IN THE NATIONAL COMPANY LAW TRIBUNAL,

MUMBAI BENCH-II

IA 141/2023 IN CP (IB) No. 4550/MB-II/2018

[Under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the NCLT Rules, 2016]

IN THE MATTER OF:

Mr. Rohit Jindal,
Shareholder and Suspended Director
of the Corporate Debtor,
Residing at: 706/707, Lavendar Wing,
Raheja Gardens, Wanowrie, Pune,
Maharashtra-411 040. **…. Applicant**

Versus

Mr. Fanendra H. Munot
Resolution Professional of Corporate Debtor,
Shree Bhimeshwari Ispat Private Limited,
Having his address at 06th Floor, Mafatlal House,
H.T. Parekh Marg, Backbay Reclamation,
Mumbai-400020. **…...Respondent**

IN THE MATTER BETWEEN:

Oriental Bank of Commerce **… Financial Creditor(s)**

Vs.

Shree Bhimeshwari Ispat Private Limited **... Corporate Debtor**

Order Pronounced: 28.04.2025.

CORAM:

MS. LAKSHMI GURUNG, MEMBER (JUDICIAL)

SHRI ANIL RAJ CHELLAN, MEMBER (TECHNICAL)

Appearances (in Hybrid Mode):

Applicant	:	Counsel Mr. Nausher Kohli i/b Adv. Gaurav Raj Shrawat.
Respondent	:	Adv. Prashansa Agarwal a/w Kunal Chheda appeared for RP. Counsel Mr. Rohit Gupta appeared for SRA.
State Bank of India (CoC member)	:	Counsel appeared but did not mark attendance.

ORDER

Per: Anil Raj Chellan, Member (Technical)

1. **Background**

1.1 This is an application filed by the Applicant, who is the Shareholder and Suspended Director of the Corporate Debtor, under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (‘the Code') read with Rule 11 of the NCLT Rules, 2016, seeking, *inter-alia,* the following reliefs:

a) Pass necessary directions stating that calculation by the Resolution Professional (‘RP’) of the voting percentage with respect to approval of the Resolution Plan of Khatav Man Taluka is incorrect.

b) The Tribunal be pleased to reject I.A. No. 146 of 2021 filed by the RP for approval of Resolution Plan of Khatav Man Taluka on the ground that the above-mentioned resolution plan has not received *the requisite voting percentage (i.e. 66%) of the Committee of Creditors ('CoC') of the Corporate Debtor in accordance with the provisions of the Code.*

c) *The Tribunal be pleased to permit the Applicant herein to submit a legally permissible resolution plan before the CoC in accordance with the applicable provisions of the IBC and to direct the CoC to consider the resolution plan proposed to be submitted by the Applicant.*

2 Case of the Applicant:

2.1 The Applicant, namely, Mr. Rohit Jindal, is the suspended director of the Corporate Debtor i.e., Shree Bhimeshwari Ispat Private Limited. The Applicant was appointed on 01.04.2008 as a director of the Corporate Debtor. The Applicant forms part of the promoter group of the Corporate Debtor and also holds 15,21,409 equity shares of the Corporate Debtor, aggregating to 9.26% of the Issued, Subscribed, and Paid-Up Share Capital of the Corporate Debtor.

2.2 The Corporate Debtor was incorporated on 08.02.2005 under the Companies Act, 1956. The Corporate Debtor has been involved in steel manufacturing since 2008 and owns its manufacturing facility unit in Satara, Maharashtra. The Corporate Debtor is classified as an MSME under the provisions of the Micro, Small and Medium Enterprises Development Act, 2006 (‘MSMED Act’) and has a valid registration certificate in accordance with MSMED Act.

2.3 Oriental Bank of Commerce filed an application before this Tribunal for initiation of the Corporate Insolvency Resolution Process (‘CIRP’) of the Corporate Debtor, which came to be admitted u/s 7 of the Code on 28.11.2019.

