limited extent as set out in paragraph 8(a)(i) and 8(a)(vii). The above statement has been made in paragraph 8(viii) to the following effect:-

> *"viii) In light of the above, the Appellant, humbly seeks to challenge the Impugned Order to the limited extent set out in paragraph 8(a)(i) and paragraph 8(a)(vii) above."*

2.4. Paragraph 8(a)(i) and 8(a)(vii) as referred above of the Appeal is as follows:-

> *"i) Schedule VI Clause F of the Resolution Plan inter alia provides for roll-over of the NFB Limits, to the extent of each Appellants' exposure, to be made available to the Borrower. This clause further provides that the issuance of the BGs / LCs (i.e. the NFB Limits) will be done based on due consideration of the project and subject to applicable laws and regulations for such issuance / utilization.*
>
> *vii) Such a direction to release the NFB Limits at the first instance, without due consideration of the Borrower, and for the Respondents to provide documents / information as requested by the lenders (including the Appellants), is wholly without any basis and reasons whatsoever. By passing such a direction, the L.d. Adjudicating Authority has re-negotiated and/or re-written the commercial terms that were already agreed under the Resolution Plan and NFB Agreement and has exceeded its jurisdiction by interfering in the commercial terms agreed between the parties. The Impugned Order, to*

this extent, is wholly contrary to the terms of the Resolution Plan and the NFB Agreement."

2.5. When we look into paragraph 8(a)(i) and 8(a)(vii), paragraph 8(a)(i) notices the Clause F of Schedule VI of the Resolution Plan and does not contain any prayer. Prayers are contained in paragraph 8(a)(vii). The direction which has been challenged in the Appeal is contained in paragraph 7.9 of the impugned order, aggrieved by which direction this Appeal has been filed. Paragraph 7.9 of the impugned order is as follows:-

"7.9. We note that the implementation of the Plan got delayed for the reasons stated to be beyond the control of the SRA and this led to exclusion of the time by consent before Hon'ble NCLAT. It is the case of Respondent that the delay in implementation of plan has necessitated the consideration of company as well for release of the NFB facilities and the consideration of company is expressly stipulated in the NFB agreement signed by the Corporate Debtor. However, we are of the considered view that the NFB limits ought to have been released at the first instance by the lenders as contemplated the plan. The respondents shall have the right to constantly monitor the business performance of the company and shall be competent to raise flags at appropriate time in case of deviations and take corrective action at that time. The Corporate Debtor shall furnish the information/documents required by lenders for review of financial performance of the company after its first release."

2.6. The challenge in the Appeal is only to the limited extent as prayed in the Appeal itself. In the relief sought in the Appeal, Appellant has prayed following relief in Paragraph 21 which reads as follows:-

> *"21. Reliefs Sought*
>
> *In view of the facts mentioned in paragraph 7 above, points in dispute and questions of law set out in paragraph 8 above, and grounds mentioned at paragraph 9 above, the Appellants prays that this Hon'ble Tribunal be pleased to:*
>
> *a) Allow the present Appeal and set aside the Impugned Order dated August 20, 2024 passed by the Hon'ble National Company Law Tribunal, Mumbai, Bench-1 in I.A. 4549 of 2023 and I.A. 5023 of 2023 in the matter of C.P. (IB) 1137/MB/2017 directing the Appellants to release the non- fund based limits under the resolution plan approved for the Corporate Debtor to the Borrower i.e. Jyoti Structures Limited;*
>
> *Pass such other and further reliefs as the nature and circumstances of the case may require."*

3. We have heard Counsel for the Appellant as well as Counsel appearing for the Respondent No.1 and Counsel appearing for Investors.

4. Counsel for the Appellant challenging the impugned order contends that the order passed by the Adjudicating Authority is contrary to the Resolution Plan. Counsel for the Appellant referring to Clause F (I) in Section VI of the Resolution Plan submits that the clause provides that the

