# BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
# PRINCIPAL BENCH, NEW DELHI

**CA- 322(PB)/2019 in**
**C.P. NO.IB-77(PB)/2018**

**IN THE MATTER OF:**
Asset Reconstruction Company (India) Limited
....Financial Creditor
vs.

M/s. Rustagi Impex Private Limited
....Corporate Debtor

**AND IN THE MATTER OF:**
Shri Shailesh Balachandra Desai
Resolution Professional
For M/s. Rustagi Impex Private Limited
..... Applicant

**SECTION: Under Section 31 of the Insolvency and Bankruptcy Code, 2016**

**Order delivered on: 06.08.2019**

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

**SHRI S.K. MOHAPATRA**
**Hon'ble Member (Technical)**

**PRESENTS:**

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| For the RP | : Mr. Abhijeet Sinha, Mr. Rajendra Beniwal Aditya & Mr. Adity Sukha, Advs. |
| For the Respondent | : Mr. CS Gupta, Advocate |
| For Resolution Applicant | : Mr. Saurabh Kalia & Ms. Parika Thakral, Advocates, Mr. Prakhar Singhal, CA |
| For the ITD | : Ms. Lakshmi Gurung, Sr. Standing Counsel with Mr. Sagar, Standing Counsel |

**ORDER**
**M.M.KUMAR, PRESIDENT**

1. This order shall dispose of the following CAs:
    i. C.A. No. 77(PB)/2019 filed by the Resolution Professional (for brevity 'RP') under Section 30 & 31 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') with a principal prayer to approve and accept the resolution plan approved by the Committee of Creditors (for brevity 'CoC') submitted by the H1 Resolution Applicant. The resolution plan has been filed by Technopack Industries in the Corporate Insolvency Resolution Process (for brevity 'CIRP') of the Corporate Debtor.
    ii. C.A. No. 947(PB)/2019 filed by the Income Tax Department seeking appropriate directions for allowing the claim of the department.
2. Brief facts of the case necessary for disposal of the above mentioned applications may first be noticed. Asset Reconstruction Company (India) Limited filed C.P. No. IB – 77(PB)/2018 against M/s. Rustagi Impex Private Limited

under Section – 7 of the Code. We admitted the petition under Section-7 of the Code on 10.05.2018 (Annexure-A/1). As a consequence, the CIRP commenced and moratorium in terms of Section – 14 was imposed. In pursuance of Section – 15 of the Code the IRP made public announcement inviting claims on 14.05.2018.

3. In pursuance of the announcement made the IRP received claims from various financial creditors and operational creditors. In the 1st meeting of the CoC it was resolved to replace the IRP with another resolution professional and Shri Shailesh Bhalchandra Desai was appointed as RP by the Tribunal vide order dated 19.07.2018 (Annexure- A/2). The IRP and RP have taken up various other processes as enjoined upon them under the Code. The RP has convened 8 meetings of the CoC upto 19.02.2019.

4. The RP has further disclosed that in compliance of Regulation 27 read with Regulation 35 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016, he appointed two registered valuers namely – R.K. Associates Valuers & Techno Engineering Consultants (P) Ltd. and Peritus Advisory (P) Ltd. to

ascertain the fair value and liquidation value of the Corporate Debtor. It is also submitted that the RP appointed Ernst & Young LLP to conduct forensic audit of the transactions done by the Corporate Debtor from 01.04.2011 to 31.03.2018.

5. It is further submitted that the RP made a publication for calling of Expression of Interest (EoI) in Form-G as prescribed under Regulation 36A.(5) of the Insolvency Resolution Process for Corporate Persons Regulations,2016. The publication was carried out in the newspapers namely Business Standard (English Edition, New Delhi) and Jansatta ( Hindi Edition, New Delhi) on 30.07.2018. The CoC in its 2nd meeting held on 10.08.2018 approved the evaluation matrix for the bids to be submitted by the prospective resolution applicants in accordance with Section 25(2)(h) of the Code. It is further submitted that no prospective resolution plan was received by the stipulated last date and subsequently, an addendum was published in the newspapers extending the last date for submission of EoI to 31.08.2018. Since no EOI was received till the last

date, the CoC in its 4th meeting resolved to liquidate the corporate debtor.

