FIT FOR INDEXING.

IN THE NATIONAL COMPANY LAW TRIBUNAL: NEW DELHI
PRINCIPAL BENCH

CA No. 811(PB)/2018
in
(IB)-02(PB)/2017

IN THE MATTER OF:

Nikhil Mehta & sons (HUF) &Ors. .... **APPLICANT / PETITIONER**

v.

M/s. AMR Infrastructure Ltd. .... **RESPONDENT**

SECTION:
Under Section 7 of Insolvency & Bankruptcy Code, 2016

Order delivered on 29.09.2018

Coram:
CHIEF JUSTICE (RTD.) M.M. KUMAR
Hon'ble President

Sh. S.K. Mohapatra,
Hon'ble Member (T)

Presents
For the Petitioner(s):- Mr. Nishant Singh, Mr. Mohit Singh, Advs.

Mr. Abhishek Anand, Mr. Anant A. Pavgi, Mr. Tushar Tyagi, Advs. for RP.

Mr. Sakal Bhushan, Amicus Curiae.

ORDER

M.M KUMAR, PRESIDENT

CA-811(PB)/2018

A short question of law raised in this application filed under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 concerns the deadlock created by the low percentage of votes cast by a new

category of financial creditor - Real Estate (Commercial) and Real Estate (Residential). The aforesaid class of creditors were recognised by Code, 2016 by Amendment Act of 2018 w.e.f. 06.06.2018.

2. In order to put the controversy in its proper perspective it would first be necessary to notice few material facts. CP No. (IB)-02(PB)/2017 (Nikhil Mehta& sons (HUF) &Ors. v. M/s. AMR Infrastructure Ltd. was admitted for initiating Corporate Insolvency Resolution Process on 10.05.2018 by this Bench. Mr. Vikram Bajaj was appointed as Interim Resolution Professional. He made a public announcement on 15.05.2018 in terms of Regulation 6(1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (for brevity the 'CIRP Regulations'). The public announcement was published in the 'English Daily' (Business Standard) and its Hindi edition as well. The last date for submission of proof of claim in terms of Regulation 6(2)(c) of CIRP Regulations was 24.05.2018. A copy of the public announcement was duly uploaded on the website of the IBBI and has also been placed on record (Annexure A-2, colly).

3. The applicant- Interim Resolution Professional has taken various steps in discharge of his duties as per the requirement of law which include invitation of verification of claims; collation of information on assets of the company; custody of assets etc. A detailed progress report was filed by the applicant- Interim Resolution Professional and it was taken on record by this Bench on 05.07.2018 (Annexure A3).

4. In pursuance of amendment carried w.e.f 06.06.2018 corresponding Regulations have also been framed by the IBBI on 13.07.2018 which were to take effect from 03.07.2018. In terms of Section 21(6)(b) of the Code, 2016 the applicant- Interim Resolution Professional filed an application being CA-725(PB)/2018 with a prayer to appoint two authorised representatives. The application was allowed vide order dated 14.08.2018 and Mr. Alok Kaushik and Ms. Maya Gupta were appointed to represent class of creditor belonging to Real Estate (Commercial) & (Residential) respectively. A copy of the order has been placed on record (Annexure A-4).

5. The first meeting of the Committee of Creditors of AMR Infrastructure Limited was scheduled to be convened on 25.08.2018. Accordingly, a notice of the said meeting along with agenda papers and background notes was sent to the Authorised Representatives and suspended Board of Directors through email on 17.08.2018 as per the requirements of Code, 2016 (Annexure A-5, colly).

6. The applicant-Interim Resolution Professional has furnished a list of 906 financial creditors along with their admitted claims, email-IDs and vote shares to the Authorised Representatives and in terms of Regulation 16A (6) of the CIRP Regulations (3rd amendment) access was provided to the Authorised Representatives to electronic means of communication for communicating with the financial creditors namely their respective class of creditor. The detail of the aforesaid facility has

been disclosed in the application. It is asserted that the e-voting window remained open from early morning on 23.08.2018 till 10:00 AM on25.08.2018. It was thus opened for more than 48 hours. It was kept open keeping in view the large number of financial creditors who are spread all over the country. A list of financial creditors has been placed on record (Annexure A-6). In other words all steps were taken by the RP and the Authorised Representatives for explaining the agenda items through meetings, email explanations and phone replies etc. to all the members. The applicant- IRP and the Authorised Representatives sent email links for e-voting and timely technical assistance was provided and wherever required instructions for voting with reminder were also sent by the Authorised Representatives to their respective class of creditors. It has been asserted that despite keeping the window open for over 48 hours, repeated follow up for voting and timely assistance, there were only 236 financial creditors in Real Estate (residential) representing (16.36 %) 'voting shares' had voted. Likewise in the Real Estate (commercial) only 227 financial creditors came forward for voting instructions which represent 36.4%.As such overall voting instructions of 463 financial creditors representing 52.78% voting shares were received by the Authorised Representatives prior to CoC meeting i.e. up to 10:00 AM on 25.08.2018. In view of the second proviso of sub-Section 3 of Section 25A of the Code, 2016 the remaining financial creditors were deemed

to have abstain from voting in the first meeting of the CoC. It has been highlighted that there are no well organised sector constituting financial creditors like banks or financial institutions involved in the case as the project was entirely funded through investments from individual investors on promise of 'assured return'. A summary of agenda item which were placed for decision of the CoC in its first meeting held on 25.08.2018 for voting and the voting thereon has been summed up in the application with the help of the following tables which reflect agenda items Nos. 4, 5, 6, 7, 8 & 9.

