

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-II

I.A.2159/ND/2020

IN

Company Petition No. (IB)1232(ND)/2019

IN THE MATTER OF:

American Express Banking Corporation

...Financial Creditor

Versus

Fourth Dimension Solutions Limited

...Corporate Debtor

AND IN THE MATTER OF:

Pooja Bahry

Resolution Professional of Fourth Dimension Solutions Ltd.

59/27 Prabhat Road

New Rohtak Road

New Delhi-110005

...Applicant

Versus

1) **Linkstar Infosys Pvt. Ltd.**
9/C, Vardan Complex
Near Vimal House
Lakhudi Circle, Navrangpura
Ahemdabad -380014

2) **Mr. Dhaval Jitendra Kumar Mistry**
C/104, Suyash Homes
Nr. Vandematram Township
Bh. Vishwakarma Mandir, New SG Road
Gota Ahemdabad -382481

...Resolution Applicants

Order Delivered on : 25.09.2020

SECTION : 30(6) of the Insolvency and Bankruptcy Code, 2016.

CORAM:

CH. MOHD. SHARIEF TARIQ, MEMBER (J)

SHRI L. N. GUPTA, HON'BLE MEMBER (T)



PRESENT:

For the Applicant : Ms. Pooja Bahry, RP and
Mr. Abhishek Anand, Advocate
For Resolution Applicant : Mr. Atul Sharma, Advocate

ORDER

PER SHRI L. N. GUPTA, MEMBER (T)

IA No. 2159/2020 has been filed by Ms. Pooja Bahry, the Resolution Professional of the Fourth Dimension Ltd. (hereinafter referred as 'Resolution Professional') for approval of the Resolution plan submitted by the Linkstar Infosys Pvt. Ltd. and Mr. Dhaval Jitendra Kumar Mistry. (hereinafter referred as 'Resolution Applicants').

2. That the prayers made in the IA No. 2159/2020, which is taken up for consideration, are reproduced below :

- (a) *Allow the present application;*
- (b) *Approve and accept the revised resolution plan of Resolution Applicant Linkstar Infosys Pvt Ltd and Mr Dhaval Mistry along with Addendum dated 24.04.2020 as approved by the Committee of Creditors by 100% as submitted in respect of the Corporate Debtor i.e. Fourth Dimension Solution Limited;*
- (c) *Declare that upon approval of the Resolution Plan by this Hon'ble Adjudicating Authority, the provisions of the Resolution Plan shall be binding on the Company, its creditors, guarantors, members, employees and other stakeholders in accordance with Section 31 of the Code, and shall be given effect to and implemented pursuant to the order of this Hon'ble Adjudicating Authority;*



- (d) *Declare that upon approval of the Resolution Plan by this Hon'ble Adjudicating Authority, the provisions of the Resolution Plan shall be binding on Securities Exchange Board of India (SEBI) and SEBI shall not be allowed to enforce orders dated 17th March 2020 (read with its Addendum dated 30th March 2020) against the Corporate Debtor.*
- (e) *Approve the appointment of the monitoring agency as approved by the Committee of Creditors;*
- (f) *Approve and grant reliefs and directions sought under the resolution plan by the Resolution Applicants;*
- (g) *pass such other or further order / order(s) as may be deemed fit and proper in the facts and circumstances of the instant case.*

3. To put succinctly, the facts of the case are that the Financial Creditor, M/s American Express Banking Corporation filed an Application bearing No. IB-1232 (ND)/2019 under Section 7 of the I&B Code for initiation of Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor, Fourth Dimension Limited. The said Application was admitted by this Tribunal vide Order dated 25.07.2019 and Mr. Jaswant Singh was appointed as the Interim Resolution Professional (IRP).

4. In terms of the Regulation 6(1) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the said Interim Resolution Professional made a public announcement in Form-A on 02.08.2019. The public announcement was also uploaded on the website of Insolvency and Bankruptcy Board of India (IBBI).



5. The Interim Resolution Professional constituted a Committee of Creditors, which comprised of the following financial creditors with voting share given against each :

S. No No.	Name of the Creditor	Claim Admitted (Rs. in Crore)	Voting Share %age
1.	Auric Solutions Pvt Ltd	0.07	1.28
2.	Auric 3D Pvt Ltd	0.19	3.48
3.	P-Net solution Ltd	2.99	54.78
4.	American Express Banking Corporation	2.21	40.46
5.	Amlendu Mukherjee (Related Party)	3.95	NIL
Total		9.41	100.00

6. That there was no consensus amongst the Members of CoC in naming the RP. The American Express Banking Corporation having a voting share of 40.46% had proposed the name of an RP, which was not acceptable to the remaining members of COC with combined voting share of 60%. Given the peculiar facts and circumstances of the case leading to inordinate delay in the resolution process, this bench, with the acceptance of both the sides, vide Order dated 27.11.2019 had appointed Ms. Pooja Bahry as the Resolution Professional of the Corporate Debtor.

7. That the Form 'G' was published on 15.01.2020 in the newspapers namely, Financial Express (English edition) and Jansatta (Hindi edition), according to which the last date of submission of the Expression of Interest (EOI) was 30.01.2020.



