NATIONAL COMPANY LAW TRIBUNAL
GUWAHATI BENCH
GUWAHATI

IA No. 10 of 2021
IN
C.P. (IB) No. 37/GB/2019

IN THE MATTER OF:

Bank of India .... Financial Creditor

V/s

Agnipa Energo Pvt. Ltd ....Corporate Debtor

IN THE MATTER OF

Pradeep Kumar Goenka, RP .... Applicant

Section: Under Section 33 of IBC, 2016 for Liquidation of the Corporate Debtor

Coram: Hon'ble Shri H. V. Subba Rao, Member (J): **Hearing through**
Hon'ble Shri Prasanta Kumar Mohanty, Member (T): **Video Conference**

S.No.	NAME (CAPITAL LETTERS)	DESIGNATION	REPRESENTATION	SIGNATURE
1.	MR. PRADEEP KUMAR GOENKA	Applicant-RP	In Person	Present
2.	MR. PRANAY AGARWAL	Advocate	RP	In Video
3.	MR. RAKESH DUBEY	Advocate	Respondent	Conference

Order delivered on 04.02.2022

ORDER

The case is fixed for pronouncement of order.

The order is pronounced in the open court, vide separate sheet.

Sd/-

(Prasanta Kumar Mohanty)
Member (Technical)
& Adjudicating Authority

Sd/-

(H. V. Subba Rao)
Member (Judicial)
& Adjudicating Authority

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<u>O R D E R</u>
[Per se: Shri Prasanta Kumar Mohanty, Member (T)]

1. This instant application IA No. 10 OF 2021 in C.P.(IB)No. 37/GB/2019)- **Bank of India Vs. Agnipa Energo Pvt. Ltd.** has been filed by the Resolution Professional under Sec. 33 of Insolvency and Bankruptcy Code, 2016 for Liquidation of the Corporate Debtor.

2. Brief facts as mentioned in the Application are that:

2.1 The main petition being the C.P.(IB) No. 37/GB/2019 had been filed by the Financial Creditor, namely **Bank of India**, hereinafter referred to as the Financial Creditor under section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP in the matter of **Agnipa Energo Private Limited** (hereinafter referred as the Corporate Debtor), claiming dues owed to the said Financial Creditor by the Corporate Debtor

2.2 The aforesaid petition was heard by this Bench and upon the said hearings, Application was admitted, CIRP in the matter Limited was initiated vide order dated **12.02.2020** wherein the Applicant herein i.e. Shri Pradeep Kumar Goenka was appointed as the Interim Resolution Professional.

2.3 After verification and collation of claims, the Applicant herein constituted the Committee of Creditors (CoC), **wherein only one Financial Creditor is the sole member of the COC having 100% voting share.**

2.4 The 1st meeting of the COC was held, wherein the CoC unanimously resolved to appoint the Applicant herein as the Resolution Professional. However, the CIRP could not be proceeded with further due to Nationwide Lockdown announced from 25.03.2020 in the wake of Covid-19 pandemic.

2.5 As soon as the lockdown restrictions were relaxed, **Form G**, inviting expression of interest (EoI), was published in the newspapers till the last date for submission of the resolution plans, only **two resolutions plans were received. One** of the Resolution Applicant i.e. Seema Holdings Pvt. Ltd. had submitted a cheque of Rs.40 lakhs towards EMD instead of a Draft/Fixed Deposit/Bank Guarantee as per the terms and conditions specified in the approved RFRP. The CoC was of the view that the resolution plan of Seema Holdings Pvt. Ltd. could not be accepted and advised the Applicant to inform the said Resolution Applicant that their resolution plan could only be considered if the EMD was submitted in Draft/Fixed Deposit/ Bank Guarantee. As such the Applicant herein, informed the same to the Resolution Applicant but no reply was received. Consequently, the resolution of Seema Holdings Pvt. Ltd. could not be considered. The resolution plan of Rare Asset Reconstruction Ltd. was discussed in details The CoC requested the said Resolution Applicant to improve its plan size for consideration. This Bench vide order dated **07.12.2020**, had excluded a period of 160 days from the timeline of resolution process, that was sought for by the Applicant due to Covid 19 pandemic and consequent lockdown

2.6 The only Resolution Applicant i.e., Rare Asset Reconstruction Ltd. revised its plan to 196.64 lakhs which was discussed in the meeting held but the term for assignment of personal/corporate guarantees given by promoters/others to the Resolution Applicant was not revised. The resolution plan of Rare Asset Reconstruction Ltd. was put on vote in the 9th CoC meeting held, wherein the CoC with 100% voting share, rejected the resolution plan.