<table>
<tr><td colspan="5">Agenda Items to be decided by Voting :</td></tr>
<tr><td>4.</td><td colspan="4">Ratification of cost of IRP

VOTING</td></tr>
<tr><td></td><td>Class of Creditors</td><td>Total Voted</td><td>Approving Resolution</td><td>Disapproving Resolution</td></tr>
<tr><td></td><td>Real Estate Residential</td><td>16.36%</td><td>8.63%</td><td>7.73%</td></tr>
<tr><td></td><td>Real Estate Commercial</td><td>36.42%</td><td>20.84%</td><td>15.58%</td></tr>
<tr><td></td><td>Total</td><td>52.78%</td><td>29.47%</td><td>23.31%</td></tr>
<tr><td></td><td colspan="4">55.84% of the votes casted have been casted in favour of the resolution and 44.16% of the votes casted have been casted against the resolution.</td></tr>
<tr><td>5.</td><td colspan="4">Appointment of IRP as Resolution Professional (RP) by the COC (subject to written consent of IRP) under Section 22(3)(a) of Insolvency and Bankruptcy Code, 2016
VOTING</td></tr>
<tr><td></td><td>Class of Creditors</td><td>Total Voted</td><td>Approving Resolution</td><td>Disapproving Resolution</td></tr>
<tr><td></td><td>Real Estate Residential</td><td>16.36%</td><td>8.97%</td><td>7.39%</td></tr>
</table>

	Real Estate Commercial	36.42%	23.59%	12.83%
	Total	**52.78%**	**32.56%**	**20.22%**
	61.69% of the votes casted have been casted in favour of the resolution and 38.31% of the votes casted have been casted against the resolution.			
6.	**Fixing the expenses to be incurred on or by the Resolution Professional and Source of Funding for the expenses**			
	Class of Creditors	**Total Voted**	**Approving Resolution**	**Disapproving Resolution**
	Real Estate Residential	16.36%	8.81%	7.55%
	Real Estate Commercial	36.42%	22.46%	13.96%
	Total	**52.78%**	**31.27%**	**21.51%**
	59.25% of the votes casted have been casted in favour of the resolution and 40.75% of the votes casted have been casted against the resolution.			
7.	Raising of Interim Finance to fund CIRP Cost **VOTING**			
	Class of Creditors	**Total Voted**	**Approving Resolution**	**Disapproving Resolution**
	Real Estate Residential	16.36%	9.55%	6.81%
	Real Estate Commercial	36.42%	23.47%	12.95%
	Total	**52.78%**	**33.02%**	**19.76%**
	62.56% of the votes casted have been casted in favour of the resolution and 37.44% of the votes casted have been casted against the resolution.			
8.	Change of Management of MRG Promoters P Ltd. by removal of present directors and appointment of new directors. **VOTING**			
	Class of Creditors	**Total Voted**	**Approving Resolution**	**Disapproving Resolution**

	Real Estate Residential	16.36%	16.02%	0.34%
	Real Estate Commercial	36.42%	36.12%	0.30%
	Total	**52.78%**	**52.14%**	**0.64%**
	98.79% of the votes casted have been casted in favour of the resolution and 1.21% of the votes casted have been casted against the resolution.			
9.	Banking arrangements for AMR Infrastructures Ltd. **VOTING**			
	Class of Creditors	**Total Voted**	**Approving Resolution**	**Disapproving Resolution**
	Real Estate Residential	16.36%	15.87%	0.49%
	Real Estate Commercial	36.42%	35.53%	0.89%
	Total	**52.78%**	**51.40%**	**1.38%**
	97.39% of the votes casted have been casted in favour of the resolution and 2.61% of the votes casted have been casted against the resolution.			