8. It is submitted by the RP that there was only one Resolution Plan received and the same was placed for consideration and vote before the Committee of Creditors (COC).

9. It is submitted by the RP that in the 14th meeting of the COC held on 28.04.2020, the Resolution Plan was placed along with the following resolution for consideration and vote :

*“**RESOLVED THAT** to accept the revised/ modified Resolution Plan submitted by M/s Linkstar Infosys Pvt Ltd and Mr Dhaval Mistry on 2nd April 2020 (read along with the Addendum to the Resolution Plan, dated 24th April 2020).*

***RESOLVED THAT** in accordance with section 30(4) & 30(6) of the Code read with regulations made thereunder, the approval of the members of Committee of Creditors be and is hereby accorded to the Resolution Plan submitted by Linkstar Infosys Pvt Ltd and Mr Dhaval Mistry for the Corporate Debtor, Fourth Dimension Solution Limited and for filing of the approved Resolution Plan with Hon’ble Adjudicating Authority i.e. NCLT by RP.”*

***RESOLVED THAT** the Resolution Professional be and is hereby authorized to file application for approval of resolution plan and do all such acts and things as may be required necessary or incidental thereto.”*

10. It is further submitted by the RP that e-voting on the aforesaid resolution had commenced at 11 A.M. on the 29th April, 2020 and continued till 11A.M. on the 1st May, 2020. It has been added by the RP that the Resolution for approval of the Resolution Plan submitted by Linkstar Infosys Pvt Ltd and Mr Dhaval Mistry was unanimously approved by the Committee of Creditors with 100% voting in its favour. The relevant extract of the E-voting results as submitted by the RP is reproduced overleaf :

Item No.	Brief Description of the resolution	American Express Banking Corporation (40.46 % as per erstwhile IRP)	Auric Solutions Pvt Ltd (1.28 % as per erstwhile IRP)	Auric 3D Pvt Ltd (3.48 % as per erstwhile IRP)	P-Net Solutions Ltd (54.78 % as per erstwhile IRP)	FINAL VOTE / DECISION OF COC
1	<p>To Resolve to accept the revised/ modified Resolution Plan submitted by M/s Linkstar Infosys Pvt Ltd and Mr Dhaval Mistry on 2nd April 2020 (read along with the Addendum to the Resolution Plan, dated 24th April 2020)</p> <p>To resolve in accordance with section 30(4) & 30(6) of the Code read with regulations made thereunder, the approval of the member of Committee of Creditors be and is hereby accorded to the Resolution Plan submitted by Linkstar Infosys Pvt Ltd and Mr Dhaval Mistry for the Corporate Debtor, Fourth Dimension Solutions Limited and for filing of the approved Resolution Plan with Hon'ble Adjudicating Authority i.e. NCLT by RP</p>	<p>ASSENT</p> <p>Voted FOR the Agenda</p>	<p>ASSENT</p> <p>Voted FOR the Agenda</p>	<p>ASSENT</p> <p>Voted FOR the Agenda</p>	<p>ASSENT</p> <p>Voted FOR the Agenda</p>	<p>100 % ASSENT (Voted FOR the Agenda)</p> <hr/> <p>RESOLUTION PASSED</p>

(Handwritten mark)

11. As regards to the contents of the Resolution plan, it is submitted by the RP that during the CIR process, the following claims were received and admitted category-wise :

Particulars	Amount Claimed (Rs. in Cr.)	Claim Admitted (Rs in Cr.)
Financial Creditors	65.93	9.41
Operational Creditors	139.05	86.73
Workmen & Employees	8.91	6.54
Other Creditors	NIL	NIL
Total	213.89	102.68

(Handwritten mark)

12. It is submitted by the RP that the Resolution Applicants have offered Rs 12 Crore in their Resolution Plan. It is further submitted by the RP that the Average Fair value of the Corporate Debtor stands at Rs 3.98 Crore and its Liquidation value is Rs 2.7 Crore. It has been added that the Resolution Applicants have proposed the payment to the creditors in the following manner :

Particulars	Amount (Rs. in Cr.)
CIR Process Cost (Includes amount paid till date out of the fund available with CD and the amount payable, which shall be duly approved by COC)	3.44
Payment to Financial Creditors excluding related parties	3.55
Payment to Operational Creditors including government dues	1.73
Payment to Workmen excluding related parties	0.41
Payment towards Share Holders (For Public Holding Only)	0.12
Payment towards contingent liabilities	0.25
Working Capital & CAPEX (as and when required during execution of various contracts)	2.50
Total	12.00

13. That the payment schedule as set out by the Resolution Applicants in the Resolution Plan is reproduced overleaf :



Particulars	Amount (Rs. in Cr.)	Percentage of the Total Plan	Timeline
CIR Process Cost	3.44	28.66%	Pending CIRP cost to be paid within 30 days subject to adjustment of EMD of Rs. 25 lakh w.e.f. the effective date
Payment to Financial Creditors (excluding related parties)	3.55	29.58%	45% within 90 days 45% within 180 days 10% within 365 days
Payment to Operational Creditors including government dues (excluding related parties)	1.73	14.42%	Within 365 days by way of issue of preference shares and redemption of shares
Payment to Workmen & Employees (excluding related parties)	0.41	3.42%	Within 180 days
Payment towards Share Holders	0.12	1.00%	Within 365 days
Payment of contingent liabilities	0.25	2.08%	Within 30 days as and when crystallised reserving the rights to file appeal before the higher forum
Working Capital & Capex	2.50	20.84%	As and when required during execution of various contracts
Total :	12.00	100.00	

