IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH : COURT-IV

IA-2559/2023 IN C.P.(IB)-197/(MB)/2018

Under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 r/w Rule 11 of the NCLT Rules, 2016.

Application moved by:

Shamrock Pharmachemi Private Limited,
Member of the Resolution Applicant Consortium of Unimark Remedies Limited consisting of Asset Reconstruction Company (India) Limited and Intas Pharmaceuticals Limited and Shamrock Pharmachemi Private Limited

... Applicant

Vs.

The Monitoring Agency of Unimark Remedies Limited & Ors.

... Respondents

In the matter of

ICICI Bank Limited

... Financial Creditor

Vs.

Unimark Remedies Limited

... Corporate Debtor

Order Pronounced on **: 07.11.2023**

Coram:

Mr. Prabhat Kumar
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli
Hon'ble Member (Judicial)

Appearances:

For the Applicant(s)	:	Mr. Zal Andhyarujina, Ld. Sr. Counsel a/w Mr. Nausher Kohli, Mr. C. Keshwani, Mr. Akash Manwani and Ms. Shubhangi Khandelwal, Adv.
For the RP	:	Mr. Pulkit Sharma a/w Mr. Saurabh and Mr. Amit, Adv.
For the Respondent-2	:	Mr. Zaid Mansuri, Adv.
For the Respondent-9	:	Ms. Anamika Singh a/w Mr. Kushal, Adv.

O R D E R

Per: Prabhat Kumar (Member Technical)

1. The Applicant ("SRA" herein is a member of the Successful Resolution Applicant Consortium of Unimark Remedies Limited ("Company" or "Corporate Debtor") comprising of: (i) Asset Reconstruction Company (India) Limited ("ARCIL") ie Respondent No. 2; (ii) Shamrock Pharmachemi Private Limited ("Shamrock") i.e Applicant; (iii) Intas Pharmaceuticals Limited ("Intas") i.e Respondent No. 3.
2. The Applicant has sought urgent directions inter alia restraining the Respondent No. 1, the Resolution Professional ("RP") from distributing the moneys (to the members of the Erstwhile CoC) paid by the Resolution Applicant Consortium under the approved Resolution Plan in light of the failure of Respondent No. 1 to adhere to their reciprocal obligations under the Approved Resolution Plan and minutes of the meetings of the Monitoring Agency; urgent directions inter alia restraining Respondent No. 1 from distributing the moneys (to the members of the Erstwhile CoC)

paid by the Resolution Applicant Consortium under the approved Resolution Plan in light of the failure of the Respondent No. I to adhere to their reciprocal obligations.

3. The Respondent No. 1 is the "Monitoring Agency" of Unimark Remedies Limited constituted on 21 April 2023, by virtue of the of the Resolution Plan dated 21 December 2018 ("Approved Resolution Plan"), submitted by the Resolution Applicant Consortium and approved by this Hon'ble Tribunal vide its order dated 17th April 2023 ("NCLT Approved Date").
4. As per the terms of the Approved Resolution Plan, the Monitoring Agency comprises of 07 (seven) representatives viz: 01 (one) representative from Applicant, 01 (one) representative from Respondent No.2, 01 (one) representative from Respondent No.3, 03 (three) representative of the Financial Creditors and the Erstwhile RP as its Chairman. The following are members of the Monitoring Agency:

Three representative of top three Financial Creditors	1. ICICI Bank Limited 2. Export-Import Bank of India (EXIM Bank) 3. Omkara Assets Reconstruction Private Limited
One representative from ARCIL, Intas Pharmaceuticals and Shamrock Pharmachemi (P) Limited	1. Mr. Vijay Baheti – ARCIL (Respondent No.2) 2. Mr. Jitesh Khokhani – Shamrock Pharmachemi P Ltd. (Applicant) 3. Mr. Yogesh Hede – Intas (Respondent No.3)
Erstwhile Resolution Professional	Erstwhile Resolution Professional

	Mr. Amit Gupta

5. It is the case of the Applicant that while the Consortium has complied with the obligations in terms of the Approved Resolution Plan, the Erstwhile RP and members of the Erstwhile CoC till date failed to comply with their reciprocal obligations. The meetings of the Monitoring Agency were held between 27th April 2023 to 5th April 2023, wherein several issues with respect to the implementation of resolution plan was brought forth.