2.7 **The 180 days of CIRP was completed after exclusion of 160 days from the CIRP period and the CoC with 100% voting share, had passed the resolution recommending liquidation of CD and appointment of the Resolution Professional i.e. the Applicant herein be appointed as the Liquidator in terms of Section 34(1) of the Insolvency and Bankruptcy Code, 2016. The Written Consent and the Declaration of Eligibility of the proposed Liquidator has been annexed.**

3. After hearing the matter of Liquidation Application, this Bench had passed the following order on 10.02.2021:

"The major portion of CIPP period starting from 12.02.2020 to 06.01.2021 i.e. from the date of admission till the date of passing the resolution for liquidation by the COC is under lockdown/Shutdown restrictions and there is no clarity about the approval of the Resolution plan in the 8th CoC meeting and rejection of approval of the Resolution plan in the 9th CoC meeting, consent to assign debt but not guarantee, when CD is MSME Unit.

The Resolution Professional is hereby directed to ensure another CoC meeting inviting the Promoter of the CD under CIRP, the said Resolution Applicant for negotiation in clear terms to find out any Viable Resolution Plan, if any.

The CoC shall discuss in details in the light of the recent amendment in IBC with regard to MSME Unit. This meeting is to be convened before 01.03.2021 preferably at the office of the CD maintaining Covid Protocol.

The Resolution Professional is to submit the detailed report along with the Compliance Report- Form H by 05.03.2021."

That the Resolution Professional in compliance to the order dated 10.02.2021 had filed his report. It is stated in the report that

a. Representative of Rare Asset Reconstruction Limited expressed its inability to improve further in view of the present stalled project of the CD. And the Suspended Director of the CD has submitted one Resolution Plan

b. Representative of the Bank of India opined that in view of non-compliance to the requirement of section 25(2) (h) of the code with regard to EMD, the Plan submitted by the Suspended Management could not be considered and requested Mr. Gaurav Jaina to submit the EMD to enable the RP to consider their plan, if it complied with all other requirements of the code and related regulations.

4. During hearing the Learned Counsel for the CD submitted that the CD did not enclose the EMD with a fear that the FC would adjust the EMD, if its Resolution Plan was not accepted as because the FC had already adjusted the part of the OTS amount deposited by it earlier with the FC. The Learned Counsel for the CD had submitted that the CD could deposit the EMD/or Bank Guarantee for that amount, if the amount was not adjusted by the FC, in case the Resolution Plan submitted by it was not accepted.

5. Thereafter this Bench, after considering the submissions of both parties, had passed the following order dated 23.03.2021:

"Heard both the sides. Considering the submissions of both parties, 15 (fifteen) days' time is granted from today as prayed for settling the issue. The CD can deposit EMD/ BG of Rs.40.00 Lacs as required and the CoC/FC is directed not to adjust the EMD/BG, if the Resolution Plan of the CD is not accepted. The same is to be returned to the CD, if the proposed Resolution Plan is not accepted. This transaction is to be treated as an independent transaction without reference to earlier OTS, if any."

6. The CD has submitted its **Final Resolution plan with Rs 40.00 lacs considering all the requests of CoC on 8th July 2021. This plan considers a**

payment to Financial Creditors which was greater than the amount provided by RARE ARC Plan and also the liquidation value. Also all other issues were clarified such as source of finance etc.

7. **The FC has submitted that the Plan received from the CD is not acceptable as it is not viable one.** The bone of contention that led to the non-approval of the Final Resolution Plan by the CoC and recommended liquidation has arisen out of the following facts:

7.1 It was purely a commercial decision by the CoC based on commercial interest.

7.2 Forensic Audit of the account revealed serious discrepancies in term of completion of the project and also transactions.

7.3 Account was declared fraud and has been reported to the RBI on 11.02.2020 based on the observations of the Forensic Audit.

7.4 An FIR has been lodged and registered with the CBI on 21.01.2019 and the entire matter is under investigation. Internal investigation carried out by the Vigilance(East), Head Office has also initiated the process of declaration of the company and directors as wilful defaulters by issuing Show Cause Notices which have been put under challenge in WP (C) No. 7664/2019 suspending the further proceeding of declaration of wilful defaulter of the CD and its promoter by the FC. The interim order still continues.