2.4 In the 05th CoC Meeting held on 26.08.2020, the resolution plan submitted by Khatav Man Taluka Agro Processing Ltd came up for consideration, and a decision was taken by the CoC to invite the Prospective Resolution Applicant i.e. Khatav Man Taluka Agro Processing Ltd (‘Khatav Man Taluka’), to make a presentation on the Resolution Plan in the next CoC meeting. Accordingly, the PRA made a presentation on the resolution plan before the 06th CoC on 14.09.2020, and further discussed in the 07th CoC meeting held on 09.10.2020. Based on the suggestions of the members of the CoC, the PRA agreed to undertake certain revisions to its resolution plan by providing an addendum to the Resolution Plan. Thereafter, in the 08th CoC meeting held on 21.10.2020, the Addendum to the Resolution Plan submitted by Khatav Man Taluka was discussed. After the said meeting, the Resolution Plan submitted by Khatav Man Taluka, along with its Addendum, was put for voting. The voting was held through electronic platform, and the period for voting was from 09.11.2020 to 23.11.2020.

2.5 A total of six (6) banks and financial institutions form part of the CoC of the Corporate Debtor. The names of each member of the CoC, along with their voting share, are given in the table below:

Sr. No.	**Name of all the CoC Members**	**Voting Share (%)**
1.	Andhra Bank now merged with Union Bank of India	47.82
2.	Oriental Bank of Commerce now merged with the Punjab National Bank	26.87
3.	State Bank of India	8.32
4.	Bank of Baroda	9.21
5.	Phoenix ARC	4.28
6.	Reliance Home Finance	3.50
	TOTAL	**100**

2.6 Pursuant to the e-voting held during the period from 09.11.2020 to 23.11.2020, the following CoC members voted in favour of the Resolution Plan submitted by Khatav Man Taluka:

Sr. No.	Name of the CoC Members Voted For the Resolution Plan	Voting Share (%)
1.	Andhra Bank now merged with Union Bank of India	47.82
2.	Bank of Baroda	9.21
3.	Phoenix ARC	4.28
	TOTAL	**61.31**

2.7 The names of the CoC members who voted against the Resolution Plan are given below, along with their voting share:

Sr. No.	Name of the CoC Members Voted Against the Resolution Plan	Voting Share (%)
1.	Oriental Bank of Commerce now merged with Punjab National Bank	26.87
2.	Reliance Home Finance	3.50
	TOTAL	**30.37**

2.8 The members of the CoC who abstained from voting on the Resolution Plan of Khatav Man Taluka, along with their voting shares, are given in the table below:

Sr. No.	**Name of the CoC Members Abstained From Voting**	**Voting Share (%)**
1.	State Bank of India	8.32
	TOTAL	**8.32**

2.9 Thereafter, in January 2021, the RP filed an IA No. 146 of 2021 before the NCLT u/s 30 and 31 of the Code for approval of the Resolution Plan of Khatav Man Taluka.

2.10 The Applicant submits that as per Section 30(4) of the Code, the CoC may approve a resolution plan by a vote of not less than 66% of the voting share of the financial creditors. In the present case, the voting on the Resolution Plan submitted by Khatav Man Taluka was held in electronic form during the period from 09.11.2020 to 23.11.2020. The Applicant humbly submits that based on the analysis of the e-voting results and the voting share of each CoC member, it is clear that a total of 61.31% of the members of the CoC voted in favour of the Resolution Plan submitted by Khatav Man Taluka and a total of 30.37% of the members of the CoC voted against the aforesaid Resolution Plan. One member of the CoC, namely, State Bank of India (‘SBI’), holding an 8.32% voting share of the CoC, has abstained from voting on the Resolution Plan of Khatav Man

Taluka. Hence, the Applicant submits that the Resolution Plan submitted by Khatav Man Taluka did not receive the requisite voting percentage as prescribed u/s 30(4) of the Code. However, the same was considered by the RP as approved by the CoC, even though technically no resolution plan was approved by the CoC as per the requisite majority required under the Code for approval of a resolution plan.

2.11 The Applicant submits that the RP has failed to calculate the correct voting percentage of the e-voting results on the Resolution Plan of Khatav Man Taluka. Since the e-voting result submitted by the RP states that the said resolution plan is approved by 6131 votes of the members of the CoC, the correct voting percentage is 61.31% and not 67% as mentioned by the RP in the e-voting result annexed as "Annexure N" to the I.A. No. 146 of 2021. The RP has made a false and misleading submission in IA No. 146 of 2021 by stating that SBI was "Absent" during the electronic voting undertaken with respect to the Resolution Plan of Khatav Man Taluka. Further, the RP has provided a misleading voting result by entirely removing the voting share of SBI from the voting results and accordingly inflated the voting results, stating that the Resolution Plan submitted by Khatav Man Taluka was approved by 67%.