5.1. Further critical non-compliances on the part of the Erstwhile Resolution Professional and members of the Erstwhile CoC, such as the following were highlighted by the Applicant and Resolution Applicant Consortium during the meetings:

a. Unaccounted and unaudited CIRP costs and expenses accrued during the CIRP of the Corporate Debtor i.e., from 3rd April 2018 to 17th April 2023;

b. Failure to provide the Applicant with complete vacant and peaceful possession of all assets, moveable and immoveable properties including but not limited all records, documents, data, information, IT severs required to continue the business of the of the Corporate Debtor;

c. Failure on the part of the members of the Erstwhile CoC approve, execute and register the relevant agreements and documentation as per the terms of the Approved Resolution Plan;

d. Failure on the part of the members of the Erstwhile CoC to handover all original title deeds and related documents with respect to the immoveable properties of the Corporate Debtor, that

have not been provided despite repeated requests and reminders of the Applicants; and

e. Failure on the part of the Erstwhile Resolution Professional to release the Performance Guarantee submitted by the Applicant on 2nd January 2019 as per the terms of the RFRP (as defined hereinbelow) and the Approved Resolution Plan;

6. On 26th May 2023, the Applicant in accordance with timelines and implementation schedule of the Approved Resolution Plan, transferred the Upfront Cash Amount of INR 120,00,00,000/- (Indian Rupees One Hundred and Twenty Crore Only) in the ICICI Bank Trust and Retention Account.

7. The Applicant, amongst others, has claimed that certain costs, which are critical for the going-concern status and pertains to the CIRP period, have not been included in the CIRP costs, this burdening the applicant in addition to the Resolution money. The Applicant has claimed a sum of Rs.41.06 Crores, out of which during the pendency of this application, the RP has accepted claims amounting to Rs.12.84 Crore and rejected claim of Rs.29.67 Crores. It was further stated by the Resolution Professional that the claim of Rs.8.92 Crore were not approved by CoC and the remaining amount of Rs.20.75 Crores are mere estimates of the Applicant which could not be admitted. Considering this, we restricts ourselves to the amount of Rs.29.67 Crores, found inadmissible by the Resolution Professional.

8. The Respondent No.5 i.e. ICICI Bank Limited, the Financial Creditor, filed reply dated 15.07.2023 stating that an audit of the CIRP cost for the period April 3, 2018 to April 17, 2023 was carried out by one N. V. Dand & Associates ("Auditor"), the auditor appointed by Respondent No. 4 and two reports were shared by the Auditor on April 27, 2023 and June 15, 2023

("Report"). The said Report, inter alla, calculated the CIRP cost as INR 92.41 Crores. However, an amount of INR 5.33 crores in relation to bills of small amount, remained unaudited by the Auditor (Respondent No. 4 had confirmed that he and his team will conduct the audit of the said amount).

8.1. The Ld. Counsel for the R-5 further submitted that the 43rd CoC Meeting and the Sixth Monitoring Agency Meeting were held post the filing of the present Application. Therefore, the following events have taken place post filing of the Application, with the approval and knowledge of the Applicant, which render the reliefs sought at prayer clauses (a) and (b) as infructuous, inasmuch as:

i. An audit has been conducted by the Auditor for the CIRP costs for the period April 3, 2018 to April 17, 2023 and the Report has also been submitted.

ii. The CIRP costs were ascertained and relevant provisions for the same were made pursuant to the 43rd CoC Meeting.

iii. The erstwhile CoC considers and accounts for the Alleged Additional CIRP Costs (as provided for the Exhibit "G" to the present Application) but does not consider the same due to lack of any supporting documentation and the fact that they were merely estimated costs, which have not been incurred as on April 17, 2023.

iv. The non-approval of the said costs is brought to the knowledge of the Applicant, who despite the said non-approval (at the Sixth Monitoring Agency Meeting) not only agrees to the immediate distribution of the Upfront Cash towards the CIRP costs and to Operational Creditors, but also agrees to distribution of the Upfront

Cash to Financial Creditors post the execution of the assignment agreements.