8. On the other hand, the CD has submitted that the CoC is not considering its Resolution Plan as because they consider the CD as wilful Defaulter. The CD is not a wilful Defaulter and there is a stay from the Hon'ble High Court of Gauhati passed in W.P. (C) No. 7664/2019 dated 21.10.2019 on the notice of wilful default issued by the FC and subsequently the stay has been reportedly extended.

9. **It is further submitted by the FC/CoC that it is a conscious decision on the part of CoC to go for early liquidation of the CD and most importantly**

the High Court did not pass any order restraining further proceedings of the instant case before this Hon'ble Tribunal.

10. Further, the FC/CoC while citing the matters of ***K. Sashidhar* vs. *Indian Overseas Bank &Ors.,* Civil Appeal No. 10673 of 2018 and Civil Appeals Nos. 2943-2944 of 2020 *Kalpraj Dharamshi &Anr* vs. *Kotak Investment Advisors Ltd., has*** stated that the Hon'ble Apex Court and the NCLAT in these matters have held that a decision arising out of the commercial wisdom cannot be questioned and the Adjudicating Authority cannot interfere on such decision. The RP also cannot decide on the issue of eligibility and ineligibility of a Resolution Applicant. In the case of ***K. Sashidhar* vs. *Indian Overseas Bank &Ors.,* Civil Appeal No. 10673 of 2018,** wherein it was observed by the Hon'ble Apex Court as under:

> *"As aforesaid, upon receipt of a "rejected" resolution plan the adjudicating authority (NCLT) is not expected to do anything more; but is obligated to initiate Liquidation process under Section 33(1) of the I&B Code. The Legislature has not endowed the adjudicating authority (NCLT) with the jurisdiction or authority to analyse or evaluate the commercial decision of the CoC much less to enquire into the justness of the rejection of the resolution plan by the dissenting Financial Creditors."*

The CoC has cited the case of **Civil Appeal No. 10673 of 2018 and Civil Appeals Nos. 2943-2944 of 2020 *Kalpraj Dharamshi & Anr* vs. *Kotak Investment Advisors Ltd.,*** wherein it was observed by the Hon'ble Apex Court as under:

> *"From the legislative history and the background in which the I&B Code has been enacted it is noticed that a completely new approach has been adopted for speeding up the recovery of the debt due from the defaulting companies. In the new approach, there is a calm period followed by a swift resolution process to be completed within 270 days (outer limit) failing which, initiation of liquidation process has been made inevitable and mandatory. In the earlier regime, the Corporate Debtor could indefinitely continue to enjoy the protection given under Section 22 of the Sick Industrial Companies Act, 1985 or under*

other such enactments which has now been forsaken. Besides, the commercial wisdom of CoC has been given paramount status without any judicial intervention, for ensuring completion of the stated processes within the timelines prescribed by the I&B Code. There is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. The opinion on the subject matter expressed by them after due deliberations in CoC meetings through voting, as per voting shares, is a collective business decision. The legislature, consciously, has not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the adjudicating authority. That is made non-justiciable. (emphasis supplied)"

This Court has held, that "it is not open to the Adjudicating Authority or Appellate Authority to reckon any other factor other than specified in Sections 30(2) or 61(3) of the I&B code. It has further been held, that the commercial wisdom of CoC has been given paramount status without any judicial intervention for ensuring completion of the stated processes within the timelines prescribed by the I&B Code. This Court thus, in unequivocal terms, held, that there is an intrinsic assumption, that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. It has been held, that the opinion expressed by CoC after due deliberations in the meetings through voting, as per voting shares, is a collective business decision. It has been held, that the legislature has consciously not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the Adjudicating Authority and that the decision of CoC 'commercial wisdom' is made non justiciable."

11. Subsequently the 15th meeting of the CoC was called and the representative of the Bank of India has opined that since they have initiated the process of declaring the

CD / Directors of the CD as Willful Defaulter and that the matter is sub judice before the Hon'ble High Court at Guwahati, they feel that the promoters are not eligible to submit Resolution Plan as per section 29A (b) of the Code and requested the RP to relook into the provisions of section 29A (b) of the Code. In view of the above, the RP recited the provisions of Section 29A (b) before the meeting which reads as follows:

> *"A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person is a willful defaulter in accordance with the guidelines of the Reserve Bank of India issue under the Banking Regulation Act, 1949 (10 of 1949)"*
>
> *RP then opined that since the proceedings to declare the CD / promoters / directors of the CD as willful defaulters initiated by the Bank of India is yet to be concluded they do not fit in to the definition of Willful Defaulter as on date and therefore, are not ineligible under section 29A (b) of the Code to submit a Resolution Plan. Representative of the Bank of India also has pointed out that certain waivers and withdrawal of proceedings sought in the Resolution Plan needs to be removed which are according to them should not be mentioned in the Resolution Plan as the same does not fall within the authority of Hon'ble NCLT to approve.*