14. As regards to the Shareholding pattern of the Resolution Applicants on approval of the Resolution plan, the following has been submitted by the RP :

“ TRANSFER EXISTING SHARE CAPITAL OF PROMOTERS AND GROUP OF PROMOTERS, AND REDUCTION IN CAPITAL OF THE CORPORATE DEBTOR :



- *Resolution Applicants propose to acquire the equity of promoters and their group.*
- *On the effective date, immediately after held by Promoters or Group of Promoters the corporate debtor shall be transferred to "Linkstar Trust" for which the Resolution Applicant will be the beneficial owner of such trust at value of Rs. 1 for entire share capital held by such promoters / group of promoters, holding such existing share capital.*
- *"Linkstar Trust" shall be created subject to approval by the Committee of Creditors and the same shall be formed after approval of resolution plan by the Committee of Creditors but before approval of plan by Hon'ble NCLT.*
- *Any other equity-linked securities, securities convertible into or exchangeable with equity shares of the corporate debtor and all other securities of the corporate debtor, if any, shall also stand cancelled and extinguished without any payment and /or further action.*
- *Existing shares held by public will be reduced by 95%*
- *After transfer, the shareholders shall be issued bonus equity shares from the reserve of the Company in the ratio of 1:1.*
- *Issue of Bonus shall be in compliance with applicable provisions of Companies Act, 2013 and SEBI Regulations.*
- *All the outstanding Share warrants shall stand cancelled and no any shares shall be issued against the warrants. Further, such warrant holders shall not make any payment towards outstanding conversion amount.*

REDUCTION IN THE EXISTING SHARE CAPITAL HELD BY PUBLIC:

- *Existing shares of Corporate Debtor held by Public shall stand reduced to 5% and the restructured equity will be as per table shown in clause 3 hereunder. The public shareholders shall be paid Re 0.02/- per share against their holding i.e, Rs. 11.58 Lakh at the end of 365 days from effective date.*
- *The shares of public shall be restored to minimum 25% within stipulated time as required under rules and regulations from date of allotment/reduction by way of disposal of shareholding of new promoters/fresh issue of further equity shares to be decided by the newly formed*

Board of Directors of Corporate Debtor with consent of shareholders.

- Compliance with respect to SEBI Guidelines regarding issue of shares and reduction and cancellation of share capital shall be adhere by the Resolution Applicants subject to applicable provisions of Insolvency & Bankruptcy Code.

PROPOSED SHAREHOLDING PATTERN AFTER APPROVAL OF RESOLUTION PLAN :

Holding	Existing Capital			Proposed Capital		
	No. of Shares	Amount Rs.	%	No. of Shares	Amount Rs.	%
Existing promoters & group (will be transferred to RA)	1,59,96,800	15,99,68,000	73.43	1,59,96,800	15,99,68,000	49.11
Existing Public	57,87,200	5,78,72,000	26.57	2,89,360	28,93,600	0.89
Bonus Issue	NIL	NIL	NIL	1,62,86,160	16,28,61,600	50.00
Total	2,17,84,000	21,78,40,000	100	3,25,72,329	32,57,23,290	100

15. That the Resolution Applicants have filed an Affidavit deposing that they do not suffer from any of the disqualifications Mentioned under Section 29A of the I & B Code, 2016.

16. It is submitted by the Resolution Applicants that they have also submitted Performance Bank Guarantee amounting to Rs 10 Lakhs in compliance of the Regulation 36-B(4-A) of the IBBI (Insolvency Resolution Process For Corporate Persons) Regulations, 2016. The same is also recorded in the Minutes of the 15th Meeting of CoC held on 09.05.2020.

17. The parameters for approval of a Resolution Plan are set out in Sections 30(2) and 31 of the IBC, 2016. It is submitted by the RP that the Resolution Plan under consideration has met the mandatory

compliances, which are reproduced below :