7. The aforesaid tables are based on the minutes of the first meeting of the CoC held on 25.08.2018 (Annexure A-7).A perusal of the tables makes it patent that majority of the financial creditors have given voting instructions to their authorised representative in favour of the resolution proposed by the applicant-IRP. It is further evident that none of the resolutions proposed could meet the 'voting threshold' prescribed under the Code and none of the resolution has been approved as per the provisions as existing. As a consequence thereof the Corporate Insolvency Resolution Process has now met a road block. The applicant- IRP did not have ratification of his cost, no clear

mandate for incurring expenses, raising interim finance, for opening and operating bank accounts and change of management of subsidiary where the corporate debtor has 99 % shareholding. Thus the applicant-IRP is not in a position to take further steps to carry on the Corporate Insolvency Resolution Process including appointment of valuers; transaction auditing; taking control over the assets, taking further steps for inviting the resolution plan; legal action against identified transactions etc. The applicant-IRP has expressed his inability to proceed any further as neither the Code nor the Regulations framed there under provide any specific guidance for resolution of the deadlock. According to IRP Section 60(5) (c) of the Code, 2016 empowers this Tribunal to decide any question of law and fact arising out of or in relation to the Corporate Insolvency Resolution Process of the corporate debtor. Accordingly, the applicant-IRP seeks appropriate directions on the aforesaid agenda item from 4-9 as listed in the tables reproduced in the preceding paras.

8. In the aforesaid backdrop, the applicant-IRP has approached this Tribunal by citing the provisions which requires 66 % of the vote sharing to pass resolution by the CoC and the voting pattern as reflected in the tables would show that it was far below 66 % of voting share. According to the averments made the result of voting by the financial creditor in this class was 52.78% vote sharing only. It is in

the aforesaid facts and circumstances that the present application has been filed with the following prayers.

"a) Allow the present application; and

b) Issue necessary directions on Agenda Item 4 to 9 placed before the Committee of Creditors in the first meeting dated 25.08.2018 as detailed in paragraph X which could not be decided in view of the low voting in view of peculiar circumstances of the case which have resulted in voting by financial creditors representing 52.78% vote share only, and to consider the mandate given by the financial creditors who have actively voted and participated in the process and to resolve the consequent deadlock and stalemate;

c) Pass such other or further order/ order(s) as may be deemed fit and proper in the facts and circumstances of the instant case."

9. When the application came up for hearing on 05.09.2018, we have noted the issue and also felt that it is likely to arise in a large number of cases. Accordingly, we requested Mr. Sakal Bhushan learned counsel to assist the court in addition to Mr. Abhishek Anand and other counsels representing the IRP and Authorised Representatives.

10. On behalf of the applicant-IRP Mr. Abhishek Anand has submitted that the log-jam has to be broken by interpreting the provisions of the Code and the CIRP Regulations framed by the IBBI. According to the learned counsel the aforesaid tables have depicted a fractured vote sharing pattern for issuing instructions to the Authorised Representatives in respect of ratification of cost of IRP. According to Section 21(8) all decisions of the CoC shall be taken by a vote of not less than 51% of vote sharing of the financial creditors subject to other provisions of the Code which provide different threshold. The vote sharing polled to arm the authorised representatives with consent have not been able to fetch adequate percentage of votes either out of the total votes or even out of the present and voting. For approval of various resolutions mentioned in the tables above only 29.47% have cast in favour and 23.31 % have been cast against it. Likewise in respect of the appointing the IRP as Resolution Professional as per the provisions of Section 22(2)the threshold of 66% vote sharing of the financial creditor is laid down either to resolve to appoint the IRP as RP or to replace him by another RP. However, even there, the total vote sharing is 32.56 % for continuation of the IRP as RP. Likewise in respect of all other items as listed in the tables in the preceding paras, a minimum threshold of 66% has not been achieved. According to the learned counsel if the principle of 'majority' as envisaged by Regulation 16A (6) of the

Regulations 2016 (1) is applied most of the items would meet the approval of CoC. Learned counsel has then argued that on the basis of Regulation 25(3) in respect of action to be taken by the Resolution Professional under Section 28(1), it is obligatory on the Resolution Professional to take a vote of the member of the committee present in the meeting on any item listed for voting after discussion on the same. Learned counsel has also highlighted by referring to the provisions of Section 25(5) the idea of providing electronic means to seek vote of the member, who did not vote at the meeting, on the matters listed for voting by electronic voting system in accordance with Regulations, 2016. The voting is required to be kept open for 24 hours.

11. Mr. Abhishek Anand learned counsel has also submitted that by virtue of provision made in Section 21(6A) (b) it can be argued that the class of Real Estate (commercial/ residential) can be regarded as a class distinct from organised sector of financial creditor like bank and other financial institutions. In that regard, it has been submitted that the issues may be decided by applying the principle of 'present and voting'.

12. We requested Mr. Sakal Bhushan, learned counsel to assist us to find out correct and legally acceptable canon of construction to interpret Section 22(2) of the Code. Learned Amicus has adopted a different line of reasoning than the counsel for Interim Resolution

Professional and submitted that the argument advanced by Mr. Anand, would lead to an interpretation which would run contrary to the intention of the legislature as could be gathered from the Code itself and other sources. Accordingly, Mr. Bhushan submitted that an approach which advances the object of the Code would be preferable as has been reiterated by the Hon'ble Supreme Court in Atlas Cycle Industries Ltd. and Ors. v. State of Haryana (1979) 2 SCC 196.