Suspended Director had requested the CoC to specifically identify those points/clauses in the Resolution Plan to enable them to look into the same and address appropriately. It is submitted by him that **the Bank of India being the sole creditor has all along acted arbitrarily and high handed manner. The conduct of the Bank both during the OTS settlement proposal between November 2018 to May 2019 after which the Bank instituted a false and frivolous case, which is subject matter of challenge before the Hon'ble High Court in WP(c) 7563 and WP(c) 7664 and is pending consideration before the Hon'ble High Court. It is the specific case of the promoters that the reports etc. have been antedated and entire action of declaring the account as "fraud" or "Willful Defaulter" is arbitrary, illegal, bad in law and void ab initio. The High Court was prima facie satisfied and was pleased to direct that no coercive steps be taken.**

12. **There has been no change in circumstances between February and July, 2021 and the Bank was always aware of the pending proceedings pertaining to wilful defaulter and fraud and yet never treated the same as an issue which would in any manner impeded upon any resolution plan and like during the OTS settlement discussions, engaged with the promoters and when the settlement was almost done, the bank arbitrarily and without any cogent reason, citing pendency of default proceedings wriggled out of the CoC without allowing any vote on the promoter's proposal.**

13. **This arbitrary and high handed act of the sole lender would render, the entire process nugatory and the bank which would otherwise recovered part of its dues in line with industry standards for settlement under the CIRP process will not stand to gain if the company is sent to liquidation, which remains the only option now. The reason for bank's arbitrary behavior, is the pendency of the Suit by the CD against the bank wherein the bank would be liable to pay in excess of Rs. 12 crores, as the liability of wrong insurance policy and loss suffered by the CD**

14. **The CD has submitted that the action of the bank is defeating the purpose of IBC i.e. resolution of the debt and leading to force liquidation, which ought not to be permitted by this Hon'ble Tribunal in the present case.**

15. **During the process of hearing this Bench has observed that the Financial Creditor is the sole Member of the CoC and the Petition has been filed for liquidation of the CD. It is not clear on what basis the Resolution has been passed by the CoC and the Application for liquidation is filed before this Bench rejecting the Resolution Plan for MSME Unit submitted by the CD when the amount provided in the Resolution Plan submitted is more than Twenty (20) times of the Liquidation Value of the CD. It is further reported that there are certain issues like a Suit filed by the CD, a Writ**

pending before the Hon'ble High Court, FIR filed with an Investigating Agency, report to RBI etc. It is also not clear whether the Resolution Plan submitted by the CD is not approved by the CoC on account of such issues when such issues are apparently not related to acceptance of the Resolution Plan and rescue of the Stressed Assets with its employees from the Liquidation. It was made clear that the objectives of the IBC are very clear and liquidation of a MSME Unit is the last resort. Hence, CoC needs to clarify these points.

16. **However, the CoC / FC (sole Member) has appeared in person and submitted that it is the Commercial Decision of the CoC to go for the liquidation but he has not clarified whether it is a Commercial Decision / Wisdom of the CoC to go for liquidation of a MSME Unit, when the Suspended Management of the CD has offered Resolution Plan worth more than 20 times of the liquidation value. Liquidation is the last resort and IBC process must not be allowed to be misused.**

17. **The RP present in person has submitted that the plan submitted by the Suspended Management itself does not come under the Section 29A of IBC. He has conveyed the same to the CoC. On the other hand, the learned Counsel appearing for the Suspended Management has submitted that they have filed an Affidavit in this regard. The learned Counsel appearing for the CoC has submitted that the CoC has not received the copy of the reply Affidavit filed by the Suspended Management and he is not aware of about the views of the RP on the Resolution Plan submitted. He has prayed for some time to come with all details on the plan.**

18. **The CoC has alleged that the RP has not complied the provisions of IBC when he placed the Resolution Plan submitted by the Suspended Management for approval and sought certain clarifications from him**

19. In response to that, the RP has made the following submissions:

19.1 The CIRP was conducted in the utmost transparent manner, and he fails to understand and comprehend as to why such clarifications are being sought at this stage of the process and after so many sessions of price negotiations by the CoC with the Resolution Applicants, despite the CoC being aware of each and every detail of the process and the manner in which it was conducted. And also, given the fact that such queries and confusion were non-existent at any prior stage of the process,