8.2. It was also submitted by Respondent No.5 that all the amounts which an estimate were and does not fall within the definition of CIRP cost were not approved by the CoC. The Corporate Debtor had receive warning letters for non-payment of the USFDA fees. In fact, the said fact was discussed in the meeting held on November 1, 2018 of the erstwhile CoC (10th CoC Meeting"), whereby the representative of the Resolution Applicant Consortium justified their offer on the ground that the Corporate Debtor was under stress for a long time and the Resolution Applicant Consortium would need a lot of time and efforts to revive the Corporate Debtor. In any event, as mentioned hereinabove, Respondent No. 2 (being a member of the erstwhile CoC), one of the members of the Resolution Applicant Consortium, was aware of the decisions taken by the erstwhile CoC. Accordingly, the Applicant cannot seek that the said amounts ought to be considered as CIRP Cost.

8.3. It was also argued by R-5 that the Applicant/Resolution Applicant Consortium was aware of the status of the Corporate Debtor before submission of the Resolution Plan and had in fact valued the Corporate Debtor after being aware of the warning letter for non-payment of USFDA fees.

9. The Respondent No.6, EXIM Bank, the financial creditor and member of CoC

filed reply dated 02.08.2023 stating that it adopts the pleadings contained in reply of R-5. It was further submitted that the answering Respondent No.6 has shared the list of title deeds available vide email dated 03.07.2023 with erstwhile CoC members and the erstwhile Resolution Applicant and with Mr. Maulik Sanghavi, BDO India LLP, Advisors to the Applicant vide email dated 17, 2023. The answering Respondent No.6 has requested the erstwhile Resolution Professional in his capacity as chairman of the Monitoring Agency to convene another meeting to discuss and set out further steps for implementation of the plan.

10. The Respondent No.9 i.e. Citibank N.A. the financial creditor and member of CoC filed reply dated 17.08.2023 stating that in accordance to Regulation 31(e) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the costs directly related to the CIRP and as approved the CoC shall form part of the insolvency resolution process costs as defined under Section 5(13)(e) of the Insolvency and Bankruptcy Code, 2016. It was further stated that the erstwhile CoC in its commercial wisdom has approved all necessary, justified and substantiated costs during the CIRP period. The Resolution Applicant Consortium is accordingly precluded from raising any such objections in relation to the commercial wisdom exercised by the erstwhile CoC in determination of CIRP costs. It is pertinent that a bare perusal of the 42nd and 43rd minutes of the CoC meeting clearly indicate that the CoC had during the initial CoC meeting had

provided its approval for all costs which were required to maintain the Corporate Debtor as a going concerned.

11. We heard the Counsel and perused the material available on record.

12. We find that the Resolution Professional also filed the reply on each component of expenditure claim to be forming part of CIRP costs which is required to be reimbursed to the RA or in alternate to be met out of resolution money as CIRP costs. We are reproducing the response of RP in relation to the components of costs, which are found to be not acceptable, and deal with them in the following para(s).

12.1. Hazardous Waste Disposal (incineration, sludge & liquid disposal and associated overheads) (Estimated basis quantity in the plant) Amount INR 2.89 crores - The Applicant has argued that the Corporate Debtor, having accumulated the Hazardous Waste during its Operation in CIRP period, it has incurred the liability to dispose of the same in that period itself in view of provisions contained in Rule 8 (1) of Hazardous and other waste Management and Transboundary Movement Rules, 2016 mandating that the hazardous waste from facilities have to be removed within a period of 90 days.

