Through Videoconference

IN THE NATIONAL COMPANY LAW TRIBUNAL
SPECIAL BENCH, MUMBAI COURT No. II

IA 1029 of 2020
in
CP (IB) 2156/MB/2019

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

Between

Gangamai Industries & Construction Limited
Having office address at:
Tapadia Terraces, 2nd Floor, Adalat Road,
Aurangabad-431001. **... Applicant/Intervenor**

And

Mr. Pankaj Joshi
Resolution Professional of
KGS Sugar and Infra Corporation Limited.
Having office address at:
Unit 12, Kakad Industrial Estate, Lady Jamshedji Cross Road No.3, Mahim (West), Mumbai-400016.

... Respondent

In the matter of

CANARA BANK ... Financial Creditor

Versus

KGS SUGAR AND INFRA CORPORATION LIMITED

... Corporate Debtor

Order Delivered on 01.03.2021

Coram:

Janab Mohammed Ajmal	Mr. Ravikumar Duraisamy
Hon'ble Member Judicial	Hon'ble Member Technical

Appearance:

For the Applicant	:	Mr. Ashish Pyasi, Counsel a/w Ms. Vaishnavi Mungelkar, Advocate.
For the Respondent	:	Mr. Zaman Ali, Advocate a/w Ms. Vinita Hobalkar, Advocate i/b Orbit Law Services & Mr. Pankaj Joshi, Resolution Professional.

ORDER

Per: Ravikumar Duraisamy, Member

1. This is an Application seeking intervention and appropriate directions to the Respondent for successful, fair and unbiased completion of Resolution Process of the Corporate Debtor while balancing the interest of all the Resolution Applicants.
2. The financial creditor has filed C.P. (IB) 2156 (MB) of 2019 before this Adjudicating Authority. The CIRP of the Corporate Debtor commenced vide order dated 10.10.2019 and Mr. Balady Sherkar Shetty was appointed as the Interim Resolution Professional. The Committee of Creditors (CoC) in its first meeting held on 25th November 2019, appointed Mr. Shetty as the Resolution Professional.

Submissions made by Applicant by way of Interlocutory Application:

3. The Applicant submits that the Resolution Professional published the invitation for Expression of Interest (hereinafter referred to as "EoI") in terms of Section 25(2)(h) of the Insolvency and Bankruptcy Code

(the IB Code) in English Newspaper 'Business Standard' and local newspaper 'Lokmat' in Mumbai on 18.01.2020, wherein the last date for submission of EoI was 10.02.2020 and for submission of Resolution Plan was 05.04.2020.

4. The Applicant submits that the Resolution Professional received EoI and thereafter shortlisted four eligible applicants to be included in the Provisional List of Prospective Resolution Applicants. Thereafter the Applicants on 20.02.2020 received an Email from the Resolution Professional which included an attachment consisting of the names of eligible and ineligible applicants to be in the Provisional list of "Eligible Prospective Resolution Applicants".

5. The Applicant submits that in an email dated 06.03.2020 captioned as "*Final list of eligible Prospective Resolution Applicants - KGS Sugar And Infra Corporation Ltd"* the Resolution Professional informed the applicant that its EoI had been found eligible to be in the Final List of Eligible Prospective Resolution Applicants.

6. The Applicant submits that on 05.06.2020 the applicant received an email captioned as "*Intimation of appointment of the undersigned as the Resolution Professional of KGS Sugar & Infra Corporation Limited (under CIRP)"* wherein it was communicated to the Applicant that the CoC had resolved to replace Mr. Balady Shekhar Shetty and appoint Mr. Pankaj Sham Joshi as Resolution professional for the Corporate Debtor. Furthermore, the NCLT Principal Bench by way of its order dated 27.05.2020 allowed the Interlocutory Application and approved the appointment of the new i.e. Current Resolution Professional of the Corporate Debtor and has taken office with effect from 27.03.2020.

The Applicant further submits that the Respondent could not have taken office with effect from 27.03.2020 as the erstwhile Resolution Professional Mr. Balady Sherkar Shetty was very much in office and was conducting the CIRP of the Corporate Debtor.

7. The Applicant received another email dated 13.06.2020 from the Resolution Professional captioned as "*Inclusion of Dwarkadhish Sakhar Karkhana Limited in the provisional list of eligible prospective resolution applicants for KGS Sugar and Infra Corporation Limited*" wherein it was informed to the Applicant that Dwarkadhish Sakhar Karkhana ("DSKL") has re-submitted its EoI on 9th June 2020 to submit a Resolution Plan for the Corporate Debtor and the CoC in its 9th Meeting held on 13th June 2020 has allowed DSKL to submit its Resolution Plan.

8. The Applicant submits that initially when the invitation for EoI Expression of Interest was issued, there was a delay in submitting the EoI by DSKL which eventually led to rejection of their Application/EoI by the former Resolution Professional after due consideration of their EoI under Regulation 36 A sub-regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate persons) Regulations, 2016 (the Regulations) and concluded that DSKL did not qualify to be in the PRA list. Hence DSKL was not included in the said final list issued by the former Resolution Professional after due consultation with the CoC of the Corporate debtor.

9. Aggrieved by the aforesaid decision of the Resolution Professional, the Applicant on 15.06.2020 sent an email captioned *"Objection to inclusion of Dwarkadhish Sakhar Karkhana Limited to the provisional list of eligible prospective resolution applicants for KGS Sugar and Infra Corporation*

Limited". On 16.06.2020 the Applicant received a reply email from the Resolution Professional.