19.2 RP has not been able to identify any CoC meeting wherein any participant representing the sole member of the CoC had initiated any discussion related to the matter that the Bank of India has classified the account as fraud and has initiated the action with the CBI except in the last meeting of the CoC held on 16.07.2021 which was scheduled for voting on the Resolution Plan submitted by the Directors of the Corporate Debtor post multiple sessions of price negotiations between the CoC and the Resolution Applicant. Also, to the best of RP's understanding, the CBI is yet to conclude its investigation and file a charge sheet against the directors establishing them to be fraud in the instant matter. Further, RP fails to understand that had this been an issue for the CoC why did the CoC indulge in any price negotiation with the specified Resolution applicant, at all, elongating the CIRP and incurring unnecessary cost.

19.3 In the matter regarding process initiated by the Bank of India for declaring the CD and its directors as wilful defaulter, as acknowledged by the FC the Hon'ble High Court at Guwahati has ordered a stay in the proceedings of declaring the CD and its Directors as wilful defaulter, RP cannot ignore the same and presume any person to be fraud or wilful defaulter without them being declared so by a competent authority. RP hopes that CoC does not expect the him to act in any manner that would be in contravention of the referred Order of the Hon'ble High Court at Guwahati. The EOI's received in response to the Form G published in news papers were placed before the CoC, which included the EOI of Directors of the Company also, wherein it was discussed and prima facie all the EOI Applicants were found to be eligible. No objection of the nature that is being raised now were raised at that point in time or any point thereafter.

19.4 As regards raising allegations on the RP for not prescribing transaction audit/forensic audit in the matter, that the transactions during the permitted look back period, i.e., 2 years preceding commencement of the CIRP (in case of transactions with related parties) and 1 year preceding the commencement of the CIRP in other transactions, did not raise any suspicion in his mind which require further audit.

19.5 Further, as regard to the contention that the absence of a transaction audit /forensic audit invalidates a compliance under section 29A, RP is not aware of any authority/judgement/provision of law to that regard and would not like to comment on any specific interpretation of the law, having no authority to do so. Further, RP fails to understand the intention of the Bank in raising the issue of Transaction Audit / Forensic Audit at this late stage of the process after multiple rounds of price negotiation with the specified Resolution Applicant/s and after 14 CoC meeting over more than 500 days.

19.6 As regard to not providing any supporting document evidencing source of funds RP has referred communication wherein the relevant document was attached for CoC consideration. The RA has already submitted an EMD of Rs. 40 Lakhs along with it's resolution plan and a comfort letter from a RBI registered NBFC for a support of Rs. 300 Lakhs, copy of the comfort letter was already provided to CoC as an attachment. RP has submitted that every discussion, decision and decision in each meeting of the CoC was carried out in very transparent manner and were accepted by FC being the sole member of the CoC. Although, despite the process having been conducted in a very conducive manner until the 15th (the last) meeting of the CoC wherein the Resolution Plan submitted by the directors was put up for voting with complaint of whatsoever nature having been raised by any stakeholder, threat of reporting the matter to IBBI at this stage by FC is unexpected. However, any stakeholder who is aggrieved with the manner of handling of the process is permitted to report the matter with Grievance Cell of the IBBI in the Format prescribed under the Code.

19.7 It is the RP's presumption that this threat of reporting the matter to IBBI has been given to create undue influence and duress on an independent Insolvency Professional. **Further, under the given facts and circumstances the RP wants to withdraw his consent to act as the liquidator. He has submitted the conduct of the Bank is neither bonafide, nor justified and definitely not in good taste.**

20. In accordance with the Tribunal's order dated 05.10.2021, the RP has filed Progress Report, wherein it is submitted that:

20.1 Pursuant to the order of the Hon'ble Tribunal dated 05.10.2021, the 16th CoC meeting was called on 19.10.2021, wherein the Resolution Applicant was also present. The RA and the CoC negotiated and discussed the terms of the resolution Plan in greater details. The CoC requested the RP to request the Hon'ble Tribunal to allow a few day's time to reach a fruitful conclusion as the CoC is in principle inclined to reconsider the revised resolution plan subject to compliance

20.2 **Resolution Applicants have agreed to withdraw clauses relating to withdrawal of pending suits against the Company / Directors of the Company from the Resolution Plan**. However, bank's insistence on continuance of proceedings against the personal / corporate guarantors is not acceptable to the Resolution Applicants. Mr. Jaina clarified that the company being an MSME unit and the Resolution Applicants being the guarantors, continuance of actions against their guarantees will render hindrance in implementation of the resolution plan in case the proceedings in the matter of personal / Corporate guarantee continues.