Provisions under Section 30(2) of the Code	Compliance under the Resolution Plan
<p>(a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the repayment of other debts of the Corporate Debtor;</p>	<p>Yes, Clause 4.2 of the Resolution Plan provides for the Insolvency Resolution Process Cost. (Page No. 398)</p> <p>RA has agreed in Clause 4.2.2 read with 4.2.3 that although estimated CIRP cost is Rs. 3.44 crores of which CIRP Cost of Rs. 1.31 crores has already been paid by RP, whereas, CIRP Cost of Rs. 2.13 is pending. The shortfall in CIRP Costs will only be paid in full and priority and such cost shall be approved by the CoC. Further, in case if the CIRP Cost already paid from the existing fund available of the Corporate Debtor, RA will pay such reduced amount to meet the CIRP Cost. (Page No. 398)</p>
<p>[(b) provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than-</p> <p>i. the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or</p> <p>ii. the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53, whichever is higher, and provides for the</p>	<p>Clause 4.3 provides for payment to Employees/Workmen : Resolution Applicant proposes to pay 10% of amount admitted for non-related parties i.e. Rs. 41.20 Lakh. Resolution Applicant does not propose to pay any amount to claims of related parties. No any additional amount will be paid to the workmen/employees of the Corporate Debtor. (Page No. 399)</p> <p>In Clause 4.4.3, the RA has stated that though, the liquidation value due to operational creditors presumed to be NIL, RA proposes to pay 2% of admitted claim of INR 86.73 Cr i.e. Rs. 1.73 Cr. towards full and final payment of operational creditors. However, COC if deems fit, may provide more amount to Operational Creditors against their claims over and above Rs. 1.73 Cr. RA proposes to bring in a payment of 2% of outstanding dues as envisage under Clause No. 4.4.3. of the Resolution Plan in manner prescribed in Para 4.4.4. hereunder. (Page No. 401)</p> <p>Clause 4.4.4 provides for issue of 0.001% Non-Cumulative Non-Convertible Redeemable</p>

payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor.

Explanation 1. - For removal of doubts, it is hereby clarified that a distribution in accordance with the provisions of this clause shall be fair and equitable to such creditors.

Explanation 2. - For the purpose of this clause, it is hereby declared that on and from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019, the provisions of this clause shall also apply to the corporate insolvency resolution process of a corporate debtor-

- i.* where a resolution plan has not been approved or rejected by the Adjudicating Authority;
- ii.* where an appeal has been preferred under section 61 or section

Preference Shares having a face value of Rs. 100 each. Redemption of the said preference shares at the end of year 1 from date of issue of such preference shares at price of Rs. 2/- per share i.e. @2% of issue price. Pay amount as determined at the time of redemption to the bank accounts. **(Page No. 401)**

Payment towards operational creditor is to be made within 365 days from the effective date, is in compliance with section 30(2)(b) read with regulation 38(1).

Dissenting Financial Creditors:-

The RA has made compliance of Section 30(2)(ii). However, the RA in clause 4.5.8 have stated as under:-

Liquidation value due to financial creditors is not known to the Resolution Applicant. Hence, in case, any of the Financial Creditor who has right to exercise its vote, do not vote in favour of the resolution plan, COC shall take care that such financial creditor shall get at-least liquidation value due to them in priority of other financial creditors who have voted in favour of resolution plan. **(Page No. 407)**

<p>62 or such an appeal is not time barred under any provision of law for the time being in force; or</p> <p>iii. where a legal proceeding has been initiated in any court against the decision of the Adjudicating Authority in respect of a resolution plan;]</p>	
<p>(c) provides for the management of the affairs of the Corporate Debtor after approval of the resolution plan;</p>	<p>Yes, the Resolution Plan in Clause 7 provides for management of the Company by the Resolution Applicant. (Page No. 414 to 416)</p> <p>Clause 7.1.1.1, 7.1.1.2, 7.1.1.3 & 7.1.1.5 provides for constitution of Monitoring Agency (MA), whereby RA will appoint another insolvency professional other than the present Resolution Professional as Chair Person, with 2 members of RA and 1 representative of FC having highest share in the CoC with a maximum number of 3 members. (Page No. 414 to 416)</p>
<p>(d) the implementation and supervision of the resolution plan;</p>	<p>Yes, the Resolution Plan provides for term and implementation of the resolution plan in Clause 5.1, 5.3 & 5.4 of the Resolution Plan. (Page No. 412 and 413)</p>
<p>(e) does not contravene any of the provisions of the law for the time being enforce;</p>	<p>Yes, statement has been included in the Resolution Plan in Clause 9.9. (Page No. 421)</p>
<p>(f) confirms to such other requirements as may be specified by the Board.</p>	<p>Yes, as detailed in para 18 below.</p>

18. **Other requirements as specified by the Board (IBBI) :** The Resolution Professional has further submitted that the Resolution Plan is in compliance of other requirements as prescribed by the Board (IBBI) :



Regulation 36B (4A) of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016	<u>Compliance under Resolution Plan</u>
Regulation 38(1) of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 Regulation 38(1) - <i>The amendment has substituted the said regulations to provide- The amount due to the operational creditors under a resolution plan shall be given priority in payment over financial creditors</i>	Yes
<i>1A – A resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors of the corporate debtor.</i>	Yes
<i>1B – A resolution plan shall include a statement giving details if the resolution applicant or any of its related parties has failed to implement or contributed to the failure of implementation of any other resolution plan approved by the Adjudicating Authority at any time in past</i>	Yes
Regulation 38(2) of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016	<u>Compliance under Resolution Plan</u>
<i>(a) the term of the plan and its implementation schedule;</i>	Yes
<i>(b) the management and control of the business of the corporate debtor during its term;</i>	Yes
<i>(c) adequate means for supervising its implementation;</i>	Yes
Regulation 38(3) of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2017	<u>Compliance under Resolution Plan</u>