12.1.1. It is contention of the RP that the expenses can be said to have been incurred only when the liability to pay such expenses arises. Mere obligation to do an act cannot result into a liability to pay unless that act is actually done. Accordingly, the RP has supported the decision of CoC in this respect and submitted that these are not costs actually incurred by the Corporate Debtor and there are no invoices in respect of the same.

These are merely costs estimated by the Applicant as being costs that it will be incurring for revival of the plants.

12.1.2. We find that Rule 8(1) Hazardous and other waste Management and Transboundary Movement Rules, 2016 allows a factory to accumulate waste up to 90 days, however, the factory is under obligation to dispose of the waste in accordance with the Rules made thereunder and non-fulfilment of such obligation may entail financial penalties. The financial liability in terms of expenses to be incurred for waste disposal shall arise at the time, such disposal takes place, and cannot be said to have accrued at the interval of 90 days even when no disposal took place. We find force in the contention of the RP that no expenses were incurred and the applicant is claiming on mere estimates. Accordingly, we reject the contention of the applicant on this ground and hold that waste disposal expenses can not form part of CIRP costs.

12.2. *Upkeep Site and safety compliances (Estimated cost, basis site visit, to be incurred for clearing site, damage debris, decommissioning of the facilities in Vapi and Bavla Plant) Amount INR 2.50 crores*. The RP has rejected the claim.

12.2.1. The Applicant submitted that these costs should have been paid to maintain the asset of the Corporate Debtor in a working condition, which is bare essential for any pharmaceutical manufacturing unit. This is towards upkeep of the plant to the minimum level, without which the plant and its value, will not only begin to deteriorate, but it will also cost the Applicant a huge sum to reverse the damage caused by failure to maintain the machinery and plant. On 24 June 2020, Applicant proposed

to take on lease the plant at Vapi and as part of arrangement, expenses pertaining to electricity, gas, water effluent treatment and maintenance which were being undertaken by Resolution Professional would be assumed by the Applicant and the Applicant will directly pay those expenses. The proposal stated that the Applicant would pay a sum of INR 1 lakh per month as fixed rental fees, and given the experience of the Applicant, the operations and expenses of the plant would have been taken care of by the Applicant. However, the CoC orally informed the Applicant that the Vapi Plant cannot be leased as there is a conflict of interest due to the fact that the Applicant is one of the members of the SRA.

12.2.2. We find that Resolution Professional, in terms of decisions of the CoC, is empowered to take decision, as to how and in what manner, the Corporate Debtor has to be kept as a going concern. It is undisputed fact that the Corporate Debtor was undergoing Resolution Process, and there was financial constraints. Even, the Corporate Debtor's business, during CIRP period, was not able to manage direct costs of its operations. In such case, we do not find that these costs were necessarily required to be incurred by the Resolution Professional, so as to make it part of CIRP cost. Accordingly, we are of considered view that this component of costs can also not form part of CIRP costs, as claimed by the Applicant.

12.3. *Interest and penalty, if any on employees' dues (Basis INR 90 lakhs per month at 12% p.a. for average period of 1.5 years) Amount INR 0.64 crores.* The RP stated that Completely frivolous claim made by the Applicant for payment of interest on these dues. The Applicant submitted that it is denied that the claim is frivolous. Admittedly, there is a delay in the payment of employees dues, and the RP has failed to make a positive statement as to whether the interest on employees dues has accrued.

12.3.1. We find that the Corporate Debtor goes to the SRA on a clean slate principal, hence claim if any of employees in relation to interest and penalty on account of delayed payment are to be satisfied by the RP in terms of provisions of Code, and to the extent such claims remains unsatisfied, such claims extinguish qua Corporate Debtor as on the date of Order approving Resolution Plan by this Tribunal. Accordingly, we can not make RP obligated to bear this interest & penalty, which otherwise is to be dealt in terms of the approved Resolution Plan.