20.3 As regards paying interest on the amount to be paid after 30 days from the date of approval of Resolution plan by the Hon'ble NCLT, the Suspended Director has submitted that initially, they have not submitted any Resolution Plan, however, on the direction of Hon'ble NCLT to explore for a viable resolution plan for an MSME unit, they have submitted their initial plan offering a sum of Rs. 190 Lakhs to the Bank of India which after certain rounds of negotiations with CoC was raised up to Rs. 300 Lakhs. He then said that he would have to calculate the interest part and see whether it was possible for them to include the same in the Resolution Plan.

20.4 RP has opined that the role of IMC is practically over when RA makes the full payment as per the Resolution Plan and also stated that IMC costs will be negligible as the meetings would be conducted through Video Conferencing primarily for discussion and monitoring the progress in implementation of the Resolution Plan with regard to payment to creditors as per Plan. The Bank of India had objected and opined that the role of IMC is much beyond mere holding meetings which would incur costs and expenses. The CoC has further said that as per Resolution Plan submitted, proposed repayment period is six months from the date of approval by Hon'ble NCLT and hence during this period, there is no mention of costs and remunerations etc. besides the composition of the members of the Committee. Therefore, the scope as well as costs/expenses relating to IMC should be appropriately mentioned in the Resolution plan.

20.5 As regards withdrawal of Bank of India's name as defendant in the Insurance case filed by the Directors of the Company, the Suspended management has agreed to withdraw the name of the Bank as defendant from their case subject to the approval of their Resolution Plan by the Adjudicating Authority. However, the proceedings against the other defendants shall continue.

20.6 As regards on going CBI enquiry, the Suspended management has said that they have no issue in CBI enquiry against them and will appropriately address the same in the revised Resolution Plan.

20.7 As regards evidence for the source of funds, Mr. Jaina of Suspended Management has said that they have already provided the evidence regarding source of funds for implementation of Resolution Plan.

20.8 Mr. Vijoy Kumar Verma representing the Bank of India has asked Mr. Gaurav Jaina to ensure submission of an unconditional Resolution Plan as the present plan stipulates several conditions / reliefs sought from FC whereas these conditions / reliefs should not be linked with the Resolution of the CD. He also requested Mr. Pradeep Kumar Goenka, the Resolution

Professional to seek additional time from the Hon'ble NCLT, Guwahati Bench to facilitate the negotiations between the CoC and the Resolution Applicants.

21. The RP has filed the 5th Progress Report from 17.09.2021 to 21.12.2021, wherein the RP has submitted that:

21.1 After a detailed discussion on the matter, representative of the sole member of the CoC requested the representative of the Resolution Applicant to submit revised resolution plan at the earliest to enable them to take a call on the same.

21.2 The Resolution Applicants submitted their revised Resolution Plans which was sent to the sole member of the CoC on 13.11.2021 through email along with RP's compliance report on the same.

21.3 RP has sent email reminders to the CoC on 19.11.2021, 26.11.2021 and 02.12.2021 requesting them to advise a suitable date for convening the meeting to decide on the Resolution Plan submitted by the Resolution Applicants.

21.4 RP has received an email from the sole member of CoC on 06.12.2021 seeking certain clarifications on the revised resolution plan which was responded through email on 07.12.2021.

21.5 RP has again sent reminder emails on 14.12.2021 and 21.12.2021 requesting the CoC to advise their position in the matter. RP has been made to understand that the Resolution Plan is under consideration of the Competent Authority of the Sole member of the CoC. A response on the same is awaited.

22. **In order to know the fate of the Revised Resolution Plan submitted by the Suspended Director, the matter was last listed on 11.01.2022 before this bench. The learned RP has submitted during the hearing that the Revised Plan has been rejected by CoC and Resolution passed for Liquidation stands.**

ORDER

23. Heard the FC-Bank of India, the sole Member of the CoC, the RP and Resolution Applicant, Suspended Director of the CD an MSME Unit, at length and perused the documents, written submissions made available. It is observed that:

23.1 CD is a MSME unit and FC had given Loan to the CD but the Project is stalled and yet to be completed /start Operation. **Bank of India, only one Financial Creditor, is the sole member of the COC having 100% voting share.**

23.2 Initially only **two resolutions plans were received.** One of the Resolution Applicant i.e. Seema Holdings Pvt. Ltd. had submitted a cheque of Rs.40 lakhs towards EMD instead of a Draft/Fixed Deposit/ Bank Guarantee. The same was rejected by the CoC as it had not submitted EMD in the form of Draft/Fixed Deposit/ Bank Guarantee as per the terms and conditions specified in the approved RFRP.