BGs/ LCs will be released, upon a request made by the borrower after due consideration of the project by the respective issuing lender and subject to applicable laws and regulations for such issuance/ utilisation. Counsel for the Appellant refers to RBI Circular to support his submission. Counsel for Appellant refers to RBI Circular dated 01.04.2023. Clause 2.2.3 which requires safeguards to be observed by the banks. Counsel for the Appellant submits that there is no commercial basis or benefit in evaluating a project in isolation, without evaluating a borrower. Resolution Plan was voted by the CoC on 27.03.2018 and after several rounds of litigations, it was approved by the Adjudicating Authority. More than five years have elapsed and a viability check of the borrower is essential. Adjudicating Authority in paragraph 7.9 of the impugned order has directed the Appellants to release the NFB Limits at the first instance without the due consideration of the borrower, while directing the Respondents to furnish the information/ documents required by lenders for review of financial performance of the borrower, after the first release. Such a direction is wholly contrary and over and above the terms agreed under the Resolution Plan as well as the Master Circular issued by the RBI. It is further submitted that the impugned order is contrary to the terms agreed under the NFB Agreement between the borrower and the Appellants post approval of the Resolution Plan. Counsel for the Appellants has referred to clause 2.4(a)(i) and (iii) of the NFB Agreement which empowers the lenders to consider borrower as well as the project. The above clause clearly indicate that the lenders have right to evaluate the borrower under the project and based on that evaluation lenders may disburse the NFB limits. Counsel for the Appellant again

reiterated the resolution on the basis of Master Circular dated 02.07.2012 as amended from time to time specially clause 2.2.3 as noted above. It is contended that under the Master Circular of the RBI, the Appellants are statutorily required to assess the borrower prior to issuing the BGs/LCs to the borrower. It is further submitted that the Adjudicating Authority has failed to appreciate that there is no inconsistency between the terms of the Resolution Plan and the NFB Agreement. It is further submitted that the Appellants have not denied the release of NFB limits to the borrower and have only sought for certain documents/ information to be provided to check the viability and financial condition of the borrower prior to such release.

5. Counsel appearing for the Respondent- Company refuting the submissions of the Counsel for the Appellant submits that the Resolution Plan was approved by the Appellants with majority of 80% which clearly contemplated roll-over of the NFB facilities to the company which was to be continued in the proportion as was earlier operating. The submission of the Appellants that they do not have any obligation to issue/ release/ disburse the NFB limits under the approved Resolution Plan is incorrect. The Appellants knowing all facts including the viability of the company have approved the Resolution Plan and approved the plan which provided for rolling over of the NFB facilities on basis of appraisal of the project. Counsel for the Respondents have referred to relevant clauses of Part-VI of the Resolution Plan which also contain stipulation that NFB limits are not to be unreasonably withheld. As per the provisions of the IBC, consideration of feasibility and viability of the Resolution Plan can be conducted only at the

stage of approval of the Resolution Plan under Section 30(4). When the Resolution Plan has been considered and approved by the CoC after considering the feasibility and viability of the company and it was decided to roll-over the NFB limits, there is no occasion to turn round and oppose issuance of NFB facilities. The Corporate Debtor was EPC Company which after obtaining relevant contract is required to submit Performance Bank Guarantee and due to non-release of BGs/LCs, the very business of company cannot progress. Further the Resolution Plan itself contemplated that pay out under the plan has to be on the basis of revenue generated. The RBI Circular relied by the Counsel for the Appellant is not attracted. RBI Circular was very much in existence at the time of approval of the Resolution Plan. NFB Agreement which was relied by the Counsel for the Appellant was entered between the parties to give effect to the approved Resolution Plan and the said Agreement has to be read and interpreted in the light of the Resolution Plan. Counsel for the Respondent has also referred to the Joint Lenders' Meeting held on 26.09.2024 where one of the Banks i.e. IDBI Bank has flagged that non-release of the NFB limits may jeopardize the operations of the company which *inter alia* will impact its ability to make payments under the approved Resolution Plan. It is submitted that the order passed by the Adjudicating Authority amply protect the interest of the Appellants as well as the Company. As per the provisions of the Resolution Plan, Appellants are fully entitled to consider the projects for which bank guarantees are asked for by the company. But at the time of consideration of the project for which bank guarantees have to be submitted, there is no occasion to start examining the viability and

feasibility of the company for issuance of the bank guarantees, which issue is already over by approval of the Resolution Plan by the CoC.

6. We have considered the submissions of the Counsel for the parties and perused the record.

7. The dispute between the parties lay in a very narrow campus which has been noticed in paragraph 7.1 of the impugned order. In paragraph 7.1, Adjudicating Authority while noticing the dispute has observed:-

> *"7.1. There is no dispute between the parties that the Respondents have right to evaluate each project before issuing any Guarantee/Letter of Credit in relation to such project awarded by the customer of Company. The dispute before us pertains to the Respondent's right to also evaluate the Company as such before releasing Non-Fund Facilities, which shall result into issuance of Guarantee(s)/Letter of Credit by the Respondents in relation to projects awarded to the Company, as is contemplated in NFB Agreement having been entered subsequent to approval of Resolution Plan in terms of stipulation contained in such approved Resolution Plan that the parties shall enter into definitive agreements."*