6. It is pertinent to mention that a resolution was passed in the 4th meeting of CoC dated 19.10.2018 whereby it was resolved to file an application for liquidation of the Corporate debtor. Accordingly, CA-1160(PB)/2018 was filed before the Adjudicating Authority-NCLT praying for liquidation of the corporate debtor. This Bench vide an order dated 29.11.2018 dismissed the application for liquidation and passed the following order:

**ORDER**

**CA-1160(PB)/2018**

This is an application under Section 33 of the Insolvency and Bankruptcy Code has been filed by ARCL through its Resolution Professional. The ARCL is the sole financial creditor constituting the committee of creditors as it has acquired the assets of the corporate debtor by assignment agreement. The petition was admitted on 10.05.2018 and the period of 180 days has come to an end on 06.11.2018.

2. It is appropriate to mention that the total debt owed by the corporate debtor is Rs. 126.71 crores. The fair value of the assets of the Corporate Debtor on the basis of average of two

reports has been stated to be Rs. 12,23,78,246/- and the liquidation value is Rs. 8,57,40,089/-.

3. On the last date of hearing, we have observed that the 'expression of interest' was floated on 30.07.2018 by issuing notices in English Daily 'Business Standard' (DelhiEdition) and Hindi Daily of 'Jansatta' (Delhi Edition). In addition, the notices were also published on the website of the RP as well as IBBI. We have been apprised that no resolution plan applicant came forward and thereafter the committee of creditors comprising of single financial creditor namely ARCL decided to issue an other advertisement. Accordingly, the advertisement was repeated in the same newspaper on 16.08.2018. The repeated advertisement reads as under:-

**EXPRESSION OF INTEREST**
**RUSTAGI IMPEX PRIVATE LIMITED**
**EXTENSION OF DATE FOR SUMISSION OF RESOLUTION PLAN**

The last date of submission of Expression of Interest as specified in the advertisement dated 30th July 2018, as available on the website of the Resolution Professional stands **extended up to 31st August 2018**

All terms and conditions of the EoI remains the same.

Sd/-
**ShaileshBhalchandra Desai**
Resolution Professional
**RustagiImpexPvt. Ltd.**

**Date :** 16th August 2018
**Place :**Mumbai

Note: For further information, please visit **www.headwayip.com**

4. Having perused the aforesaid advertisement, we are not left with any doubt that such a public notice would not attract

attention of anyone as it is put on an insignificant portion of the newspaper. We are satisfied that such a public notice would not meet the requirement of sending reasonable information to all concern. Therefore, it is required to be in bold elaborate form similar to the one issued earlier on 30.07.2018. Hon'ble the Supreme Court has repeatedly emphasised that resolution is the rule and liquidation is an exception. In that regard we may place reliance on the observation made by Hon'ble Supreme Court in the recent judgement rendered in the case of *Arcelor Mittal India Private Limited v. Satish Kumar Gupta &Ors. (Civil Appeal No. 9582 decided on 04.10.2018.).*In para 83 the following pertinent observations have appeared:-

*"83............However, we cannot forget that the consequence of the chopper falling is corporate death. The only reasonable construction of the Code is the balance to be maintained between timely completion of the corporate insolvency resolution process, and the corporate debtor otherwise being put into liquidation. We must not forget that the corporate debtor consists of several employees and workmen whose daily bread is dependent on the outcome of the corporate insolvency resolution process. If there is a resolution applicant who can continue to run the corporate debtor as a going concern, every effort must be made to try and see that this is made possible."*

5. In view of the above, and in order to advance the basic object of the Insolvency and Bankruptcy Code couple

with the facts that the period of 270 days is not over; and that the huge haircut is likely to be suffered by the stakeholders we deem it appropriate to direct that a proper public notice by inviting the resolution plan be issued preferably in newspaper of wider circulation. It may be published even in newspapers different than the one already utilised like English daily 'Indian Express' (Delhi Edition) and Hindi Daily 'Punjab Kesari'. The RP shall comply with the aforesaid directions at the earliest but not later than one week. In the interest of justice and for the aforesaid reasons, we also extend the period from 180 days to 270 days w.e.f. 06.11.2018.