23.3 The other resolution plan of Rare Asset Reconstruction Ltd. was discussed in details The CoC requested the said Resolution Applicant to improve its plan size and further informed that their term for assignment of personal/corporate guarantees given by promoters/other to the Resolution Applicant might not be accepted. Representative of Rare Asset Reconstruction Limited expressed its inability to improve further in view of the present stalled project of the CD. However, the Rare Asset Reconstruction Ltd. revised its plan to 196.64 lakhs which was discussed in the 8^{th} CoC meeting but the term for assignment of personal/corporate guarantees given by promoters/others to the Resolution Applicant was not revised. Hence the Resolution plan was rejected by the CoC.

24. **On completion of 180 days of CIRP, the CoC with 100% voting share, had passed the resolution recommending liquidation of CD and appointment of the Resolution Professional i.e. the Applicant herein be appointed as the Liquidator in terms of Section 34(1) of the Insolvency and Bankruptcy Code, 2016. The Written Consent and the Declaration of Eligibility of the proposed Liquidator was enclosed.**

25. When the matter of Liquidation was taken up by this Bench it was found that the major portion of CIPP period i.e. from the date of admission till the date of passing the resolution for liquidation by the COC was under lockdown/Shutdown restrictions and there was no clarity about the approval or rejection of the Resolution plan in the 8th and 9th CoC meeting. One Plan was received but rejected mainly for the low amount offered. Moreover, the CD is a MSME unit. Project is yet to be completed and commencement of operation yet to start. Hence passing the order for Liquidation of an MSME unit at this stage shall be wastage of funds already invested. The objective of the IBC is for Resolution of the Stressed Assets especially for a MSME unit and Liquidation is the last resort. Hence the RP/CoC was advised to have another CoC meeting to explore a viable resolution plan and discuss in details in the light of the recent amendment in IBC with regard to MSME Unit and take a decision thereafter about the resolution passed for Liquidation.

26. Thereafter, the Suspended Management had submitted a Resolution Plan and several CoC meetings have taken place. FC has been continuously negotiating with the Suspended Director for a long time on different points and different conditions of the Resolution Plan submitted by them

It is found that the CD has submitted its **final Resolution plan addressing almost all the points raised by the CoC with the stipulated amount of BG of Rs 40.00 lacs The amount provided in the Plan for the sole Financial Creditor is not only more than the amount provided by RARE ARC Plan to FC but also more than the liquidation value of the CD. Other issues raised relating to the source of funds etc., have been clarified by the RP and the Suspended Director.**

27. The CoC has submitted that the bone of contention that led to the non-approval of the Final Resolution Plan but for liquidation has arisen out of the following facts:

27.1 It was purely a commercial decision by the CoC based on commercial interest.

27.2 Forensic Audit of the account revealed serious discrepancies in term of completion of the project and also transactions.

27.3 Account was declared fraud and has been reported to the RBI on 11.02.2020 based on the observations of the Forensic Audit.

27.4 An FIR has been lodged and registered with the CBI on 21.01.2019 and the entire matter is under investigation. Internal investigation carried out by the Vigilance(East), Head Office has also initiated the process of declaration of the company and directors as wilful defaulters by issuing Show Cause Notices which have been put under challenge in WP (C) No. 7664/2019 suspending the further proceeding of declaration of wilful defaulter of the CD and its promoter by the FC. The interim order still continues.

27.5 The Suspended Management is not eligible under Sec 29 A(b) of IBC to be Resolution Applicant.

28. The CoC has alleged that the exact position relating to Sec 29A of IBC was not placed by the RP before the CoC at the time of submission of the Resolution Plan for Approval. The RP has replied to all points including the provision of 29 A. The RP has clarified that the matter relating to Wilful Defaulter is yet to be decided Hence the Suspended Management of the MSME Unit is eligible to submit the Plan which was conveyed to the CoC at the time placement of the Resolution Plan for consideration. The RP now seeks to withdraw his consent to become Liquidator.

29. The Suspended Management has submitted that they are not Wilful Defaulters and there is no issue for them about the Continuation of CBI case. They have also agreed to withdraw the name of the FC from the Civil Suit filed relating to the rejection Insurance claim submitted.