8. Before we proceed to enter into respective submissions of the parties, it is relevant to notice certain clauses of the approved Resolution Plan with regard to which clauses there is no dispute between the parties. Resolution Plan itself has captured the nature of business and necessity for roll-over of

the bank guarantees/letter of credit. Clause 2(b) of the plan notices as follows:-

> ***"2. Restructuring of Debt***
>
> *(b) Engineering Procurement & Construction ("EPC") business is dependent on banking support. In this regard, the Proposed Investors have not sought any fresh limits. The Proposed Investors would only require roll-over of bank guarantees ("BG")/letter of credit ("LC") limits to the extent of the current exposure of financial creditors as on the date on which the CoC votes on this Final Resolution Plan.*
>
> *This will ensure growth of revenue and margins for the Company, which are crucial for meeting debt repayment commitments. The roll-over of the BG/LC limits is only applicable to the extent of released/discharged/cancelled/returned (by the beneficiaries) BGs/LCs (and not invoked/ encashed BGs/LCs). This is further explained in paragraph F of Section VI.*
>
> *In case any new BG/LC, that is issued after the BG/LC limit being rolled over, is invoked or encashed, the amount of such invocation/encashment will be payable by the Company on demand, as per the terms of the BG/LC.*

9. Section VI of the Resolution Plan contains heading 'Financial Proposal'. Clause C deals with 'overall repayment schedule' which notices that an amount of Rs.3674 crores is proposed to be paid over a period of 15

years. One of the source of payments under the plan is 'cash flows of the company'. Clause C (1) is as follows: -

> ***"C. Overall Repayment Schedule***
>
> ***1. Secured Financial Creditors***
>
> *As per the Information Memorandum and subsequent amendments to the same, claims of existing secured financial creditors (fund based) other than those listed in paragraph C.6 below add up to INR 6405.49 crores (please refer to Section I, paragraph C(2) (a)). As per the Final Resolution Plan, out of the cash flows of the Company including from the equity infusion as per the terms of this Final Resolution Plan, an amount of INR 3674 crores is proposed to be paid over a period of 15 years. The repayment schedule is placed below and forms part of this Final Resolution Plan ("Secured Financial Creditor Repayment Schedule")"*

10. Clause F of Part VI deals with 'Bank Guarantee/ Letter of Credit Limits' which is as follows: -

> ***"F. Bank Guarantee/ Letter of Credit Limits***
>
> *1. The Proposed Investors have not sought any fresh BG/LC limits, but have only sought a roll-over, utilisation/issuance of the BG/LC limits to the extent of the current exposure of financial creditors as on the date on which the CoC votes on this Final Resolution Plan. Provided however that any such utilisation/issuance of the BG/LC will be done based on due consideration of the project by such creditor*

issuing the LC/BG and subject to applicable laws and regulations for such issuance / utilisation. However, the approval for the same will not be unreasonably withheld by the relevant Secured Financial Creditor issuing the BG/LC. Also, prior to issuance / utilisation of the LC/BG, the BG/LC issuing bank will be provided with all details of the project including but not limited to the client, location, and project funding while requesting for issue of rolled over BG/LC, for its evaluation."

11. Further, Section VII deals with 'other stipulations for the final Resolution Plan' which also contain provisions for payment to financial creditors from the equity infusion as well as arising from the business operations of the company. Section VII (I) is as follows: -

"I. Those financial creditors of the Company who qualify as "dissenting financial creditors" (as defined under the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process For Corporate Persons) Regulations, 2016, as amended from time to time) ("Dissenting Financial Creditors") shall be paid an amount as would have been paid to them in respect of their financial debt in case of liquidation of the Company ("Dissenting Financial Creditor Dues"). As set out in the provisions of the Insolvency and Bankruptcy Code, 2016 and the regulations framed thereunder, the Dissenting Financial Creditor Dues shall be paid from the cash flows of the Company including from the equity infusion as per the terms of this Final Resolution Plan and arising from the business operations of the Company, before any

recoveries are made by the Financial Creditors who voted in favor of the Final Resolution Plan as follows:…."

12. Stipulation pertaining to roll-over the BG/LC is also captured in Section VII (B) which is as follows:-

"B. The Company will need roll-over of BG/LC limits as described in paragraph C.2 (b) of Section I and paragraph F of Section VI. This will ensure growth of revenue and margins, which are crucial for meeting debt repayment commitments. BG limits will be allowed to be used as LCs as per the business needs. No fresh limits are being sought. The stipulation is only for the roll-over of the BG/LC limits to the extent of the current exposure of financial creditors as on the date on which the CoC votes on this Final Resolution Plan. The BG/LC charges will be limited to 0.5% per annum."