2.12 Hence this application.

3 Case of the Respondent:

3.1 The Respondent/RP contends that the Applicant has no locus to file this Application.

3.2 The Resolution Plan was approved by the CoC on or about 23.11.2020, and the Application seeking NCLT's approval for the Resolution Plan was filed in the year 2021. The Applicant and the other promoters have been attending the CoC meetings and were provided with copies of the Resolution Plan. No such objections were ever raised by the Applicant or other promoters regarding the Resolution Plan. It is only raised after a period of 777 days from the date of approval of the Plan for the reasons best known to the Promoters.

3.3 The Applicant has failed to make the Resolution Applicant and the CoC as parties to the application, and therefore, the Application should be rejected at the very outset for non-joinder of necessary parties.

3.4 The voting percentage has been reckoned in accordance with the order of Hon'ble NCLAT in CA(AT)(Ins.) No. 536 of 2019. Further, a legal opinion was also sought by the Respondent regarding the same proposition. Therefore, the Respondent submits that he has diligently performed his duties in accordance with law.

3.5 The Applicant has raised a contention that the Corporate Debtor is an MSME and therefore, the Applicant is in a position to submit a resolution plan. In this regard, it is stated that it is true that the Corporate Debtor is an MSME. Nothing prevented the Applicant from submitting a resolution plan within the stipulated timeline. The question of pre-packaged insolvency does not arise in this particular case, even though the Corporate Debtor is an MSME.

3.6 If at all the Tribunal is inclined to allow submission of the resolution plan for voting, then to avoid any further controversy, the CIRP time should be extended or excluded and permission for fresh Form G should be given so that equal and fair opportunity is given to all the prospective Applicants and the Resolution Applicant can also put in a fresh plan.

4 <u>Written Submissions on behalf of the Applicant:</u>

4.1 Ld. Counsel for the Applicant in his written submissions has narrated the facts to establish his case, which need not be repeated herein for the sake of brevity, as by and large the said facts have already been stated hereinbefore.

4.2 Ld. Counsel for the Applicant has placed reliance upon the decision of the ***National Company Law Tribunal, Chennai Bench vide Order dated***

22.07.2022 in I.A.(IBC) No. 649/CHE/2022 in IBA/386/2020, in support of his case.

5 Written Submissions on behalf of the Respondent:

5.1 Ld. Counsel for the Respondent submits that it is a settled position in law that an erstwhile promoter shareholder of the Corporate Debtor does not have any locus to challenge the Resolution Plan. To buttress the aforesaid submission, Ld. Counsel for the Respondent relies upon the decision of the Hon'ble NCLAT in the matter of ***Dr. Ravi Shankar Vedam v. Tiffins Barytes Asbestos and Paints Ltd. and Ors., Company Appeal (AT) (INS) No.653/2019. [Paragraphs 27, 28].*** Therefore, the Ld. Counsel for the Respondent urges that the captioned Application being preferred by an erstwhile promoter, is liable to be rejected for want of locus.

5.2 Ld. Counsel for the Respondent further submits that the only entity that could have objected to the voting percentage was the entity whose voting has been disregarded, i.e., SBI. Therefore, only SBI could have objected to the voting percentage, and no other entity. The Application is liable to be dismissed for this reason alone. It is further reiterated that SBI has never objected to being recognized as a creditor who remained absent from voting, and by no stretch of imagination, the promoters can contend that the non-inclusion of SBI in the denominator prejudices them.

5.3 Ld. Counsel for the Respondent imputes malafide motives on the part of the Applicant by submitting that the Applicant has preferred the captioned Application only to achieve his ulterior objective of obstructing the approval of the SRA's Plan by this Tribunal so as to enable itself to participate in the CIRP at a belated stage. Ld. Counsel for the Respondent states that the Applicant had not even submitted an Expression of Interest for the Corporate Debtor at the stage of publication of Form G. Therefore, the Applicant is not entitled to any such leave to submit a Plan at this stage.