<p><i>A resolution plan shall demonstrate that:</i></p> <ul style="list-style-type: none"> • <i>It addresses the cause of default.</i> • <i>It is feasible and viable.</i> • <i>Provides for effective implementation.</i> • <i>It has provisions for approvals required and timeline for the same.</i> • <i>The Resolution Applicant has capability to implement the Resolution Plan.</i> <p><i>The request for resolution plans shall require the resolution applicant, in case its resolution plan is approved under sub-section (4) of section 30, to provide a performance security within the time specified therein and such performance security shall stand forfeited if the resolution applicant of such plan, after its approval by the Adjudicating Authority, fails to implement or contributes to the failure of implementation of that plan in accordance with the terms of the plan and its implementation schedule.</i></p>	<ul style="list-style-type: none"> • <i>Resolution Plan addresses the reasons for the default by the Corporate Debtor.</i> • <i>The CoC has decided the feasibility and viability of the resolution plan.</i> • <i>The plan provides for its term and implementation.</i> • <i>The plan provides the provisions for approvals required and timelines for the same.</i> • <i>The Resolution Applicant has provided its financial strength, which Committee of Creditors may consider.</i> <p><i>Yes, the Resolution Applicant in Clause 6, wherein the Resolution Applicant has undertaken to provide the performance security of 5% of the Bid Amount payable as envisage under resolution plan in form of Deposit/BG as per the terms of the RFRP. (Page No. 414)</i></p>
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19. During the course of hearing on 05.08.2020, the Bench has raised the certain queries, to which the following replies were submitted by RP :

Sr. No.	Query	Reply
1	That whether the CD is a Listed Company?	Yes, the Corporate Debtor i.e. Fourth Dimension Solutions Limited is a company listed on the National Stock Exchange ("NSE") with symbol "FOURTHDIM" and International Securities Identification Number (ISIN) -INE382T01014.
2	If Listed, what is the Current market Cap of the Company?	That the trading value per share of the Corporate Debtor as on date is Rs. 5.70/- and the face value per share of the Corporate Debtor is Rs. 10/-. The Market Capitalization of the Corporate Debtor as on date is total number of shares (2,17,84,000 shares) into the market price per share (Rs. 5.70) which comes to Rs. 12,41,68,000/- (approximately Rs. 12.42 Crore). The market capitalization of the Corporate Debtor as on date as per the money control website is Rs. 12.42 Crore.

20. That this Bench had further sought the following clarifications from the Resolution Professional on 09.09.2020, which along with replies submitted by RP are reproduced below :

S. No	Clarification Sought	Reply given by RP
a)	It is observed that the total cost of Resolution Plan is Rs. 12 crore out of which, the CIRP cost is stated to be Rs. 3.44 crores, which comes to nearly 29% of the entire Resolution Plan. The RP shall submit the detailed break up of this CIRP Costs.	The breakup has been provided by the RP in terms of an Annexure to the reply. It is pertinent to mention that out of Rs. 3.44 crore estimated as CIRP Costs by the Resolution Applicants, an approximate amount of Rs. 1.44 Crore is towards the salaries of the employees, which is a part of the CIRP Costs as per Section 5(13)(c) of the I & B Code, 2016. The CIRP costs and the costs for running of the Corporate Debtor as a going concern had been duly approved by the Committee of Creditors as discussed in various meetings of the CoC.
b)	It has been further indicated that the CIR cost "includes amount paid till date out of the fund available with the CD. Amount payable shall be duly approved by the CoC. RP shall indicate what portion and amount of CIR Cost incurred has been already approved by CoC and how much remains to be approved.	It is apposite to mention here that out of the total CIRP Costs of Rs. 3.44 crore as mentioned by the Resolution Applicants in their Resolution Plan, Rs. 2.735 crore already stands paid during the CIRP Process and an approximate amount of Rs. 1.1 crore is pending, which will be paid by the Resolution Applicants.
c)	The Second CoC meeting held on 17.10.2019 vide item no. 5, has discussed the	That during the CIRP an amount of Rs. 9,14,817 as per the approval of the CoC is paid to the Suspended Board of Director i.e. Mr. Amalendu Mukherjee (plus Rs 4,38,271 deposited as TDS) and an amount of Rs.