13. We may also notice certain clauses of NFB Agreement which has been relied by the Counsel for the Appellant. Counsel for the Appellant has relied on clause 2.4(i) & (iii) which are as follows:-

"2.4. "Terms of the Facilities

(a) Utilisation of the Facilities

(i) Subject to the terms and conditions set forth in this Agreement, the Borrower may request a Lender to issue, in a form, manner and tenor acceptable to such Lender based on due consideration of the Borrower and the project by such Lender, a Letter of Credit or Bank Guarantee for its own account, up to the Lender's

available Limit in respect of the relevant Letter of Credit Facilities or Bank Guarantee Facilities, as the case may be. The Letter of Credit Facilities and the Bank Guarantee Facilities may be interchanged upto the extent as set out in Schedule 1.

(ii).....

(iii) Any such utilisation/issuance of a Bank Guarantee or Letter of Credit will be done based on (a) due consideration of the Borrower and the project by such Lender issuing the Bank Guarantee or Letter of Credit and subject to applicable laws and regulations for such issuance/utilization, to the satisfaction of the Lender. However, the issuance of the same will not be unreasonably withheld by the relevant Lender issuing the Bank Guarantee or Letter of Credit. Also, prior to issuance / utilisation of the Bank Guarantee or Letter of Credit, the issuing Lender will be provided with all details of the project including but not limited to the client, location, and project funding while requesting for issue of rolled over Bank Guarantee or Letter of Credit, for its evaluation."

14. It is further relevant to notice that the obligation of the NFB lenders is effective from the closing date. As noted above, the closing date has been admittedly achieved in November 2021.

15. One more clause of the Resolution Plan necessary to be noticed is clause E (3) of Section VI of the Resolution Plan, which is as follows:-

"3. Upon the Final Resolution Plan receiving the approval of the NCLT, in the event of any

inconsistency between the terms set out in the Final Resolution Plan as approved by the NCLT and the terms set out in any agreement, documents, arrangement executed between the Company / its guarantors/ security providers/Founder Promoters/directors/employees and any of its creditors, the terms set out in the approved Final Resolution Plan shall prevail to the extent of such inconsistency."

16. Before we proceed further, we need to notice the prayers made in the application IA No.4959 of 2023 which was filed by the Company. In the application, Respondent No.1 had made following prayers:-

"PRAYER

In view of the above-mentioned facts and circumstances the Applicant most respectfully prays that this Hon'ble Tribunal may be pleased to:

a. Direct each of the Respondents to immediately and severally fulfill their obligations under the Approved Resolution Plan towards disbursement of their respective share of the NFB Facilities in accordance with the terms of the Approved Resolution Plan.

b. Grant an exclusion for the period from the date of the Exclusion Order i.e. 02 August, 2023 till each of the Respondents disburse their respective NFB Facilities in accordance with the terms of the Approved Resolution Plan.

c. Pass any other order which this Hon'ble Tribunal may deem fit in the interest of justice, equity and good conscience.

In the interim, the Applicant most respectfully prays that this Hon'ble Tribunal may be pleased to:

i. Suspend the payment obligations of the Company as envisaged under the Approved Resolution Plan during the pendency of this Application and/ or till each of the Respondents disburse their respective NFB Facilities in accordance with the terms of the Approved Resolution Plan.

ii. Pass any other order which this Hon'ble Tribunal may deem fit in the interest of justice, equity and good conscience."

17. It is relevant to notice that no other prayers of the application have been granted by the Adjudicating Authority except the direction issued in paragraph 7.9 of the impugned order. Applications have been partly allowed and other prayers made in the application has been refused which is clear from paragraphs 8 and 9 of the judgment of the Adjudicating Authority. The submission which has been much pressed by the Counsel for the Appellant is that under the Resolution Plan itself the lenders have to consider any request of the borrower subject to applicable laws and regulations for such issuance/ utilisation. Counsel for the Appellant has referred to Clause 2.4 (a)(i) & (iii) of NFB Agreement which provides as follows:-

"2.4 Terms of the Facilities

(a) <u>Utilisation of the Facilities</u>

(i) Subject to the terms and conditions set forth in this Agreement, the Borrower may request a Lender to issue, in a form, manner and tenor acceptable to such Lender based on due consideration of the Borrower and the project by such Lender, a Letter of Credit or Bank Guarantee for its own account, up to the Lender's available Limit in respect of the relevant Letter of Credit Facilities or Bank Guarantee Facilities, as the case may be. The Letter of Credit Facilities and the Bank Guarantee Facilities may be interchanged upto the extent as set out in Schedule I.