12.4. *Monthly Rental Cost (Basis INR 4 lakhs for 18 months average) Amount INR 0.72 crores*. The RP submitted that the Rent though provided in the books of the Corporate Debtor has not been approved by the CoC. Since, the transaction was a related party transaction, CoC's approval under Section 28 was mandatory, and in the absence of approval of CoC in relation to this transaction, the claim was rejected by the RP.

12.4.1. The Applicant stated that monthly rental cost of INR 0.72 crores

pertains to the lease of equipment & machinery. As per the filed ITR of the Corporate Debtor for assessment year 2022-23, the annual rent cost is INR 91.80 lakhs. Therefore, the monthly rental cost is INR 8 lakhs (approximately), out of which INR 4 lakhs is for the rent of leased office premises of the Corporate Debtor and INR 4 lakhs is for lease of equipment & machinery. Accordingly, the Applicant required the RP to clarify whether the lease for equipment & machinery is a related party transaction or not.

12.4.2. We have considered the arguments, and find that the question is whether this cost is payable by SRA or not? We find that the RP has categorically stated that it was a related party transaction, hence the same was not approved by CoC. However, the Applicant raised a doubt whether the rent of equipment, stated to be Rs. 4.00 lacs, is also a related party transaction? We consider it appropriate to direct the RP the confirm to the Applicant whether any obligation till the date of Order approving Resolution Plan by this Tribunal rests on the Applicant in connection with the Equipment rent. If so, the same may be considered as CIRP costs.

12.5. *USFDA GDUFA fees for 4 years - Amount INR 7.19 crores. GPCB (Basis estimates for 4 years) Amount INR 0.20 crores. Fire compliance 0.19 crores. Goods Manufacturing Practice certification fee 0.21 crores. Other manufacturing Licenses Amount INR 0.40*. The RP submitted that these are

not costs actually incurred by the CD and there are no invoices in respect of the same. These dues are payable to various government agencies for which there is no invoice generated by the government authority.

12.5.1. The SRA has contended that once the SRA takeover of the Corporate Debtor is complete, the SRA will be forced to clear all such arrears which should be cleared by the RP as CIRP Costs. It is the contention of the SRA the cost need not actually be paid to be "incurred" within the meaning of Section 5, sub-section 13 of the IBC, 2016. To maintain the plant as a going concern, paying the regulatory fees such as GDUFA was essential which the CoC as well as the RP completed neglected. The Applicant made a proposal to the CoC for payment of GDUFA fees at the interest rate of 2% on 13 November 2019 and on 04 December 2019 but the CoC rejected the offer as they had received an offer from Recipharm for payment of GDUFA fees for 2019- 2020. Additionally, on 24 June 2020, the Applicant had made another proposal to pay the GDUFA fees as part of the lease proposal for the Vapi Plant of the Corporate Debtor.

12.5.2. On perusal of the minutes of the CoC meeting held on 20.09.2019, we find that the CoC considered to approve the proposal for raising Interim Finance for the payment of GDUFA fees to be funded by the members of the Committee of Creditors, and the Chairman apprised the members of the CoC that the Vapi plant is USFDA

approved and there are 4 ANDAS which are also USFDA approved, both of which requires the corporate debtor to pay annual fee called GDUFA fees. In case the GDUFA fee is not paid the approval will be cancelled and corporate debtor will not be able to supply pharmaceutical products manufactured at such USFDA approved facility to US and other continents (following the USFDA norms). The RP is stated to have told CoC that it's important for the corporate debtor to retain the USFDA approval to maintain its value and continue business operations during CIRP period which is supporting the cash flows of the company and enabling corporate debtor to meet substantial monthly CIRP expenses viz salaries, wages, security and other fixed expenses. The CoC deliberated this aspect, and there was no unanimity in the members on this aspect. Representative of Exim Bank enquired whether the said GDUFA fees can be paid by the Resolution Applicant and if not, whether they are ok if the plant is not USFDA compliant. To which the Chairman stated that there is no condition precedent pertaining to USFDA compliant plant in the Resolution Plan. Representative from ICICI Bank asked to check if there is a remedy to non-payment of USFDA fees and whether the RA can pay the penalty and make the plant USFDA compliant. It was clarified to ICICI Bank that if the Company fails to pay the USFDA fees then the supply to US and other market (following USFDA norms) will stop. The RP also stated that major of