5.4 At last, the Ld. Counsel for the Respondent argues that a Resolution Plan can be remitted back for reconsideration if there is any non-compliance with Section 30(2) of the Code. It is thus submitted that in the event this Tribunal arrives at a finding that the voting percentage was required to be calculated after including SBI and that the Plan was not approved by 66% of the CoC, this Tribunal be pleased to remit the Plan for re-voting by the CoC. In order to buttress his argument, Ld. Counsel for the Respondent has drawn our attention to the judgment of Hon'ble NCLAT in Nivaya Resources Pvt. Ltd. vs. Asset Reconstruction Company (India) Ltd., Company Appeal No. 1184 of 2022.

6 Analysis & Findings

6.1 We have heard the Ld. Counsel for the Applicant and the Ld. Counsel for the Respondent. We have perused the pleadings as well as the documents and materials available on record. We have also carefully examined and weighed the aforesaid submissions and contentions of the rival parties.

6.2 It is an uncontroverted fact that in the 08th CoC meeting held on 21.10.2020, the Resolution Plan submitted by Khatav Man Taluka along with the 02nd Addendum thereto were discussed and deliberated upon by the members of the CoC of the Corporate Debtor, and it was resolved that the aforesaid Resolution Plan shall be put to vote. Accordingly, the Resolution Plan submitted by Khatav Man Taluka, along with the 02nd Addendum thereto, was put for voting through electronic platform from 09.11.2020 to 23.11.2020.

6.3 On perusal of the e-voting results, it is evident that 6131 votes have been cast in favour of the agenda of considering the Resolution Plan (including the 02nd Addendum) of Khatav Man Taluka while 3037 votes have been cast against the aforesaid Resolution Plan. State Bank of India, which is one of the six members of the CoC of the Corporate Debtor, having a voting share of 832 votes, did not cast its vote.

6.4 Thus, the primary issue which now remains to be examined is whether the Resolution Plan in question has been approved by the CoC by a vote of not less than 66% of the voting share of the financial creditors of the Corporate Debtor, as required under Section 30(4) of the Code.

6.5 Before adverting to the rival contentions made by the Ld. Counsel for the parties, we may notice the relevant provisions of the Code and the allied Regulations.

30 – Submission of Resolution Plan

xxx xxx xxx

(4) - The committee of creditors may approve a resolution plan by a vote of not less than sixty-six per cent. of voting share of the financial creditors, after considering its feasibility and viability, the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of section 53, including the priority and value of the security interest of a secured creditor and such other requirements as may be specified by the Board:

Provided that the committee of creditors shall not approve a resolution plan, submitted before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 (Ord. 7 of 2017), where the resolution applicant is ineligible under section 29A and may require the resolution professional to invite a fresh resolution plan where no other resolution plan is available with it:

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

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

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

IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016 ['CIRP Regulations'],

26. Voting through electronic means.

(1) The resolution professional shall provide each member of the committee the means to exercise its vote by either electronic means or through electronic voting system in accordance with the provisions of this Regulation.

Explanation- For the purposes of these Regulations-

(a) the expressions ''voting by electronic means'' or ''electronic voting system'' means a "secured system" based process of display of electronic ballots, recording of votes of the members of the committee and the number of votes polled in favour or against, such

that the voting exercised by way of electronic means gets registered and counted in an electronic registry in a centralized server with adequate cyber security;

(b) the expression ''secured system'' means computer hardware, software, and procedure that –

(i) are reasonably secure from unauthorized access and misuse;

(ii) provide a reasonable level of reliability and correct operation;

(iii) are reasonably suited to perform the intended functions; and

(iv) adhere to generally accepted security procedures.

(2) [***]

(3) At the end of the voting period, the voting portal shall forthwith be blocked.

(4) At the conclusion of a vote held under this Regulation, the resolution professional shall announce and make a written record of the summary of the decision taken on a relevant agenda item along with the names of the members of the committee who voted for or against the decision, or abstained from voting.