……

(iii) Any such utilisation/issuance of a Bank Guarantee or Letter of Credit will be done based on (a) due consideration of the Borrower and the project by such Lender issuing the Bank Guarantee or Letter of Credit and subject to applicable laws and regulations for such issuance / utilization, to the satisfaction of the Lender. However, the issuance of the same will not be unreasonably withheld by the relevant Lender issuing the Bank Guarantee or Letter of Credit. Also, prior to issuance / utilisation of the Bank Guarantee or Letter of Credit, the issuing Lender will be provided with all details of the project including but not limited to the client, location, and project funding while requesting for issue of rolled over Bank Guarantee or Letter of Credit, for its evaluation and (b) the funding/ financial arrangements required for undertaking and completing the project (including any fund based or non-fund based financing, or milestone based payment in terms of the relevant EPC contract for the

project, as applicable), for which the Bank Guarantees/ Letters of Credit is being requested from the relevant Lender(s), has been arranged by the Borrower and requisite documents to this effect having been submitted to the relevant lender prior to the issuance of the Bank Guarantees/Letters of Credit. The Lender(s) shall also, prior to the issuance of any LC/BG, as required, have the right to appoint a lenders' independent engineer for appraisal and evaluation of the project. The reasonable costs and expenses of such LIE shall be borne by the Borrower. Such appointment shall not be unreasonably withheld or delayed by the lenders."

18. The bone of contention between the parties is that although Resolution Plan contain issuance of NFB facilities after considering the projects where the agreement contains a clause which provide due consideration of the borrower and project by lenders. It is submitted by the Appellant that the contract entered between the parties have to be read in terms of the commercial contract between the parties. He further submits that on account of huge delay, company's viability has also to be looked into before issuance of any bank guarantee. The Adjudicating Authority has dealt the issue of viability of the company in the impugned order and after considering the provisions of Section 30(4) and judgment of the Hon'ble Supreme Court held that aspect of the viability of the corporate debtor and capability of person behind it after successful resolution would have been duly examined and considered by the CoC at the time of approval of the plan by the CoC. In paragraphs 7.4, 7.5 and 7.6, following has been laid down:-

"7.4. Section 30(4) of the IB Code provides that "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". Regulation 38 of IBBI (CIRP) Regulations, 2016 deals with the mandatory contents of the Resolution Plan and clause (3) thereof mandates that a Resolution Plan must demonstrate, amongst others, that (i) the plan is feasible and viable; and (ii) the resolution applicant has the capability to implement the plan. To demonstrate the feasibility and viability of a Resolution Plan, financial projections in relation to business of Corporate Debtor also forms part of the Resolution Plan. A Resolution Plan is placed for consideration of Committee of Creditors (CoC), which is comprised of financial creditors who in the present case are prominent banking companies of India. Before approving a Resolution Plan, the members of CoC are under bounden duty to make assessment of, inter-alia, (i) feasibility and viability of the plan, and (ii) capacity of the Resolution Applicant to implement the plan. It is pertinent to note the clause 5.3.1 of BLRC committee Report which states that "The Committee reasoned that members of the creditors committee have to be creditors both with the capability to assess viability, as well as to be willing to modify terms of existing liabilities in negotiations. Typically operational creditors are neither able to decide on matters regarding the insolvency of the entity, nor willing to take the risk of postponing payments for better future prospects for the entity. The Committee

concluded that, for the process to be rapid and efficient, the Code will provide that the creditors committee should be restricted to only the financial creditors".

7.5. In case of Essar Steels vs. Satish Chandra Gupta, the Hon'ble Supreme Court held that "31. Since it is the commercial wisdom of the Committee of Creditors that is to decide on whether or not to rehabilitate the corporate debtor by means of acceptance of a particular resolution plan, the provisions of the Code and the Regulations outline in detail the importance of setting up of such Committee, and leaving decisions to be made by the requisite majority of the members of the aforesaid Committee in its discretion. Thus, Section 21(2) of the Code mandates that the Committee of Creditors shall comprise all financial creditors of the corporate debtor". Further, at Para 40, the Hon'ble Supreme Court in this case stated that "Thus, what is left to the majority decision of the Committee of Creditors is the "feasibility and viability" of a resolution plan, which obviously takes into account all aspects of the plan, including the manner of distribution of funds among the various classes of creditors. What is important is that it is the commercial wisdom of this majority of creditors which is to determine, through negotiation with the prospective resolution applicant, as to how and in what manner the corporate resolution process is to take place".