the output is generated from the Vapi Plant and there is no production at the Bavla Plant as on date. The RP apprised the members that the Vapi plant is running at 10% to 12% capacity and if the USFDA fees is not paid then it will be difficult to maintain the going concern status of the Corporate Debtor. However, the CoC members deliberated this aspect and after considering that NCLT litigations and Miscellaneous Application filed by various parties has further prolonged the Resolution of the Corporate Debtor/ CIRP period and lead to an increase in the CIRP cost, which is stated to be around 25 crores as on that date. Representative from Citi Bank expressed his discomfort to fund the interim finance for the payment USFDA fees and stated that the RP shall generate funds for the payment of USFDA fees from outside sources and not from the Financial Creditors. Considering the aforesaid, the members stated that the RA shall fund the payment of GDUFA fees as it's important for the RA to retain the value of the Assets and its USFDA approval status. They also stated that RP shall schedule a meeting of RA with financial creditors requesting him for payment of GDUFA fee and also assure the bailor-bailee vendor so that operations can run well and help in curtailing the unpaid CIRP cost.

12.5.3. These facts clearly suggest that the it is not obligatory to pay GDUFA fee, however it was recommendatory to have it paid in case the Corporate Debtor wants to sell its product in US market other market

(following USFDA norms). The SRA was aware of these facts, and had proposed the bid for the Corporate Debtor after having considered the impact of USFDA compliance not being available to the Corporate Debtor. It is also seen that the Resolution Plan itself contemplate obtaining of Regulatory Approvals, and such approvals are to come at cost of SRA. Hence, we find no merit in the argument of the SRA that CoC ought to have borne these costs, to keep the Corporate Debtor as going concern, as the Corporate Debtor's status could be maintained as going concern, as it was done, and SRA can not mandate in what manner the status of going concern was required to be maintained to claim Regulatory fee and costs incidental thereto as part of CIRP costs. Hence, we reject this claim also.

12.6. *GST (Liability on removal of goods of APRA) Amount INR 1.60 crores* - The RP submitted that though such cost forms part of the CIRP cost, however, there is no liability pertaining to GST as there is an input credit for more than the amount payable. The Applicant has contended that the GST input credit is the asset of the Corporate Debtor and cannot be used to discharge GST liability which admittedly is CIRP cost, accordingly GST liability must be paid out of INR 120 crores of upfront cash infused by the SRA.

12.6.1. We find that the stated GST liability is arising on account of removal of goods, on which the Corporate Debtor had taken the input

credits when those goods were received by it during the CIRP period in process of keeping the Corporate Debtor as going concern. It is undisputed fact that the input credit on those goods was taken by the Corporate Debtor and was allowed by the GST department during the relevant period, and such goods when to be cleared as such or in manufactured form were liable to GST, which is permissible to paid out of input credit available with the tax-payers. Since, the Corporate Debtor enjoyed the benefit of GST credit on such goods during the CIRP period, the output tax liability on their removal has to be discharged out of balance of such input credit available with the Corporate Debtor during CIRP period. Accordingly, we do not find any merit in the argument of the Applicant in relation to this claim. However, it is clarified that the output GST liability, to the extent it can not be met from the Input tax liability available as on the date of Order approving Resolution Plan by this Tribunal, shall form part of CIRP costs.