(5) The resolution professional shall circulate a copy of the record made under sub-regulation (4) to all participants by electronic means within twenty-four hours of the conclusion of the voting.

6.6 The Ld. Counsel for the Applicant submits that State Bank of India holding 8.32% did not participate in the voting and only 61.31% of the members of the CoC voted in favour of the Resolution Plan and hence the Resolution Plan did not receive the requisite voting percentage as prescribed under Section 30(4) of the Code.

6.7 On the other hand, the Respondent submits that in the e-voting three options namely 'Approve', 'Reject' and 'Abstain' were given to the creditors. All the creditors, except for the State Bank of India, constituting 8.32 % of the CoC, participated in the voting and opted for either of these options. It is further contended that only those members who cast their votes either in favour or against or have abstained from voting on the decision shall be taken into account and not all member(s) who were present in the meeting but did not exercise their voting rights at all. In other words, the Ld. Counsel for the Respondent submits that the voting share of the member(s) who did not cast a vote cannot be taken into account in the denominator while computing the e-voting results. The denominator will depend upon the creditors actually exercising the vote, either in the category of approval or rejection, or exercising the option of 'abstain'. One who chooses not to exercise any of the options will not be regarded as a creditor who participated in the process and therefore will not be considered while calculating the denominator for the purposes of voting. Accordingly, the Respondent, while calculating the voting percentage, deducted 8.32% from the total of 100% and has construed that 91.68% would constitute the total voting in respect of the Resolution Plan. Since the Resolution Plan submitted by Khatav Man Taluka garnered 66.87 %

(61.31 / 91.68 x 100 = 66.87), it was declared that it crossed the minimum threshold of 66% as mandated under Section 30(4) of the Code.

6.8 In support of the above contention, the Ld Counsel relied on the order of ***Hon'ble NCLAT in the matter of IDBI Bank Ltd. v. Anuj Jain, Company Appeal No.536 of 2019,*** which is based on the judgement of Hon'ble NCLAT *in* ***'Tata Steel Ltd. Vs. Liberty House Group Pte. Limited & Ors****.'- Company Appeal (AT) (Insolvency) No. 198 of 2018' disposed of on 04th February, 2019.*

6.9 In the above backdrop, we may notice that Section 30(4) of the 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***". Thus, it is very clear that approval of a resolution plan requires not less than 66% of the voting share of the financial creditors. Section 5(28) of the Code defines as under:

"voting share" means the share of the voting rights of a single financial creditor in the committee of creditors which is based on the proportion of the financial debt owed to such financial creditor in relation to the financial debt owed by the corporate debtor.

6.10 A plain reading of Section 30(4), read with the definition under Section 5(28) gives an indication that a resolution plan is required to pass through the litmus test of not less than 66% of the voting rights of all the financial creditors. This view is further strengthened by the Report of the Insolvency Law Committee of March 2018, which recommended changes in the voting percentage.

"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."

6.11 As regards the contention of the Respondent that one who chooses not to exercise any of the options in the voting will not be regarded as a creditor who participated in the process, the Ld. Counsel relied on the order passed in the Interim Application in the matter of IDBI Bank Ltd v. Anuj Jain (supra), wherein the Hon'ble Appellate Tribunal observed as follows:

"We make it clear that if any of the Financial Creditor remains absent from voting, their voting percentage should not be counted for the purpose of counting the voting shares, as held by this Appellate Tribunal in ***'Tata Steel Ltd. Vs. Liberty House Group Pte. Limited & Ors****.'- Company Appeal (AT) (Insolvency) No. 198 of 2018' disposed of on 04th February, 2019."*

6.12 It is, however, observed that the law laid down by *Hon'ble NCLAT in Tata Steel Ltd. Vs. Liberty House Group Pte. Limited & Ors* (supra), is slightly different as follows:

"45. A member of the 'Committee of Creditors' who is not present in the meeting either directly or through Video Conferencing and thereby not considered its feasibility and viability and such other requirements as may be specified by the Board, their voting shares, therefore, cannot be counted for the purpose of counting the voting shares of the members of the 'Committee of Creditors'. Therefore, we hold that only the members of

the 'Committee of Creditors' who attend the meeting directly or through Video Conferencing, can exercise its voting powers after considering the other requirements as may be specified by the Board. Those members of the 'Committee of Creditors' who are absent, their voting shares cannot be counted."