7.6. This clearly demonstrates that a Resolution Plan is approved by CoC after looking into the aspect of its feasibility and viability as well as capability of Resolution Applicant submitting it to implement such

plan. Accordingly, it can be concluded that the aspect of viability of corporate debtor and capability of person behind it after successful resolution would have been duly examined and considered by the CoC being conscious of peculiar requirement of business of Corporate Debtor and the underlying assumptions in the financial projections embodied in the Plan based on stipulation that NFB facilities shall be in place."

19. It is also relevant to notice that present is not a case that SRA has violated in payment of money under the plan which fact has been noticed by the Adjudicating Authority in paragraph 7.7 which is as follows:-

"7.7. At this juncture, it is pertinent to take note of submission of Respondent that consideration of Company for release of NFB facility is necessitated on account of delay caused in implementation of the plan. We find that there is no allegation of violation in payment of money to various stakeholders proposed so far, though this Tribunal had granted additional time to the Applicants to make payments, which had fallen due, and which stands paid after raising further money via rights issue by the Company from its Investors. The Resolution Plan, in question, is a long tenure plan contemplating payment to various stakeholders out of cash flow of the Company in each succeeding year after approval of the Plan, and such stipulation of payment to stakeholders out of cash flow was considered feasible by the Respondents while exercising their vote on the plan. Accordingly, we have no hesitation to hold that CoC was conscious of proposals in the Resolution Plan in relation to NFB limits and they voted on the Plan

realising fully well that the said NFB limits are to be released, subject to project appraisal. As regards consideration of Company is concerned, we are of considered view that, after having found the Resolution Plan feasible and viable in the form it was placed before CoC and that Plan contemplated for revival of the Corporate Debtor, the Respondents cannot seek re-appraisal of the Company at the first instance as condition precedent for release of NFB facilities subject to project appraisal. The RBI Master Circular dated July 2, 2012 was in existence at the time of consideration of the Resolution Plan and CoC, while considering the need for continuance of NFB facilities, did not find the Plan in contravention of any law at that time. Accordingly, the argument in relation RBI directions has no merit."

20. Present is a case where except Bank of Baroda, no other lender has issued any bank guarantee or letter of credit. Present is not a case that the company has defaulted in any of the bank guarantee or letter of credit issued by the bank. At very threshold, the lenders are not operationalising the clauses of the Resolution Plan which provided roll-over of the NBF facilities. It is also not the case of the lenders that the project for which bank guarantee or letter of credit has been asked for are not viable project nor there being any consideration and rejection of issuance of bank guarantee on the basis of evaluation of any project. In paragraph 5.4, Adjudicating Authority has noticed that the company has infused Rs.170 Crores and company has procured 14 prestigious contracts with regard to which necessary bank guarantees etc. were to be issued. Paragraph 5.4 of the impugned order is as follows:-

"5.4. After the infusions of INR 170 crores the Company continued to, in line with the revival strategy contemplated under the Approved Resolution Plan and in its bona fides, secure the turnaround of the Company by obtaining new contracts and business. Considering that the Company had been a stalwart in its industry prior to undergoing CIRP, the Company was able to procure the following prestigious contracts having a consolidated value of INR 1162 crores:

Sr. No.	***Client***	***Project***	***LOA Value Rs. Cr. (excluding GST)***
1	*Adani Transmission*	*MP-II*	*127.10*
2	*Adani Transmission*	*Khavda - I*	*323.85*
3	*MPSEZ Limited Utilities*	*66 kv Mundra - I*	*39.54*
4	*Sterlite Power Transmission*	*Goa & Karnataka Projects*	*200.95*
5	*MPSEZ Limited Utilities*	*Mundra SEZ-II*	*36.26*
6	*Renew Power*	*Gadag Phase - II*	*27.77*
7	*Hydrotech Eng Co.*	*Towers for MEW Project, Kuwait*	*4.00*
8	*Adani Transmission*	*Khavda - II*	*170.72*
9	*Sterlite Power Transmission*	*Tower Testing*	*0.71*
10	*Bajaj Elec. Ltd*	*Tower Testing*	*0.58*
11	*Bajaj Elec. Ltd*	*Tower Testing*	*0.98*

12	*Bajaj Elec. Ltd*	*Tower Testing*	*0.55*
13	*Apraava Energy*	*FGH3-Bhadla*	*221.05*
14		*Other Income*	*8.36*
		Total	*1,162.42*