13. Keeping in view the aforesaid, Mr. Bhushan submitted various thresholds mentioned in the Code can be found in Sections 12A(90%), 12(2), 22(2), 27(2), 28(3), 30(4), 33(2) all 66 % and 21(8) 51%. Before the amendment of the Code vide the IBC (Amendment) Ordinance which has been now replaced by IBC (Second Amendment) Act, 2018 w.e.f. 06.06.2018, the threshold was 75 % of the total voting share of the financial creditors in all cases.

14. Learned Amicus submitted that for reviewing the working of the Code after one year of its promulgation, the Government set up the Insolvency Law Committee on 16.11.2017. The Committee submitted its Report to the Government on 28.03.2018. In Para No. 11.5 of the said Report, the committee considered the thresholds applicable in USA, Canada, UK and Singapore. The Report mentions that in USA and Canada the threshold was of the **total voting share** whereas in UK and Singapore it was of the **voting share of the present and**

voting. The committee in Para 11.6 recommended to reduce the threshold from 75% to 66% for the critical decisions and 51% for the routine decisions, but in both the cases of the total voting share of the financial creditors.

15. The recommendations of the Insolvency Law Committee has been promulgating by the IBC (Amendment) Ordinance which has been now replaced by IBC (Second Amendment) Act, 2018 w.e.f 06.06.2018. In the light of fact that the Government and Parliament have taken a conscious decision by not introducing the present and voting requirement in the IBC even while amending the IBC, it would not be open to adopt that cannon of interpretation for construction of these provisions.

16. According of Mr. Bhushan in the case in hand, the very appointment of the Resolution Professional by the CoC is facing a deadlock. First, only 52.78% financial creditors actually voted and out of that also, only 32.56% voted in favour of appointing the IRP as RP. Thus, the resolution has the approval of only 32.56% of the total voting share of the financial creditors against the requirement of 66% under Section 22(2) of the IBC. Even if we take the percentage of the present and voting (which course is not open), then also it comes to 61.69% (32.56 X 100 ÷ 52.78 = 61.69), which too is short of 66%. It is worthwhile to highlight here that without the appointment of RP, the

very working of the time-bound CIRP is just not possible and it would drag the corporate debtor to imminent liquidation under Section 33(1) of the IBC. And this cannot be the intention of law.

17. It is thus submitted that we must find out the real intention of the legislature in order to give a purposive interpretation to the various provisions of the IBC. Learned Amicus took us through the long title of the Code which states "An Act to consolidate and amend the laws relating to reorganisation and insolvency resolution....". The preamble of the IBC (Amendment) Ordinance, 2018 which was promulgated to give effect to the Report of the Insolvency Law Committee also states "..... promoting resolution over liquidation of corporate debtor by lowering the voting threshold of committee of creditors.....". It is quite manifest that the intention of the legislature is to "promote resolution over liquidation", and thus every effort should be made to interpret the provisions of IBC in such a manner as would advance the very object of the legislation rather than defeating it.

18. Mr. Bhushan then submitted that the various thresholds (90%, 66% or 51%) are only directory in nature. Insistence on the thresholds strictly would only make the provisions of the Code unworkable and would lead to deadlocks thereby pushing the corporate debtors towards imminent liquidation, frustrating the very object of this

progressive legislation. Moreover, in Sections 12A, 12(2), 22(2), 27(2) and 30(4), the expression used by the legislature itself is "may". Though in Sections 28(3), 33(2) and 21(8) the expression used is "shall", yet the same can be interpreted to mean "may" in the light of the ratio of law reiterated in the Atlas Cycle Industries' case (supra). Thus construed, it can be safely held by the Tribunal that the various voting thresholds in the IBC are merely directory in nature, and that preference can be given to decisions taken by the largest percentage in the CoC in case of a deadlock. Only this interpretation would make the Code workable and advance the object of this progressive legislation rather than defeating it.

19. Having heard the learned counsel for the Resolution Professional and the learned Amicus we find that the issue which needs to be answered in the present case is whether in the facts and circumstances of the present case the threshold of 'voting shares' in respect of the class of Financial Creditors Real Estate (Commercial) and Real Estate (Residential) as provided in various provisions of the Code (e.g. section 22(2) provides threshold of 66%) is mandatory. In the alternative could it be laid down that in case CoC is consisted of Real Estate (Commercial & Residential) representing 100% voting share then could the resolution be deemed to be approved by the highest number of the financial creditors. In different provisions variant thresholds have been provided. Many of them have 66% [e.g.