6. A copy of the order be given dasti to the counsel for the parties.

7. In compliance of the directions issued by the Adjudicating Authority-NCLT, the CoC in its 5th meeting held on 03.12.2018 revised and approved the minimum eligibility criteria for submitting resolution plans. RP carried out publication in the newspapers namely Indian Express and Punjab Kesari on 04.12.2018 mentioning the last date for submission of EoI and the Resolution plan.

8. In the 6th meeting of CoC held on 05.02.2019, the RP apprised the members that it had received two resolution plans on the last date fixed to submit the plan. In the same meeting of CoC, the two resolution plans were discussed and the CoC asked both the plan applicants to make certain amendments to the plan and submit revised resolution plans.

9. In furtherance of the same 7th CoC meeting was convened on 12.02.2019 and both the resolution plan applicants were invited to attend the meeting. The revised resolution plans submitted by both the applicants were placed for consideration and deliberation of the CoC. The CoC keeping in mind the commercial viability insisted upon both the resolution plan applicants to further revise their resolution plans but to no avail. The CoC then decided not to pursue the resolution plans submitted and rejected both the plans giving both the resolution plan applicants further time to submit revised resolution plan.

10. In the 8th meeting of CoC held on 18th/19th February, 2019 the CoC deliberated upon three resolution plans submitted (one addition to the earlier two resolution plan

applicants) Accordingly on the recommendation of the CoC, Technopack Industries was notified as the H1 Resolution Applicant in the CIR Process. Having been determined as the H1 Resolution Applicant, the CoC has held extensive negotiations and consultations with the H1 Resolution Applicant to amend its plan. Pursuant to the negotiations, the H1 Resolution Applicant submitted a revised Resolution Plan dated 18.02.2019 and the same is placed on record (Annexure A/5). The single member CoC approved the resolution with an affirmative voting share percentage of 100% which is much more than the minimum threshold of 66% as required under Section- 30(4) of the Code. A true copy of the minutes of the 8th meeting is also placed on record (Annexure A/4). The aforesaid resolution plan approved by the CoC has now been placed before us for seeking our acceptance and approval in terms of the Code and Regulations framed there under.

11. The Resolution Professional has also ascertained that the Resolution Applicant is eligible to submit the resolution plan and does not fall foul of the provisions of Section-29A (Annexure A/7). Also as per Regulation 39(4) of

the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 a compliance certificate in FORM – H has been placed on record (Annexure A/6).

12. Objections have been received from the Income Tax Department regarding the rejection of their claims by the RP.

13. Having heard the learned counsels for the Resolution Professional and the Resolution plan applicant we find that it would be first necessary to ascertain whether the requirements of the statute and subordinate legislation have been fulfilled or not.

14. According to the scheme of the Code a resolution applicant is required to submit a resolution plan to the RP prepared on the basis of information memorandum. The information memorandum is a document envisaged under Section 29 and it is required to contain such relevant information as may be specified by the Insolvency and Bankruptcy Board of India. Accordingly, in Regulation 36 of the CIRP Regulations details have been provided with regard to the contents of information memorandum. On the submission of resolution plan the RP is under mandatory

obligation to examine each resolution plan received by him under Section 30(2) of the Code and he is to confirm that each resolution plan provides for all item listed under Section 30(2) (a) to (f). If the aforesaid conditions as envisaged by Section 30(2) are fulfilled then such a resolution plan is to be presented to the CoC. The CoC may then approve a resolution plan by a vote of not less than sixty six percent of voting share of the financial creditors, after considering its feasibility and viability along with other requirements as may be specified by Board. Under Section 30(6) the RP is obliged to submit the resolution plan as approved by the CoC to the Adjudicatory Authority.

15. As per the requirement of Section 29 of the Code read with Regulation 36 of the CIRP Regulations an information memorandum prepared and a certification regarding the same was furnished by the RP to the CoC as well as before this Tribunal.