It is pertinent to observe that in the case of Tata Steel (supra), the voting rights of members who are not present in the meeting either directly or through Video Conferencing are not counted, whereas in the matter of IDBI Bank (supra) the voting percentage of Financial Creditor who remains absent from voting are held not to be counted. State Bank of India, whose voting percentage has been excluded, was present in the CoC meeting held on 21.10.2020, as evidenced by the minutes. Therefore, the law laid down in Tata Steel is not applicable in the present case. As far as the law laid down in the case of IDBI Bank (supra), it is observed that this is an interim order passed by the Hon'ble NCLAT. Further, CIRP Regulations 24(4) states that at the conclusion of a vote held under this Regulation, the resolution professional shall announce and make a written record of the summary of the decision taken on a relevant agenda item along with the names of the members of the committee who voted for or against the decision, or abstained from voting. Nowhere in the Code or CIRP Regulations does it state that the voting share of the member who did not cast their vote should be excluded when calculating the percentage prescribed under the Code.

6.13 Even otherwise, the issue of whether the votes of the financial creditors who did not cast their votes or have abstained from voting were required to be ignored for the purpose of computing the required percentage of voting share, is no more res integra as the same has been dealt with by the Hon'ble Supreme Court in ***K. Sashidhar v. Indian Overseas Bank & Ors. (2019) 12 SCC 150] as under***.

"29….. Concededly, Regulations 25 and 39 must be read in light of Section 30(4) of the I& B Code, concerning the process of approval of a resolution plan. For that, the "percent of voting share of the financial creditors" appearing vis-a vis dissenting is required to be reckoned. ***It is not on the basis of members present and voting as such. At any rate, the approving votes must fulfil the threshold per cent of voting share of the financial creditors.*** *Keeping this clear distinction in mind, it must follow that the resolution plan concerning the respective corporate debtor, namely, KS&PIPL and IIL, is deemed to have been rejected as it had failed to muster the approval of requisite threshold votes, of not less than 75% of voting share of the financial creditors.* ***It is not possible to countenance any other construction or interpretation, which may run contrary to what has been noted hereinbefore."***

39. In our view, neither the adjudicating authority (NCLT) nor the appellate authority (NCLAT) has been endowed with the jurisdiction to reverse the commercial wisdom of the dissenting financial creditors and that too on the specious ground that it is only an opinion of the minority financial creditors. The fact that substantial or majority percent of financial creditors have accorded approval to the resolution plan would be of no avail, unless the approval is by a vote of not less than 75 (after amendment of 2018 w.e.f. 06.06.2018, 66%) of voting share of the financial creditors. To put it differently, the action of liquidation process postulated in Chapter III of the I&B Code, is available, only if approval of the resolution plan is by a vote of not less than 75% (as in October 2017) of voting share of the financial creditors. Conversely, the legislative intent is to uphold the opinion or hypothesis of the minority dissenting financial creditors. That must prevail, if it is not less than the specified percent (25% in October, 2017; now after the amendment w.e.f 06.06.2018, 44%). The inevitable outcome of voting by not less than requisite percent of voting share of financial creditors to disapprove the proposed resolution pan, de jure, entails in its deemed rejection.

(emphasis supplied)

6.14 In the circumstances, the reliance on judgements passed in IDBI Bank (supra) and Tata Steel (supra) are unsustainable in law in view of the judgment of Hon'ble Supreme Court in K. Shashidhar (supra). A coordinate bench of NCLT at Chennai in Rahul Jain v. J. Karthiga (IA No. 649 of 2022) has also taken a similar view. Thus, based on the above discussion, we are of the considered view that removing the voting share of the State Bank of India from the total voting share would run contrary to what has been laid down by the Hon'ble Supreme Court in K. Sashidhar (supra).