30. It is observed that the CoC has been raising new points on the Resolution Plan submitted during the entire period of CIRP. At the latter part, the Counsel of the CoC has argued the entire matter in favour of the decision of the CoC taken for Liquidation

of the Unit only on the basis that **it is the commercial wisdom of the individual financial creditor citing the judgements of Hon'ble Supreme court in the matter *K. Sashidhar* vs. *Indian Overseas Bank &Ors.,* Civil Appeal No. 10673 of 2018 and Civil Appeals Nos. 2943-2944 of 2020 *Kalpraj Dharamshi &Anr* vs. *Kotak Investment Advisors Ltd.* Civil Appeal No. 10673 of 2018 and Civil Appeals Nos. 2943-2944 of 2020 *Kalpraj Dharamshi &Anr* vs. *Kotak Investment Advisors Ltd.***

31. **During the hearing of the Liquidation Application filed by CoC, this Bench had sought Clarifications from the Counsel of sole FC /CoC and FC present in person as to know on what basis the Resolution was passed by the CoC for liquidation rejecting the Resolution Plan for MSME Unit submitted by the Suspended Management when the amount provided in the Resolution Plan submitted is more than Twenty (20) times of the Liquidation value of the Unit. Moreover, the amount of EMD in the form of Bank Guarantee submitted to the CoC is more than Liquidation Value However instead of clarifying the above points, the arguing Counsel and FC in Person were only confining to only one point that the Commercial Wisdom of the CoC /FC could not be questioned and challenged citing the judgements of the Hon'ble Supreme Court. Liquidation Value of the stalled Unit has been obtained by and placed before CoC.**

32. **We find that the CoC /FC has lost the sight of the prime objectives of the IBC. It does not show the Doctrine of Prudence to advance argument for Liquidation instead of Resolution of the Stressed Assets that it is a Commercial Wisdom/Commercial Decision to reject the amount offered to them in terms of the Resolution Plan is more than the twenty times of the Liquidation Value. Issues like a Suit filed by the CD, a Writ pending before the Hon'ble High Court, FIR filed with an Investigating Agency, report submitted to the RBI for declaring the CD, Suspended Directors as Wilful Defaulters are apparently not related matter at this stage to be considered for rejection of the the Resolution Plan and rescue of the Stressed Assets**

with its employees from the Liquidation. The objectives of the IBC are very clear and liquidation of a MSME Unit is the last resort. The Hon'ble Supreme Court of India in Civil Appeal No. 1792 of 2021- K.N Rajakumar vs. V. Nagarajan & Ors with Civil Appeal No. 2901 OF 2021 has held that

> *"It could thus be seen that one of the principal objects of the IBC is providing for revival of the Corporate Debtor and to make it a going concern. Every attempt has to be first made to revive the concern and make it a going concern, liquidation being the last resort."*

33. **In our considered opinion, it is neither Commercial Wisdom nor a Commercial Decision of the CoC /FC to reject a Resolution Plan which offer to them an amount of Twenty times more than the Liquidation Value. In view of this the prayer made by the Applicant for liquidation of the CD needs to be rejected in achieving the Objectives of the IBC and the interest of all Stakeholders including the sole FC and the stalled MSME Unit.**

34. **Hence this IA No. 10/2021 in CP (IB) No. 37/GB/2021 filed for Liquidation is hereby rejected with the observations mentioned above and the Directions given below for Compliance.**

34.1 **The RP /CoC is directed to start afresh the process of CIRP from today**. The RP/CoC is directed to act in accordance with the provisions of the IBC and find out a viable Resolution Plan for the MSME Unit within the stipulated period of 180 days. Resolution plans may be submitted by earlier Resolution Applicants including the present one, if otherwise they are eligible.

34.2 The allegations made against the RP by the CoC are found to be not correct. Hence, Shri Pradeep Kumar Goenka is hereby appointed as RP (not IRP) for completion of the CIRP in time. Payment of his fees till the date, if not paid earlier, is to be paid by the CoC within 15 days from today. Since the unit is yet to be completed; under stress and there was/is no much work to be undertaken by the RP, the RP should charge reasonable amount from the CoC as his fees and he should ensure that the CIRP cost does not increase.

35. The Registry is directed to send the copies of this Order to the Concerned Parties by email and Speed Post.

Sd/-	**Sd/-**
(**Prasanta Kumar Mohanty)** **Member (Technical)** **& Adjudicating Authority**	**(H. V. Subba Rao)** **Member (Judicial)** **& Adjudicating Authority**