	<p>agenda item namely, "Remuneration payable to Managing Director". The CoC in this said meeting has approved the remuneration of Rs. 3 lakhs per month to the Suspended Director from the retrospective fact i.e., the date of initiation of CIRP. RP shall indicate how much amount has been paid to the Suspended Board of Directors since initiation of CIRP</p>	<p>9,12,029 is pending to be paid. The details are mentioned hereinbelow :</p> <table border="1" data-bbox="778 347 1434 1077"> <thead> <tr> <th colspan="4">Payment made to Mr. Amalendu Mukherjee</th> <th rowspan="2">TDS deposited</th> </tr> <tr> <th>Month</th> <th>Total</th> <th>Unpaid</th> <th>Paid</th> </tr> </thead> <tbody> <tr> <td>Aug-19</td> <td>300000</td> <td>300000</td> <td>-</td> <td>-</td> </tr> <tr> <td>Sep-19</td> <td>300000</td> <td>-</td> <td>255000</td> <td>45000</td> </tr> <tr> <td>Oct-19</td> <td>300000</td> <td>225000</td> <td>30000</td> <td>393271</td> </tr> <tr> <td>Nov-19</td> <td>300000</td> <td>-</td> <td>255000</td> <td>-</td> </tr> <tr> <td>Dec-19</td> <td>300000</td> <td>255000</td> <td>-</td> <td>-</td> </tr> <tr> <td>Jan-20</td> <td>300000</td> <td>-</td> <td>255000</td> <td>-</td> </tr> <tr> <td>Feb-20</td> <td>300000</td> <td>131729</td> <td>-</td> <td>-</td> </tr> <tr> <td>Mar-20</td> <td>164517</td> <td>-</td> <td>119517</td> <td>-</td> </tr> <tr> <td>Apr-20</td> <td>100</td> <td>-</td> <td>100</td> <td>-</td> </tr> <tr> <td>May-20</td> <td>100</td> <td>-</td> <td>100</td> <td>-</td> </tr> <tr> <td>Jun-20</td> <td>100</td> <td>-</td> <td>100</td> <td>-</td> </tr> <tr> <td>Jul-20</td> <td>100</td> <td>100</td> <td>-</td> <td>-</td> </tr> <tr> <td>Aug-20</td> <td>100</td> <td>100</td> <td>-</td> <td>-</td> </tr> <tr> <td>Sep-20</td> <td>100</td> <td>100</td> <td>-</td> <td>-</td> </tr> <tr> <td>TOTAL</td> <td>2265117</td> <td>912029</td> <td>914817</td> <td>438271</td> </tr> </tbody> </table> <p>That in the 11th meeting of the CoC convened on 17.03.2020, the Suspended Board of Director Mr. Amalendu Mukherjee agreed to not to take any monthly salary from that date. The same was accepted by the CoC unanimously. Thereafter, only Rs 100 per month is being paid to Mr Mukherjee.</p>	Payment made to Mr. Amalendu Mukherjee				TDS deposited	Month	Total	Unpaid	Paid	Aug-19	300000	300000	-	-	Sep-19	300000	-	255000	45000	Oct-19	300000	225000	30000	393271	Nov-19	300000	-	255000	-	Dec-19	300000	255000	-	-	Jan-20	300000	-	255000	-	Feb-20	300000	131729	-	-	Mar-20	164517	-	119517	-	Apr-20	100	-	100	-	May-20	100	-	100	-	Jun-20	100	-	100	-	Jul-20	100	100	-	-	Aug-20	100	100	-	-	Sep-20	100	100	-	-	TOTAL	2265117	912029	914817	438271
Payment made to Mr. Amalendu Mukherjee				TDS deposited																																																																																		
Month	Total	Unpaid	Paid																																																																																			
Aug-19	300000	300000	-	-																																																																																		
Sep-19	300000	-	255000	45000																																																																																		
Oct-19	300000	225000	30000	393271																																																																																		
Nov-19	300000	-	255000	-																																																																																		
Dec-19	300000	255000	-	-																																																																																		
Jan-20	300000	-	255000	-																																																																																		
Feb-20	300000	131729	-	-																																																																																		
Mar-20	164517	-	119517	-																																																																																		
Apr-20	100	-	100	-																																																																																		
May-20	100	-	100	-																																																																																		
Jun-20	100	-	100	-																																																																																		
Jul-20	100	100	-	-																																																																																		
Aug-20	100	100	-	-																																																																																		
Sep-20	100	100	-	-																																																																																		
TOTAL	2265117	912029	914817	438271																																																																																		
d)	<p>What quantum of amount of the total value of Resolution Plan is proposed to be paid to Suspended Board of Directors and related parties.</p>	<p>It is pertinent to mention here that originally the Resolution Applicants had proposed to pay an amount of Rs. 2.37 Crore to the related party financial creditor, Mr Amalendu Mukherjee. The Applicant had pointed out the decision of the Hon'ble NCLT, Allahabad Bench in the matter of <i>J.R. Agro Industries P. Limited v. Swadisht Oils P. Ltd</i>, NCLT Allahabad, wherein keeping in view of the UNCITRAL Legislative Guide on Insolvency Law, the NCLT held that the claim of a related party, whether in the nature of loan or otherwise, should rank subordinate to the claim of the operational creditors, and should be treated at par with the equity shareholders under Section 53(1)(h) of the Insolvency and Bankruptcy Code, 2016. The Applicant brought this to the notice of the COC/ RA that therefore the manner of distribution of the amount may be seen by the</p>																																																																																				

		<p>Committee of Creditors and the CoC may exercise their commercial wisdom in the interest of all the stakeholders (as the distribution of the proposed amount under the resolution plan is within the authority of the Committee of Creditors). The Applicant further pointed out that the COC may decide regarding the distribution of amount keeping into consideration the feasibility and viability of the plan and interest of all stakeholders.</p> <p>That in view of the aforesaid observation, the Resolution Applicant submitted the revised Resolution Plan dated 2nd April 2020, which has been placed before this Honble Bench for approval and accordingly, no amount is being paid to the Suspended Board of Director or related party creditors.</p>
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21. That it is a matter of fact that an Application under Section 43,45 and 66 of the I&B Code, 2016 has been preferred before this Authority by the RP, wherein the Suspended Director Sh. Amalendu Mukherjee is one of the Respondents. As per the Application, the Forensic Auditor appointed by the CoC has given observation as reproduced overleaf :