6.15 In the instant case where the Resolution Plan submitted by Khatav Man Taluka was put for voting, the voting results are that 6131 votes in favour of the Resolution Plan, 3037 votes against the Resolution Plan and one voter i.e. SBI, having a total vote value of 832 votes, did not cast its vote. Therefore, applying the provisions of Section 30(4) of the Code and the law laid down by the Hon'ble Supreme Court in K. Sashidhar (supra), we are of the considered view that while calculating the voting percentage in favour of the plan we cannot eliminate the vote share of State Bank of India, which attended the meeting through electronic, from the denominator merely on the ground that it did not cast its votes. Accordingly, we hold that out of 10,000 votes in total, only 6131 votes i.e. 61.31% votes have been cast by the financial creditors of the Corporate Debtor in favour of the Resolution Plan of Khatav Man Taluka, which is not sufficient for approval of a resolution plan u/s 30(4) of the Code. Hence, we have no hesitation in holding that the learned RP/Respondent has erred in concluding that the Resolution Plan submitted by Khatav Man Taluka has been approved by the CoC with 67% votes in favour.

6.16 We shall now deal with other objections and contentions of the Respondent as well.

6.17. Ld. Counsel for the Respondent has objected to the instant application on the grounds of delay and that the Applicant has no locus to challenge the Resolution Plan. In this regard, the learned Counsel for the Respondent has placed reliance upon the judgment of Hon'ble NCLAT in *Dr. Ravi Shankar Vedam v. Tiffins Barytes Asbestos and Paints Ltd. and Ors., Company Appeal (AT) (INS) No.653/2019.* In the above-cited case, the Hon'ble NCLAT has held that a shareholder has no locus standi to challenge the resolution plan. However, in the present case, the Applicant herein is not just a shareholder but also a suspended director of the Corporate Debtor. A suspended director is given notice of the CoC meetings by the RP u/s 24(3)(b) of the Code and has a right to attend the meetings of the CoC of the Corporate Debtor without having a right to vote, as outlined in Section 24(4) of the Code. A director has an independent right to approach the Adjudicating Authority on hearing of the resolution plan before it is satisfied that such resolution plan can pass muster under Section 31 of the Code. This right of the director has been recognized by the Hon'ble Supreme Court of India in Vijay Kumar Jain v. Standard Chartered Bank ([2019] 1 S.C.R. 779), in the following terms:

"9. This statutory scheme, therefore, makes it clear that though the erstwhile Board of Directors are not members of the committee of creditors, yet, they have a right to participate in each and every meeting held by the committee of creditors, and also have a right to discuss along with members of the committee of creditors all resolution plans that are presented at such meetings under Section 25(2)(i). ….."

"12. Last but not least, a resolution plan which has been approved or rejected by an order of the Adjudicating Authority, has to be sent to "participants" which would include members of the erstwhile Board of Directors – vide Regulation 39(5) of the CIRP Regulations. Obviously, such copy can only be sent to participants because they are vitally interested in the outcome of such resolution plan, and may, as persons aggrieved, file an appeal from the Adjudicating Authority's order to the Appellate Tribunal under Section 61 of the Code. Quite apart from this, Section 60(5)(c) is also very wide, ***and a member of the erstwhile Board of Directors also has an independent right to approach the Adjudicating Authority, which must then hear such person before it is satisfied that such resolution plan can pass muster under Section 31 of the Code****."*

(Emphasis Supplied)

14. ………Also, under Regulation 38(1)(a), a resolution plan shall include a statement as to how it has dealt with the interest of all stakeholders, and under sub-clause 3(a), a resolution plan shall demonstrate that it addresses the cause of default. This Regulation also, therefore, recognizes the vital interest of the erstwhile Board of Directors in a resolution plan together with the cause of default. It is here that the erstwhile directors can represent to the committee of creditors that the cause of default is not due to the erstwhile management, but due to other factors which may be beyond their control, which have led to non-payment of the debt. ***Therefore, a combined reading of the Code as well as the Regulations leads to the conclusion that members of the erstwhile Board of Directors, being vitally interested in resolution plans that may be discussed at meetings of the committee of creditors, must be given a copy of such plans as part of "documents" that have to be furnished along with the notice of such meetings****. (Emphasis Supplied).*

6.18. Thus, in view of the law discussed and laid down by the Hon'ble Supreme Court in Vijay Kumar Jain (supra), we are of the considered view that the Applicant, who is a member of the suspended Board of Directors, is vitally interested in the resolution plans that may be discussed at the meetings of the committee of creditors and he has an independent right to approach the Adjudicating Authority, which must then hear such person before it is satisfied that such resolution plan can pass muster under Section 31 of the Code. Therefore, we do not see any merit in the contention of the Ld. Counsel for the Respondent that the Applicant has no locus to challenge the resolution plan. Since we have already held herein that the Applicant has a locus to challenge the resolution plan, we also dismiss the contention of the Respondent that only SBI could have taken the objection with respect to its non-voting or abstention from voting on the Resolution Plan.