21. We may refer to judgment of this Tribunal in Company Appeal (AT) (Insolvency) No.539 of 2022 decided on 23.05.2023- ***"State Bank of India vs. MBL Infrastructure Limited and Ors."*** which also arose out of the direction issued by the Adjudicating Authority for implementation of the Resolution Plan. This Tribunal in the above judgment has observed that when the Resolution Plan has been approved, it is obligatory on all stakeholders to act in manner so as to implement the Resolution Plan. The argument that on account of extension of three years and nine months in the implementation of the plan, the plan is no more viable and cannot be accepted was raised and rejected. In paragraph 14 of the judgment, following was observed:-

> *"14. The object of the Code especially in a case where Resolution Plan has been approved and which approval also received the confirmation from Hon'ble Supreme Court, it is obligatory on all stake holders to initiate the implementation of the Plan, trying to find excuses for refusal to implement by either of the parties cannot be justified. All stake holders had to act in a manner so as to implement the Resolution Plan. The Lenders cannot absolve themselves from carrying out their obligation in the Resolution Plan by raising one or other pretext. The submission of the learned Counsel for the Appellant that due to granting of*

extension of three years and nine months in the implementation of the Plan, the Plan is no more viable, cannot be accepted. Viability and feasibility of the Plan is required to be considered at the stage when Plan is to be approved by the CoC. After the Plan has been approved, the issue of viability and feasibility cannot be allowed to be raised by the Appellant. The Adjudicating Authority did not modify the Plan in any manner and exclusion of the period from 18.04.2018 to 18.01.2022, cannot be said to be any kind of modification in the Plan."

22. The above judgment of this Tribunal dated 23.05.2023 was affirmed by the Hon'ble Supreme Court on 04.08.2023 by dismissing Civil Appeal No. 4636 of 2023.

23. The submission of the Appellant which we have noticed above is that Resolution Plan itself contemplated that the lenders while considering sanction of the NFB facilities have to follow the rules, regulations and laws. Counsel for the Appellant has referred to the Circular dated 01.04.2023 issued by the RBI to support his submission that the bank has to follow various safeguards. It is necessary to notice clause 2.2.3 (precautions for averting frauds) of the Circular issued by the RBI, which is as follows:-

"2.2.3 Precautions for averting frauds

While issuing guarantees on behalf of customers, the following safeguards should be observed by banks:

(i) At the time of issuing financial guarantees, banks should be satisfied that the customer would be in a

position to reimburse the bank in case the bank is required to make payment under the guarantee.

(ii) In the case of performance guarantee, banks should exercise due caution and have sufficient experience with the customer to satisfy themselves that the customer has the necessary experience, capacity and means to perform the obligations under the contract, and is not likely to commit any default."

24. The above clause which has been relied by Counsel for the Appellant as its heading showing is towards 'precautions for averting frauds'. The above clause is for the purposes of averting frauds. Present is not a case that the borrower is asking for issuance of NFB facilities which will lead to perpetuating any fraud on the lenders. Present is a case where Resolution Plan has already been approved by the CoC where decision was consciously taken to roll-over NFB facilities by the existing lenders. It is also not the case that the borrower has defaulted in any of the bank guarantees or letter of credit so as to give any apprehension in the mind of the lenders that borrower will not be able to honour the service the NFB facilities. Direction issued by the Adjudicating Authority is only to the effect that the lenders shall examine the project for which bank guarantees have been asked for and the Respondent shall have right to constantly monitor the business performance of the company and shall be competent to raise flag at appropriate time in case of deviation and take corrective action at that time and company shall furnish information/ documents required by the lenders for review of financial performance of the company after its first release. We are of the view that no error has been committed by the Adjudicating

Authority in issuing above direction. We are not persuaded to accept the submission of the Counsel for the Appellant that the lenders are entitled to review the viability and financial capacity of the company itself before release of any NFB facilities. We have noticed the relevant clauses of the plan which indicate that various repayments have to be made by company out of cash flow and revenue generated. The company being EPC contractor has to carry out and to work the contract to earn revenue, without the company carrying any contract it cannot generate revenue. Stopping the company to not able to work any contract due to non-release of bank guarantee is akin to stopping the company from carrying out normal function which shall lead non-compliance of the repayment obligation of the company which can never be object of approval of the Resolution Plan. Counsel for the Respondent has also relied on Joint Lenders' Meeting held on 26.09.2024 i.e. after passing of the order passed by the Adjudicating Authority where IDBI Bank has also flagged the issue the non-release of NFB limits may jeopardise the operations of the company which will impact the repayment of NCDs to assenting Financial Creditors. The view of the IDBI Bank has captured in minutes as well as SBI statement, which are as follows:-

> *"IDBI Bank informed that they have already put-up proposal for rollover of NFB limits to the sanctioning authority. Non release of NFB limits may jeopardize the operations of the company which inter-alia will impact the repayment of NCDs to assenting Financial Creditors, which is scheduled to start from November*

2025 and accordingly a holistic approach needs to be taken by JLM.