Our Observations with the above transactions are as below:-

- We have observed from the Statutory Audit Report of the Company for the F.Y. 2018-19 that the Company has not paid/provided managerial remuneration in accordance with the requisite approvals mandated by the provisions of Section 197 read with Schedule V to the Companies Act. *The Company has paid/ provided Rs. 2,40,00,000.00 as Director's Remuneration during the year to one director which is not in accordance as per provisions of Section 197 read with Schedule V to the Companies Act.*
- *It can be analysed from above that instead of repaying dues of Financial Creditors Company has paid huge amount of remuneration to the Director Mr. Amalendu Mukherjee amounting to Rs. 240.00 Lakhs. Hence, it can be concluded that the Corporate Debtor has mala fide intention of defrauding Financial Creditors.*
- However, the amount of remuneration provided in the Tally was not matching with the Audited Balance Sheet provided to us, this can be better understood as below:

(Amount in Lakhs)				
F.Y.	Particulars	As per Tally	As per Statutory Audit Report	Difference
2018-19	Remuneration	156.13	240.00	(96.60)

We have not been provided any reason for such difference in Remuneration as provided in the Tally and as per Audit Report.

During our audit period Borrower Company was going through liquidity crunch and was not in a position to repay the financial debts, however it can be observed from the above data company has debited Profit & Loss account by Rs. 472.26 Lakhs as director remuneration/ salary to Mr. Amalendu Mukherjee which is preferential over other financial creditors. Hence, it is evident from the above that company has done "Preferential Transactions" with Mr. Amalendu Mukherjee within the scope of Sec 43 of IBC.

- **Section 43: Preferential transactions and relevant time read as under:**

A preference shall be deemed to be given at a relevant time, if-

(a) it is given to a related party (other than by reason only of being an employee), during the period of two years preceding the insolvency commencement date;

Section 44-Orders in case of Preferential Transactions read as under:

The Adjudicating Authority, may, on an application made by the resolution professional or liquidator under sub-section (1) of section 43, by an order:

(d) require any person to pay such sums in respect of benefits received by him from the corporate debtor, such sums to the liquidator or the resolution professional, as the Adjudicating Authority may direct.


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22. That the Forensic Auditor has observed that the managerial remuneration paid to the Ex-Director Mr. Amalendu Mukharjee was not in accordance with Section 197 read with Schedule V of the Companies Act.. The erstwhile IRP had placed an Agenda in the 2nd Meeting of the CoC held on 17.10.2019 for paying remuneration @Rs.3



Lakh per month to the Ex-Director Sh. Amalendu Mukharjee from the date of initiation of CIRP i.e., with retrospective effect. The present RP has confirmed on Affidavit that Mr. Amelendu Mukherjee was being paid @ Rs. 3,00,000 per month since August 2019 and an amount of Rs. 9,14,817 has already been paid during the CIRP. The present RP has also informed that payment of Rs. 9,14,817 to Mr. Amalendu Mukherjee is still pending. The agenda placed in the 2nd meeting of CoC is reproduced below :

ITEM No.5 - TO DISCUSS REMUNERATION PAYBLE TO MANAGING DIRECTOR

Members has also discussed the requirement of services Mr. Amalendu Mukherjee, members of suspended Board of Directors of the Corporate debtor during the CIRP, keeping in view of the financial position of the company, Therefore the below resolution was placed before members for discussion, to fix and to approve the fresh salary for Mr. Amalendu Mukherjee.

"RESOLVED THAT approval of the members of the Committee of Creditors be and hereby given and Rs 3,00,000/- Per Month be is hereby approved as salary for Mr. Amalendu Mukherjee, members of suspended Board of Directors of the Corporate debtor during the CIRP and said salary is be effective since the date of CIRP initiation date.

RESOLVED THATsubject to approval of members of the Committee of Creditors in their meeting, Mr. Amalendu Mukherjee, also eligible to get reimbursement of expenses as incurred by him for discharging his functions and for the business purpose of the corporate debtor.


FURTHER RESOLVED that IRP/RP is hereby authorized to make the necessary monthly payments of salary so approved subject to availability of funds after meeting all other monthly expenses during CIRP.

FURTHER RESOLVED that the above expenses and fee of IRP will be part of Corporate Insolvency Resolution Process cost."

The above resolutions passed as voting in favor of item was 100 % and below is the Voting pattern for the Resolution.