6.19. Ld. Counsel for the Respondent submits that the Applicant is filing the captioned Application more than two years after the Resolution Plan was already approved by the CoC. However, since the Resolution Plan has not yet been approved or rejected by the Adjudicating Authority as on the date when the captioned Application was filed, the objections of the Applicant to the Resolution Plan approved by the CoC can very well be placed before the Adjudicating Authority, which must then hear such person before it is satisfied that such resolution plan can pass muster under Section 31 of the Code. Further, there is no prescribed timeline in the Code or under the CIRP Regulations to file or raise objections to the Resolution Plan before the Adjudicating Authority. Hence, the aspect of delay or laches on the part of the Applicant, if any, cannot come to the aid and rescue of the Respondent in the facts of the present case.

6.20. Having come to the conclusion that the Resolution Plan submitted by Khatav Man Talukahas did not pass the muster of Section 30(4) of the Code, the need arises to consider the request of the Applicant seeking permission to submit a resolution plan before CoC. We observe that the CIRP of Corporate Debtor was initiated on 28.11.2019, and the extended CIRP period expired on 06.01.2021. While there is no dispute as regards the status of the Corporate Debtor as an MSME in accordance with the provisions of MSMED Act, no reasons are stated in the Application for not submitting an Expression of Interest and Resolution Plan during the CIRP process. Further, the existing framework does not permit a person, even if he is a suspended director or promoter of an MSME company, to submit a resolution process without following the due process. In the circumstances, the prayer of the Applicant to submit a resolution plan cannot be entertained by the Tribunal at this stage.

6.21. Ld. Counsel for Respondent has also made a submission relying upon the decision of Hon'ble NCLAT in ***Nivaya Resources Pvt. Ltd. vs. Asset Reconstruction Company (India) Ltd., Company Appeal No. 1184 of 2022*** that in the event this Tribunal arrives at a finding that the voting per centage was required to be calculated after including SBI and that Plan was not approved by 66% of the CoC, this Tribunal be pleased to remit the Plan for revoting by the CoC. It is observed that in some matters, the Hon'ble NCLAT and Hon'ble Supreme Court favoured a view that if the resolution plan submitted by the Resolution Plan does not meet all the requirements specified under the Code and allied Rules and Regulations, the NCLT has the power to remit the resolution plan for reconsideration. Taking into account the facts of the present case and keeping in mind the objective of the resolution of the Corporate Debtor, we deem it appropriate to send back the Resolution Plan for reconsideration by the CoC. However, liberty is also granted to the CoC to choose any other option available under the Code. We also heard Ld counsel for SBI, who had stated that they could not vote as they were awaiting instructions from their higher authorities. In the meantime, SBI may also take instructions from its competent authorities.

6.22 Given the foregoing findings, analysis, reasoning, and discussion, we are of the unequivocal view that the Resolution Plan of the Corporate Debtor submitted by Khatav Man Taluka has not been approved by the requisite percent of voting share of the financial creditors as required u/s 30(4) of the Code. Hence, we are inclined to partly allow this application, and accordingly, pass the following orders:

ORDER

i. **I.A. No. 141 of 2023 is partly allowed**;

ii. **The Resolution Plan** of the Corporate Debtor submitted by Khatav Man Taluka Agro Processing Limited is remitted back for reconsideration by the CoC. Liberty is also granted to the CoC to choose any other option available under the Code in the exercise of its commercial wisdom.

iii. Parties to bear their own costs.

iv. Accordingly, I.A. No. 141 of 2023 stands disposed of on the above terms.

Sd/-	**Sd/-**
ANIL RAJ CHELLAN	**LAKSHMI GURUNG**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**