Sections 12(2), 22(2), 27(2), 28(3) 30(4) and 33(2)] 90% threshold is provided by section 12 and 51% is provided by section 21(8) of the Code. For the sake of illustration it would therefore be profitable to first read section 22(2) of the Code which is set out below *in extenso*:

> *"22. (1) The first meeting of the committee of creditors shall be held within seven days of the constitution of the committee of creditors.*
>
> *(2) The committee of creditors, may, in the first meeting, by a majority vote of not less than sixty-six per cent of the voting share of the financial creditors, either resolve to appoint the interim resolution professional as a resolution professional or to replace the interim resolution professional by another resolution professional.*
>
> *(3) Where the committee of creditors resolves under sub-section (2)—*
>
> *(a) to continue the interim resolution professional as resolution professional subject to a written consent from the interim resolution professional in the specified form, it shall communicate its decision to the interim resolution professional, the corporate debtor and the Adjudicating Authority; or*
>
> *(b) to replace the interim resolution professional, it shall file an application before the Adjudicating Authority for the appointment of the proposed resolution professional along with a written consent from the proposed resolution professional in the specified form.*
>
> *4.....*
>
> *5....."*

20. A bare perusal of section 22(2) would show that an interim resolution professional can be appointed as a resolution professional

and the threshold limit of sixty six percent voting shares in the committee of creditors is required for passing a resolution. It is true that the expression 'may' have been used but it does not have any bearing on the expression 'by a majority vote of not less than sixty six percent of the voting shares of the financial creditors'. We feel that the expression 'may' in section 22(2) is associated with the later case 'either resolve to appoint the interim resolution professional as a resolution profession or to replace the interim resolution professional by another resolution professional'.

21. Therefore the use of word 'may' in section 22(2) would not help to decide the issue whether that the provision is mandatory or directory. In fact the emphasis is on the expression 'by a majority vote of not less than sixty six percent of the voting share of the financial creditors'. A reference to other provisions where threshold limit of sixty six percent of 'voting share' has been fixed, would reveal that it is also couched in the same language as would be evident from the perusal of section 27(2) and 30(4) of the Code. In these sections word 'may' have been used for purpose other than relatable to percentage of the voting shares prescribed for approval of a resolution. In section 12A of the Code the word 'shall' has been used for withdrawal of the application admitted under sections 7, 9 or 10 of the Code and section 28(3) again uses the expression 'shall'. In section 33(2) the word 'shall' has no bearing on the question of approval by not less than

sixty six percent of voting shares. Therefore the use of word 'may' or 'shall' cannot be a guiding factor to decide the question whether these provisions are mandatory or merely directory.

22. It does not however mean that there are no tool of interpretation to overcome the impass which has emerged in this case. In the case in hand the continuation of Corporate Insolvency Process has been threatened as the appointment of the resolution professional by the committee of creditors has met a roadblock along with many other items listed in the tables set out in preceding para. Facts are such that the voting share polled does not answer the threshold limit of sixty six percent which is required for approval of a resolution to appoint an interim resolution professional as a resolution professional in our example. The facts reveal that out of total number of 'voting shares' of the financial creditors only 52.78 percent concerning appointment of IRP as RP have actually voted and out of 52.78 percent only 32.56 percent voted in favour of appointing an interim resolution professional as resolution professional (see table item 5 supra). In other words the resolution has been approved by only 32.56 percent of the total voting shares of the financial creditor (which is majority votes) against the requirement of 'not less than sixty six percent of the voting share of the financial creditor' as provided under section 22(2) of the Code.

23. There is another aspect of the matter. The issue concerning the class of creditors namely Real Estate (Commercial & Residential) have engaged the attention of the Law Makers. It is appropriate to mention that in the case of Nikhil Mehta v. AMR Infrastructure decided on 23.01.2017, the Principal Bench has found that home buyers would not answer the description of the financial creditors as it stood at that time. The learned Appellate Tribunal on appeal carved out an exception and provided that in case where 'assured return' in respect of Real Estate (Commercial & Residential) is provided in the terms of agreement then on default such category of real estate class would become financial creditors. However, the legislature intervened by promulgating an ordinance on 06.06.2018. In its long title the problem concerning home buyers have been highlighted by observing as under:-

> *"WHEREAS the Insolvency and Bankruptcy Code 2016 (the Code), inter alia, provides for insolvency resolution of corporate persons in a time bound manner for maximisation of value of assets of such persons;*
>
> *AND WHEREAS a need has been felt, inter alia, to balance the interest of various stakeholders in the Code, especially interests of home buyers and micro, small and medium enterprises, promoting resolution over liquidation of corporate debtor by lowering the voting threshold of committee of creditors*

and streamlining provisions relating to eligibility of resolution applicants ....."

In section 5(8) the definition of expression 'financial debt' has been expanded to mean a debt along with the interest if any which is disbursed against the consideration for time value of money and includes the following: -

"(a).....
(b) .....
(c) .....
(d) .....
(e) .....
(f) .....
[Explanation – For the purposes of this sub-clause –
(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and
(ii) this expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulations and Development) act, 2016 (16 of 2016)].