16. When the resolution plan as approved by the CoC is placed before the Adjudicatory Authority-NCLT then it is to record its satisfaction as per the requirement of Section-31(1) of the Code as to whether the conditions as referred to

in sub-section 2 of section 30 have been fulfilled. On its satisfaction the Adjudicatory Authority-NCLT is to approve the resolution plan which is to be binding on the Corporate Debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan. As per section 31(3) of the Code a further provision has been made that after the approval of a resolution plan the moratorium order passed under Section 14 would cease to have effect and the RP is under obligation to forward the whole record relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Insolvency and Bankruptcy Board of India to be recorded on its database. The conclusion of the aforesaid discussion is that Adjudicatory Authority-NCLT must be satisfied that the resolution plan conforms to the requirements given in Section 30(2) of the Code.

17. It is pertinent to notice the mandatory requirements of Section 30(2) of the Code for a resolution plan to fulfil. Firstly, the resolution plan approved by the CoC must provide for payment of insolvency resolution process cost in a manner specified by the Board in priority to the payment

of other debts of the corporate debtor. With the application i.e. C.A. No. 322(PB)/2019, the RP has placed on record a copy of the CoC approved resolution plan (Annexure A/5) of the highest bidder i.e. H1 Resolution Applicant – Technopack Industries. Clause 6.4 of the Resolution Plan provides for the payment of the CIRP cost in priority to the payment of any other debts of the company the same is in accordance with the provisions of Section 30(2) and Regulation 38 of the CIRP Regulations. The Plan identifies the specific sources of fund that would be used for such payment. Therefore this condition stands satisfied.

18. Secondly the resolution plan must provide for payment of the debts of operational creditors in such a manner as may be specified by the Board which are not to be less than the amount to be paid to the operational creditors under Section-53 in the event of liquidation of the corporate debtor. It is appropriate to mention that Section 53 of the Code envisaged the waterfall and the priorities in which distribution of assets of a Corporate Debtor is to take place in case of liquidation. The RP in the resolution plan (supra) has stated that the resolution plan provides for the

payment to operational creditors which are not less than liquidation value. The plan also identifies the specific sources of funds which are to be used for such payment. The resolution plan declares that Regulation 38 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016 is complied with in as much as priority is accorded to Operational Creditors in making payments over Financial Creditors. In this regard reference may be made to Clause 6.3 of the resolution plan. The same read as under:

**6.3 Resolution of dues of Operational creditors**

*..... To look after the interest of all the stakeholders, the Resolution Plan provides for sum of Rs. 20.01 Lacs for settlement of claims of operational creditors, admitted/not-admitted by the Resolution Professional.*

The aforesaid provision in Resolution Plan provides for payment of dues of the corporate debtor. However, it does not accord priority to the operational creditor for payment of their dues over financial creditors as required by Regulation 38(1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016. The third requirement is that resolution plan must provide for the management of the affairs of the corporate debtor after approval of the resolution plan. There is specific provision made for the management and control of the company after the approval of the resolution plan by the Adjudicating Authority. A detailed mechanism regarding the management & control is discussed in Clause 8 of the plan. The resolution applicant has provided for the reorganized board of directors for managing the affairs of the company. The board is proposed to be constituted within 30 days from the receipt of required regulatory approvals. Clause 6.8 of the Resolution plan provides for the continuity of employment of the existing employees and workmen and creation of fresh opportunities. Therefore, the third condition stand fully complied with.

19. The fourth condition envisaged by Section 30(2) is that it must provide for implementation and supervision of the resolution plan. A reference in that regard has been made to Clause 9 of the resolution plan. The said clause as provided in the plan reads as under:

**9. SUPERVISION, MONITORING AND IMPLEMENTATION OF THE RESOLUTION PLAN**

A Committee comprising of the Resolution Professional, a nominee of ARCIL and a nominee of the Resolution Applicant shall be appointed as the Monitoring Agency for supervision and monitoring of implementation of the Resolution plan for the term of the Resolution Plan. The Monitoring Agency may seek such information from RIPL/resolution Applicant as me be required for supervision, monitoring and implementation of the Resolution Plan. The Monitoring Committee will assist the resolution applicant by taking all necessary steps for smooth implementation of the plan.

Thus, the fourth condition also stands satisfied.

20. The fifth condition requires the RP to confirm that the resolution plan did not contravene any of the provisions of the law for the time being in force. In FORM-H (Annexure-A/6) as well as the comprehensive compliance certificate (Annexure-A/7) submitted by the RP as per the requirements of Regulation 39(4) of the CIRP Regulations it has been certified that the resolution plan did not contravene any of the provisions of the law for the time being in force and is in compliance with the provisions of the Code and the CIRP Regulations.