S. no.	Name and Address of Member of Committee of Creditors	% of Voting	Approve/Dis-approve
1	American Express Banking Corp.	40.46	Approve
2.	P-Net Solutions Ltd.	54.78	Approve
3.	Auric Solution Pvt. Ltd.	1.28	Approve
4.	Auric 3d Pvt Ltd.	3.48	Approve
	Total	100%	

ITEM NO. 6 - TO APPROVE THE CONVENING OF COC IN FUTURE AT SHORTER NOTICE


JASWANT SINGH
 IP No. TBBI/PA 002/IP-000372/201 / 2018/11136

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23. That as per Section 18 of the I & B Code, 2016, the IRP is duty bound to collect information relating to business operations of the Corporate Debtor and its Financial and Operational payments made during the previous two years. As it appears the erstwhile IRP Sh. Jaswant Singh (IBBI/IPA-002/IP-N00372/2017-2018/11135) has not performed duties diligently inasmuch as he had placed a resolution for payment of remuneration of the Ex-Director Mr. Amalendu Mukharjee at a rate higher than the pre-CIRP period knowing fully well the financial condition of the company. Further, it is observed that the total CIRP cost is estimated to be Rs. 3.4 crore, which is nearly 29 % of the Resolution Plan. We feel that the CIRP cost is too high and are, therefore, inclined to refer this aspect and the payment of remuneration made to the Ex-management to the Insolvency and Bankruptcy Board of India for making an appropriate enquiry and furnishing a report to this Bench within a period of 45 days.

24. That it has been brought to the knowledge of this Bench that a demand of Rs.2,30,34,010 has been raised by SEBI vide its Order dated 17.03.2020, which has been passed by SEBI when the moratorium had already come into force under Section 14(1) of IBC 2016. Therefore, on representation made by the Resolution Professional on 30.03.2020, the SEBI has passed an addendum to its order dated 17.03.2020 stating that till the time the moratorium is in force, the directions issued against the Corporate Debtor shall not come into effect.



25. That during the course of hearing, the Ld. Counsel for the RP had placed emphases on Section 32A of IBC 2016 and submitted that the SEBI cannot proceed against the new management of the Corporate Debtor on approval of the Resolution plan. It was further argued that the new management is immune from all the proceedings arising out of the Corporate Debtor, before the CIR Process.

26. For the purpose of clarity, the contents of Section 32A are reproduced below :

“32A. (1) Notwithstanding anything to the contrary contained in this Code or any other law for the time being in force, the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease, and the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved by the Adjudicating Authority under section 31, if the resolution plan results in the change in the management or control of the corporate debtor to a person who was not-

(a) a promoter or in the management or control of the corporate debtor or a related party of such a person; or

(b) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court:

Provided that if a prosecution had been instituted during the corporate insolvency resolution process against such corporate debtor, it shall stand discharged from the date of approval of the resolution plan subject to requirements of this sub-section having fulfilled:

Provided further that every person who was a “designated partner” as defined in clause (j) of section 2 of the Limited Liability Partnership Act, 2008 or an “officer who is in default”, as defined in clause (60) of section 2 of the Companies Act, 2013, or was in any manner in-charge of, or responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of such offence as per the report submitted or complaint filed by the investigating authority, shall continue to be liable to be

prosecuted and punished for such an offence committed by the corporate debtor notwithstanding that the corporate debtor's liability has ceased under this sub-section.

(2) No action shall be taken against the property of the corporate debtor in relation to an offence committed prior to the commencement of the corporate insolvency resolution process of the corporate debtor, where such property is covered under a resolution plan approved by the Adjudicating Authority under section 31, which results in the change in control of the corporate debtor to a person, or sale of liquidation assets under the provisions of Chapter III of Part II of this Code to a person, who was not –

(i) a promoter or in the management or control of the corporate debtor or a related party of such a person; or

(ii) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court.

Explanation.-For the purposes of this sub-section, it is hereby clarified that,-

(i) an action against the property of the corporate debtor in relation to an offence shall include the attachment, seizure, retention or confiscation of such property under such law as may be applicable to the corporate debtor;

(ii) nothing in this sub-section shall be construed to bar an action against the property of any person, other than the corporate debtor or a person who has acquired such property through corporate insolvency resolution process or liquidation process under this Code and fulfils the requirements specified in this section, against whom such an action may be taken under such law as may be applicable.

(3) Subject to the provisions contained in sub-sections (1) and (2), and notwithstanding the immunity given in this section, the corporate debtor and any person, who may be required to provide assistance under such law as may be applicable to such corporate debtor or person, shall extend all assistance and co-operation to any authority investigating an offence committed prior to the commencement of the corporate insolvency resolution process.”

27. In view of the above, this Bench approves the Resolution plan of the Applicants duly recommended by the CoC and further allows the prayers made by the Applicant from clause (a) to (e) of the Petition.



28. It is, however, clarified that the Resolution Applicants shall, pursuant to the Resolution Plan approved under Section 31(1) of the I & B Code 2016, obtain all the necessary approvals as may be required under any law for the time being in force within a period of one year from the date of approval of the Resolution Plan.

29. The order of the moratorium passed by this Adjudicating Authority under Section 14 of the IBC, 2016 shall cease to have effect from the date of passing of this Order.

30. The Resolution Professional shall forward all the records relating to the conduct of the CIRP and the Resolution Plan to the IBBI for its record and database.

31. The approved Resolution Plan shall become effective from the date of passing of this Order.

32. The Resolution Professional shall forthwith send a copy of this Order to the CoC and the Resolution Applicants.

33. IA-2159/ND/2019 is **allowed** accordingly.



(L. N. Gupta)
Member (T)



(Ch. Mohd. Sharief Tariq)
Member (J)