12.7. *Insurance (Estimate basis the site visit) Amount INR 14.21 crores*. The RP stated that the expenses are calculated on the basis of estimates and are merely Estimated Expenses' for insurance. The RP has rejected the claim amount. The Applicant submitted that there has been theft of plant and machinery valued to INR 14.21 crores. Further, as seen from Pages 51-384 of the Rejoinder, three engineering agencies had conducted site inspection of the plants of the Corporate Debtor, and it was reported that there was theft

of equipment & machinery. The RP was bound to have insurance cover for protection of the assets of the CD.

12.7.1. The RP submitted that proposal was put before CoC, however considering the financial constraints, the CoC refused to contribute towards insurance premium, and accordingly, there was no insurance cover after 03 November 2019.

12.7.2. We find that the Applicant are claiming this amount as CIRP costs on the premise, if the insurance payment had been made by the RP in time, the equipment would have been insured and substantial loss to the tune of INR 14.21 crores in the form of theft of Plant & Machinery could have been avoided, which is now putting additional burden on the RA, which cannot be put upon it.

12.7.2.1. We find that Resolution Professional, in terms of decisions of the CoC, is empowered to take decision, as to how and in what manner, the Corporate Debtor has to be kept as a going concern. It is undisputed fact that the Corporate Debtor was undergoing Resolution Process, and there was financial constraints. Even, the Corporate Debtor's business, during CIRP period, was not able to manage direct costs of its operations. In such case, we do not find that these costs were necessarily required to be incurred by the Resolution Professional, so as to make it part of CIRP cost. Accordingly, we are of considered view that the estimated amount

of insurance claim, which would otherwise have been available to the Corporate Debtor in terms of insurance coverage, can also not form part of CIRP costs, as claimed by the Applicant.

12.7.2.2. Nonetheless, it is undisputed fact that the CoC had sanctioned necessary costs towards security of the factory premises; and factory was under usage of a third party for keeping the factory as going concern. The alleged theft, if any claimed to have occurred, could not have occurred without security lapses. It is not the case, the security was in existence at the factory premises. The contention of the Resolution Professional is that the bids were called in terms of Information Memorandum on the '*as is where is*' and '*as is what is*' basis, accordingly the loss incurred by the Corporate Debtor in terms of theft of these equipment could not be claimed as part of CIRP costs. We find that the Information Memorandum discloses the Assets/infrastructure owned or possessed by a Corporate Debtor and a bid is invited in terms of those Assets/infrastructure. Accordingly, the terms '*as is where is*' and '*as is what is*' basis are to be read in conjunction with the list of assets/infrastructure declared in the Information Memorandum. The terms '*as is where is*' and '*as is what is*' basis connotes the condition & title of the assets/infrastructure and can not be read to stretched to argue that, any successful bidder can not claim all the

assets/infrastructure disclosed in the Information Memorandum, such any of such assets/infrastructure is found lost for the reasons, other than by efflux of time or usage. Accordingly, we are considered view that the Resolution Professional is duty bound to hand over all assets/infrastructure, as declared in the Information Memorandum to the SRA in the present form and condition with the quality of title the Corporate Debtor; provided such assets/infrastructure had not lost or depleted on account of efflux of time or usage. The CoC may consider looking into the reasons for theft of assets, and fix accountability so as to recover the loss, caused to the assets/infrastructure of the Corporate Debtor on account of theft, from the persons responsible for such theft.

12.8. In relation to the components of costs amounting to Rs.12.84 Crores having being accepted by the RP during the pendency of this application, the applicant has insisted upon the evidence discharging the liability qua Corporate Debtor. We direct the Resolution Professional to provide the necessary proof to evidence the payment or discharge those liabilities.

13.In view of aforesaid findings, IA-2559 of 2023 is disposed of as partly allowed.

Sd/-
PRABHAT KUMAR
MEMBER (TECHNICAL)

Sd/-
KISHORE VEMULAPALLI
MEMBER (JUDICIAL)

07.11.2023