24. The aforesaid extension added to section 5(8)(f) would show that prospective purchasers of a real estate would be covered by the definition of financial debt and would be regarded as a financial creditor. Corresponding amendments have also been carried in section 7 making such class of persons eligible to file an application for initiation of CIR process against a corporate debtor. The threshold for the purposes of seeking extension of a period of CIR process, appointing IRP as RP etc is 66% for all the financial creditors irrespective of class to which they belong.

25. It is also worthwhile to highlight that in case of Real Estate (Commercial & Residential) distinct provisions have been made in section21(6A) (a) and (b) which provide for appointment of a authorised representative. The authorised representative is to represent the interests of class of creditor- Real Estate (Commercial & Residential). The very object of making these amendments appeared to be that prospective buyers of Real Estate (Commercial & Residential) is comprised of thousands of scattered number of financial creditors and their interest are sought to be protected by the authorised representative.

26. There are other provisions which has been inserted by way of amendment in the code which would indicate that Real Estate (Commercial & Residential) are a class of creditor distinct from the well organised financial creditor like Banks, Financial Institutions, Asset Reconstructions Companies and others like non banking financial companies. These institutions are managed by a well organised hierarchical set of mangers and their documentation is also maintained in all respect.

27. It appears to us that clubbing of these categories of financial creditors in one class would amount to merging the unequal for equal treatment. In this regard we may refer to the views of learned author Mr. H.M. Seervai in his celebrated treatise 'Constitutional Law of India' (4th edition). In para 9.8 in the chapter 'Right to Equality" the learned

author observed that a law based on permissible classification fulfils the guarantee of the equal protection of the laws and is valid; a law based on an impermissible classification violates that guarantee and is void. Commenting on a view expressed by Justice P.N. Bhagwati in **E. P. Royappa vs State of Tamil Nadu & Anr AIR 1974 SC 555,** learned author opined in para 9.9 as follows: -

"9.9 The new theory involves the fallacy of the undistributed middle. A standard book on Logic explains the fallacy thus:

" *Consider the following standard from categorical syllogism:*

All dogs are mammals
All dogs are mammals
Therefore all cats are dog.

The middle terms 'Mammals' is not distributed in either premiss, and this violates Rule 2. (In a valid categorical syllogism, the middle term must be distributed in at least one premiss). Any syllogism which violates Rule 2 is said to commit the Fallacy of the Undistributed Middle. It should be clear by the following consideration that any syllogism which violates this rule is invalid. The conclusion of any categorical syllogism asserts a connection between two terms. The premisses justify asserting such a connection only if they assert that each of the two terms in connected with a third terms in such a way that the first two are appropriately connected with each other through or by means of the third. For the two terms of the conclusion really to be connected through the third, at least one of them must be related to the whole of the class designated by the third or middle term. Otherwise each may be connected with a different part of that

class, and not necessarily connected with each other at all. This is obviously what occurs in the example. Dogs are included in a part of the class of mammals, and cats are also included in part of the class of mammals. But different parts of that class may be (and, in this case are) involved, so the middle terms does not connect the syllogism a major and minor terms. For it is connected them all of the class designated by it must be referred to in at least one premiss, which is to say that in a valid syllogism the middle term must be distributed in at least on premiss"

28. In the present case merging of categories of all financial creditors and treating them as one would also amount to treating unequals as is equal which may result in violation of Article 14 of the Constitution. Therefore providing the same threshold for both categories may result to a declaration that those provisions are *ultra vires* of Article 14 of the Constitution.

29. However Hon'ble Supreme Court in various judgments has laid down that court should adopt an interpretation which sustains the provisions rather than leaning to a declaration that the provisions violate Article 14 of the Constitution. In that regard reliance may be placed on para 118 of the judgement of five judge bench in the case of **Delhi Transport Corporation v. D.T.C Mazdoor Congress and Ors. 1991 Supp (1)SCC 600** . Placing reliance on the observation made in **Sunil Batra v. Delhi Administration (1978) 4 SCC 494**, the Supreme Court observed as under:

"Where, therefore, in the interpretation of the provisions of an Act, two constructions are possible, one which leads towards constitutionality of the legislation would be preferred to that which has the effect of destroying it. If we do not read the conferment of the power in the manner we have envisaged before, the power is liable to be struck down as bad....."

The aforesaid extracts from the judgment would suggest that the principle of construction which need to be adopted has to be such that sustain the constitutional validity of a statute rather than leaning in favour of construction which results in declaration of *ultra vires*.