Indian Bank was of the view that Bank cannot take decision to release the NFB facility without the company providing any data. No committee will give approval for release of limits without due diligence or assessing the limit.

SBI informed that they have already sanctioned NFB limit. SBI had agreed for release of NFB facility subject to other lenders coming on board for proportionate release of NFB limits. However, before release of any Bank Guarantee an overview of all the projects handled by the Company, the capability of the Company to complete the ongoing projects and Company's financial status needs to be examined. As stress in any of the projects may jeopardize the new BGs being released."

25. Thus, the issue that non-release of NFB limits has also been flagged before the joint lenders meeting and the lenders have to think twice before not acting as per the approved Resolution Plan. Counsel for the Appellant has relied on the judgment of the Hon'ble Supreme Court in "***Venkatraman Krishnamurty and Anr. vs. Lodha Crown Buildmart Pvt. Ltd.- (2024) 4 SCC 230"*** to support his submission that the court cannot rewrite or create a new contract between the parties and has to simply apply the terms and conditions of the agreement as agreed between the parties under the contract. The Hon'ble Supreme Court in the above judgment in paragraphs 20 and 21 observed following:-

"20. The "date of offer of possession", under Clause 1.14, linked with issuance of the "Occupation Certificate" was distinct and separate from the "date of delivery of possession for fit outs" and Clause 11.3 unequivocally provided the consequences in the event of delay in that regard. The right of election given thereunder to the appellants to either continue or to terminate the agreement within ninety days from the expiry of the grace period was absolute and it was not open to NCDRC to apply its own standards and conclude that, though there was delay in handing over possession of the apartment, such delay was not unreasonable enough to warrant cancellation of the agreement. It was not for NCDRC to rewrite the terms and conditions of the contract between the parties and apply its own subjective criteria to determine the course of action to be adopted by either of them.

21. In this regard, we may refer to the Constitution Bench decision in General Assurance Society Ltd. v. Chandumull Jain[2], wherein it was observed that, in interpreting documents relating to a contract of insurance, the duty of the court is to interpret the words in which the contract is expressed by the parties because it is not for the court to make a new contract, however reasonable, if the parties have not made it themselves. Thereafter, in Rajasthan State Industrial Development & Investment Corpn. v. Diamond & Gem Development Corporation Ltd. 3, this Court reiterated that a contract, being a creature of an agreement between two or more parties, is to be interpreted giving the actual meaning to the

words contained in the contract and it is not permissible for the court to make a new contract, however reasonable, if the parties have not made it themselves.

22. More recently, in Shree Ambica Medical Stores v. Surat People's Coop. Bank Ltd., it was observed that, through its interpretative process, the court cannot rewrite or create a new contract between the parties and has to simply apply the terms and conditions of the agreement as agreed between the parties. Again, in GMR Warora Energy Ltd. v. CERCS, it was observed that courts cannot substitute their own view of the presumed understanding of commercial terms by the parties, if the terms are explicitly expressed. It was held that the explicit terms of a contract are always the final word with regard to the intention of the parties."

26. In the above case, National Consumer Disputes Redressal Commission decided a consumer complaint by issuing certain directions. The Hon'ble Supreme Court in paragraph 20 held that when consequences provided in the written contract, the NCDRC was not to apply its own criterion there was delay in handing over possession of the apartment, such delay was not unreasonable. The present is a case where company is requesting issuance of bank guarantees/ letter of credit as per the terms of the agreed Resolution Plan which was approved by the lenders themselves. The NFB Agreement entered between the parties was entered to give effect to the approved Resolution Plan between the parties and the NFB Agreement has to be read in a harmonious manner to give effect to the purpose and

intent of the clauses of the approved Resolution Plan. NFB Agreement clearly stipulated "Recital D of the NFB Agreement: The execution of this Agreement and other financial documents by the borrower has been authorised to give effect to the terms of the approved Resolution Plan. Thus, clauses of the NFB Agreement have to be read in a manner to give effect to the Resolution Plan and not to make any clause of the Resolution Plan otiose and unworkable.

27. We are of the view that the directions issued by the Adjudicating Authority in paragraph 7.9, which limited directions are under challenge in these Appeals, amply protect the interests of both the parties and no grounds have been made out to exercise appellate jurisdiction in these Appeals to interfere with the order impugned. We, thus, do not find any merit in these Appeals. Appeals are dismissed.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Arun Baroka]
Member (Technical)

New Delhi

Anjali