21. The resolution applicant also confirms that it is not disqualified under Section 29A of the Code to submit a resolution plan and any other law applicable which further shows that the resolution plan conforms to the provisions of the law for the time being in force and did not contravene any such provision. The RP in the FORM-H submitted by him has certified the same.

22. The sixth requirement is that it conforms to all such requirements which may be specified by the Insolvency and Bankruptcy Board. The aforesaid statement has been made by the RP in para 4 of the FORM-H (Annexure-A/6). In view of the above we are satisfied that all the requirements of Section 30(2) are fulfilled and no provision of the law for the time being in force has been contravened.

23. However, it is necessary to refer to the provisions of Regulation 38 & 39 of CIRP Regulations to conclude that the requirements specified therein are also fulfilled. A perusal of Regulation 38 would clearly show that by virtue of mandatory contents of the resolution plan as discussed in the preceding paras in relation to Section 30 and 31 of the Code all the requirements of Regulation 38 stand

fulfilled. Even the requirement of Regulation 39 has been satisfied as the RP has submitted that the resolution plan of H1 resolution applicant as approved by the CoC to this Tribunal along with the compliance certificate in FORM-H as per the requirements of Regulation 39(4) of the CIRP Regulations meet all requirements of the Code and the CIRP Regulations and that the resolution plan has been duly approved by the CoC. There is no scope for argument left that shareholder, or parties to joint venture agreement or anyone holding similar document need to accord sanction in view of the provisions of Regulation 39(6) of the CIRP Regulations which clarifies that the resolution plan as approved by the CoC must take effect notwithstanding the requirement of consent of the members or partners of the Corporate Debtor under the terms of the constitutional documents of the Corporate Debtor, shareholders' agreement, joint venture agreement or other document of a similar nature.

24. It is also made clear that the statutory dues shall be treated as operational debts and be equated with similarly situated operational creditors in view of the judgement

rendered by the Hon'ble Appellate Tribunal in the case of ***Pr. Director General of Income Tax(Admn. & TPS vs. Synergies Dooray Automotive Ltd. & Ors. [Company Appeal (AT) (insolvency) No. 205 of 2017] decided on 20.03.2019.*** The claims of the Income Tax Department to be admitted in view of the said judgement.

25. In view of the above we accept and approve the CoC approved resolution plan of H1 Resolution Applicant – Technopack Industries subject to few directions.

26. As a sequel to the above discussion we pass the following directions:-

(i) The Resolution Plan is not in accordance with the provisions of Regulation 38(1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations. According to the aforesaid provision the amount due to the operational creditors under a Resolution Plan mandatorily requires to accord priority in payment over financial creditors. In From-H the amended provision has been reproduced and the amendment made providing for the priority in payment to the operational creditor has not been reflected. Even the RP has ignored this aspect. Therefore we direct that the amount due to operational creditors under the Resolution plan must be given priority in payment over the financial creditors. To that extent the Resolution Plan is modified.

(ii) C.A. No. 322(PB)/2019 – The application filed by the Resolution Professional for accepting the resolution plan submitted by Resolution Applicant-Technopack Industries is accepted subject to directions given in para (i) above. The Resolution Applicant-Technopack Industries may file appropriate applications before the Public Authorities/Government Authorities and it is needless to say that their applications would be duly considered in accordance with law. We make it clear that we are not expressing any opinion on the claim concerning reliefs and concession nor any part of this order shall be understood in that spirit.

(iii) The Resolution Professional shall forward all records relating to the CIR Process and the Resolution Plan to IBBI to be recorded at its data base in terms of Section-31(3)(b) of the Code.

(iv) The approved 'Resolution Plan' shall become effective from the date of passing of this order.

(v) C.A. No. 947(PB)/2019 filed by the Income Tax Department stands disposed of in above terms.

Sd/-

06.08.201

**(M.M.KUMAR)**
**PRESIDENT**

Sd/-

**(S.K. MOHAPATRA)**
**MEMBER (TECHNICAL)**

06.08.2019
VIDYA