30. Another principle which needs to be highlighted is that the statue must be construed to make it effective and operative. In that regard Mr. Bhushan learned amicus has maintained that the court should not lean towards a construction which is patently against the intentions of the legislature. While accepting the aforesaid submission we find that the interpretation of section 22(2) or related provisions should not be such as to render the provision nugatory. In that regard we draw support from the observations made by Hon'ble Supreme Court in the case of **Tinsukhia Electrical Supply Co. Limited v. State of Assam (1989) 3 SCC 709**. The 5 judge constitution bench emphasised that the provision of statute must be so construed as to make it effective and operative on the principle of '*ut res majisvaleat quam pereat*'. The aforesaid principles could be

culled out from the bare perusal of para 118 and 119. Speaking for the bench Justice Venkatachaliah (as his Lordship then was) observed as under:-

> *"The courts strongly lean against any construction which tends to reduce a statute to a futility. The provision of a Statute must be so construed as to make it effective and operative, on the principle "ut res majisvaleat quam pereat". It is, no doubt, true that if a statute is absolutely vague and its language wholly intractable and absolutely meaningless, the statute could be declared void for vagueness. This is not in judicial review by testing the law for arbitrariness or unreasonableness under Article 14; but what a court of construction, dealing with the language of a Statute, does in order to ascertain from, and accord to, the statute the meaning and purpose which the legislature intended for it. In Manchester Ship Canal Co. v. Manchester Racecourse Co. Farewell J. said (pp. 360-61)*
>
> *"Unless the words were so absolutely senseless that I could do nothing at all with them, I should be bound to find some meaning and not to declare them void for uncertainty."*
>
> *119. In Fawcett Properties Ltd. v. Buckingham County Council, Lord Denning approving the dictum of Farwell, J. said (All ER p. 516)*
>
> *"But when a Statute has some meaning, even though it is obscure, or several meanings, even though it is little to choose between them, the Courts have to say what meaning the Statute to bear rather than reject it as a nullity."*

31. Thus the court have been reminded its duty to make what it can of a statute as a statue are meant to be operative and nothing short of impossibility should allow the court to declare a statute unworkable.

It has been emphasised that a statue is designed to be workable and interpretation thereof by a court should be to secure that object unless crucial omission or clear direction makes that end unattainable. We are therefore not open to the view that the provision of section 22(2) or allied provision of the Code concerning the class of financial creditors Real Estate (Commercial) & Real Estate (Residential) are not workable or there is any compelling reasons for us to say.

32. At this stage the report of the Insolvency Law Committee must be read. We refer to Para 11.5 of Report of Insolvency Law committee which read as under:-

> *11.5 The Committee also noted that globally, bankruptcy laws prescribe different voting thresholds for decisions of the CoC. In USA, approval of a plan requires 66 percent or more voting share in value and 50 percent or more voting share in number for each class of creditors. The position is similar in Canada, however, such requirement applies to each class of unsecured creditors. In the UK, approval of a plan under administration requires a simple majority in value of the creditors present and voting. While such threshold is higher in Singapore as the requirement therein is to obtain 75 percent or more of voting share by value and more than 50 percent voting share in number of creditors present and voting, for approval of the plan. The Committee was of the view a higher threshold with the present and voting requirement, or a lower threshold sans the present and voting requirement, may be adopted.*

33. It is evident that the committee noted a global scenario where different voting share threshold for decision of the committee of creditors have been prescribed. The threshold has been either of the total voting shares or it is present and voting. The committee proceeded to decide in para 11.6 which is as under:

> *"11.6 After due deliberation and factoring in the experience of past restructuring laws in India and international best practices, the Committee agreed that to further the stated object of the Code i.e. to promote resolution, the voting share for approval of resolution plan and other critical decisions may be reduced from 75 percent to 66 percent or more of the voting share of the financial creditors. In addition to approval of the resolution plan under section 30(4), other critical decisions are extension of the CIRP beyond 180 days under section 12(2), replacement or appointment of RP under sections 22(2) and 27(2), and passing a resolution for liquidation under section 33(2) of the Code. Further, for approval of the other routine decisions for continuing the corporate debtor as going concern by the IRP/RP, the voting share threshold may be reduced to 51 percent or more of the voting share of the financial creditors"*

34. A perusal of the aforesaid paras would make it patent that the Insolvency Law Committee has also opined about the object of the Code which is to promote the resolution. To achieve the aforesaid object the committee recommended the voting share threshold for decision of the committee of creditors in respect of section 22(2) as a sixty six percent of the total votes.

35. Another aspect which emerges is that the principle of voting share threshold on the basis of present and voting has been discarded. The recommendation of the committee has now been promulgated by Insolvency Bankruptcy Board (Amendment) Ordinance which is now known as Insolvency Bankruptcy Code (Second Amendment) Act, 2018 enacted with effect from 6-6-2018. In the light of the fact that the Government and Parliament have taken a conscious decisions by discarding the present and voting requirement in the Code, it would not be proper for judicial forum to adopt it by judicial interpretation. Therefore that criteria cannot be adopted for construction of section 22(2) of the Code. Therefore a workable solution by other interpretation process has to be adopted.

36. We have already opined that the court should lean against an interpretation which makes a statue unconstitutional and unworkable and adopt such an interpretation which makes it constitutional and workable and help in achieving its object. The object of the Code is to promote resolution and to discourage liquidation. It is seen that an interpretation which sustains the constitutional validity must be preferred over the one which result in declaring it as unconstitutional. It is not impermissible to add certain words which were not contained in the statute to achieve the object of enactment. In that regard reliance may be placed on the observations made by the Supreme Court in the case of **Directorate of Enforcement v. Deepak Mahajan**

(1994) 3 SSC 440 and **Ajaib Singh v. Sirhind Coop. Marketing-cum-Processing Service Society Ltd. and Anr. (1999) 6 SCC 82**. Therefore it would be necessary to read section 22 in a manner that it achieves its avowed purpose for promoting resolution over liquidation of every corporate debtors by providing the 'voting share' threshold of the committee of creditors. Therefore the efforts is required to be made to interpret these provisions including section 22(2) in a manner as would advance the object of the resolution rather than the one which would defeat it. Such a course is available in view of the judgement of the Hon'ble Supreme Court rendered in the case of **Atlas cycle Industries Limited** and **Ors. v. State of Haryana (1979) 2 SCC 196**. For the aforesaid proposition we find support from the following paras from "Craies of Statute Law' (page 242 5th edition) which reads as under: -

> *"The relevant rules of interpretation may be briefly stated thus: When a statute uses the word "shall", prima facie, it is mandatory, but the Court may ascertain the real intention of the legislature by carefully attending to the whole scope of the statute. For ascertaining the real intention of the Legislature, the Court may consider, inter alia, the nature and the design of the statute, and the consequences which would follow from constituting it one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstances, namely, that the statute provides for a contingency of the non-compliance with the provisions, the*

fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered."

37. The aforesaid paragraph has been approved by the Hon'ble Supreme Court in the cases of **the State of Uttar Pradesh & Ors. v. Babu Ram Upadhya (1961 CriLJ 77)** and **Atlas cycle Industries Limited and Ors. v. State of Haryana (1979 2 SCC 196**).

38. When the principles laid down in the aforesaid paragraphs as approved by Hon'ble Supreme Court are applied to the provisions of section 22(2) and other cognate provisions we find that threshold voting share for decision of the committee of creditor by sixty six percent would not be mandatory in the cases of class of creditors where the prospective buyers of Real Estate (Commercial & Residential) alone constitute the CoC. It has been seen that in such cases the total polled voting share is very small which in the present case is 52.78 percent. Therefore we would say that in case of deadlock the preference can be given to the decisions taken by the highest percentage in the Committee of Creditors and section 22(2) must be regarded as directory in nature in case CoC is comprised 100% of class of creditors Real Estate (Commercial & Residential). Even otherwise we have already opined that the class of creditor like Real Estate (Commercial & Residential) are distinct than the other class of creditors which includes well organised financial institutions like

Bank, Financial Companies and non banking financial companies etc. Their representation in the committee of creditor is far smaller in number. Each individual Member has high 'voting shares'. On the contrary the class of financial creditor of Real Estate (Commercial & Residential) are scattered in thousands all over the country and is wholly unorganised. In choosing the authorised representative each one of them is not to participate for various reasons. Probably it is for the aforesaid reasons that in Regulation 16A of Insolvency and Bankruptcy Board of India (Insolvency Resolution process for corporate person) Regulation 2016 a provision has been made for selecting an insolvency profession which is choice of highest number of financial creditor in the class to act as authorised representative of the creditor of the respective class. If such a distinction is not implied then there is inherent danger of section 12(2), 12 A, 22(2), 27 (2), 28(3), 30(4), 33(2) & 21 (8) becoming unworkable and unconstitutional. It may thus be declared *utra vires*. As the guidance available in various judgment of Hon'ble Supreme Court we may lean towards a construction which sustains the statute and we must also adopt an interpretation which makes the statute workable by advancing its object. Therefore we are of the view that in the case of Real Estate (Commercial & Residential) comprising 100% voting share in CoC the aforesaid provision must be read to mean that a resolution would be deemed to be passed if it is voted by highest number of

financial creditors in the class of Real Estate (Commercial & Residential). It would make the court workable and would also advance the object of this progressive legislation rather than defeating it.

39. As a sequel to above discussion, we approve (Agenda No.5) the name of interim resolution professional by appointing him as resolution professional because he had secured largest percentage of voting share threshold. Accordingly Mr Vikram Bajaj, Flat No. 12, Vasudaha Apartment, Plot No. 41, Sector 9 Rohini Delhi-110085 is appointed as resolution professional who was earlier worked as interim resolution professional. We further holds that Agenda item Nos.4, 6 to 9 are also deemed to be approved as majority in CoC has ratified those resolutions.

40. The applications stand disposed of.

Sd/-

(M.M.KUMAR)
PRESIDENT

28.09.2018

Sd/-

(S.K. MOHAPATRA)
MEMBER (TECHNICAL)

28.09.2018
Aarti