10. The Applicant submits that in the manner in which the CIRP conducted by the Respondent is not only reeking of bias but full of arbitrariness as evident from the fact that the Respondent was appointed as RP by this Tribunal, vide its order dated 27.05.2020 and the Respondent has claimed that he took office of the RP of the Corporate Debtor from 27.03.2020. It is submitted that such assumption of the Respondent to take control from 27.03.2020 itself shows that the Respondent has some ulterior motives. Further, within seventeen days from the appointment of the Respondent as the Resolution Profession of the CD, the said DSKL without any new Form G issued and without any new EoI has been called for, submitted its EoI once again, evidences that there is a bias on the part of the Respondent for the said DSKL.

11. The Applicant herein submits that it challenges the decision of the RP dated 16.06.2020 on the following grounds:

    i. The Resolution Professional has failed to give any detailed clarification regarding the reasons for inclusion of DSKL in the PRA list or as to how and when the said DSKL applied or showed interest in participation in the CIRP of the Corporate Debtor after it got rejected in the month of February 2020; the Resolution Professional has also failed to prove if the decision to add DSKL in the list was ratified by the CoC. Moreover, whether the CoC was aware of the fact that the same Resolution Applicant was disqualified by the former Resolution Professional;

ii. The provisions of the Code and the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (the Regulations for short) do not permit for change of the process as per the whims and fancies of the Respondent and the Respondent could not have reversed wheel which was already set-in motion by his predecessor as early as February 2020, particularly in the absence of any direction from this Tribunal.

iii. The former RP has already disqualified DSKL under Regulation 36 A sub-regulation 6 of the Regulations which clearly states, *"The expression of interest received after the time specified in the invitation under clause (b) of sub-regulation (3) shall be rejected."* Furthermore, it is significant to note that the word *"shall be rejected" is* used by the legislature while framing the amendment. The conduct of the Respondent as RP is in teeth of the Regulations and therefore the decision of the Respondent has to be set aside and the said DSKL should not be permitted to participate in the process.

iv. That when the former Resolution Professional had already completed the exercise of making a Final List of eligible PRAs then it was not required for the Resolution Professional to add DSKL in the PRA list.

v. The Applicant further submits that the Hon'ble Supreme Court in Swiss Ribbons (P) Ltd. Vs. Union of India: **(2019) 4 SCC 17** have held that *"it is clear from a reading of the Code as well as the Regulations that the resolution professional has no adjudicatory powers."* And in the instant case the Resolution Professional amidst the pendency of an Application filed by the DSKL before this Tribunal could not have added DSKL in the PRA list in haste.

vi. Application the inclusion of the said DSKL in the list of eligible resolution applicants is biased as it can be seen that the Respondent without waiting for the outcome of the Application preferred by DSKL proceeded to create a new provisional list when a final list of resolution applicants was already prepared by the former Resolution Professional;

vii. Further, the Respondent on 05.06.2020 also caused the extension of date for submission of the Resolution Plan to 13th of July so that he could include DSKL in the provisional list.

viii. As per the approved Process Flow Document and Form G the Resolution Professional could have only changed/cancelled the timelines for submission of Resolution Plan and could not alter/cancel the whole exercise which was already completed by the former Resolution Professional.

ix. It is further submitted that in the response to the objections raised by the Applicant, the Respondent never mentioned as to what communication took place prior to 09.06.2020 when DSKL requested for participation.

x. It is further submitted that inclusion of such a disqualified entity at a belated stage is also against the principle of natural justice and equality.

xi. Those applicants could also have removed the disqualification due to which they were disqualified in the first instance by opting if such an opportunity would have been given to them and would have led to more competition.

12. The Applicant has learnt that another Resolution Applicant namely Jai Hind Sugar Pvt. Ltd. has also sent an objection via email to the Resolution Professional to the inclusion of DSKL in the PRA list wherein the Resolution Professional has rejected to consider their objection stating that as per the Regulations they have not followed the timeline of taking an objection to the PRA list which should be within 5 days from the date of issue of the Provisional List. It is significant to note that the same Resolution Professional who has himself not adhered to the Regulations and the timelines laid down in the Code has rejected Jai Hind Sugar Pvt. Ltd's objection on ground of delay. This clearly shows the prejudicial manner in which the process is conducted by the Respondent and proves that there is a bias in favouring DSKL.

13. That allowing the instant Application will not in any manner cause any prejudice to the right of any of the parties. On the contrary if the present Application is not allowed it would disrupt the process and adversely affect the stake holders due to the biased nature of the Resolution Professional and unfairness toward the interest of the Applicant and other Resolution Applicants who have complied with the guidelines and adhered to the frameworks of law., Such action is against the spirit of the Code or any other law.

Submissions Made by Respondent by way of Affidavit in Reply:

14. The Respondent states that the Applicant is a Public Limited Company incorporated under the provisions of the Companies Act, 1956., The Applicant, being a juristic entity/person, can file any proceedings before any forum or court of law only through its

authorised representative. The present Application has not been filed by any authorised representative of the Applicant. No Board Resolution has been produced by the Applicant along with the Application authorising Mr. Ranjeet Padmakar Mulay to file the Application on behalf of the Applicant. In fact, there is not even averment in the Interlocutory Application or the Affidavit in support of the Application which states or suggests that Mr. Mulay, who has digitally signed the Application on behalf of the Applicant, is in fact an authorised representative of the Applicant.

15. The Application is therefore defective and not maintainable before this Tribunal. Therefore, it should be summarily dismissed.

16. The Respondent also submits that alternatively the Application suffers from non-joinder of DSKL as a necessary party.

17. The Hon'ble Supreme Court in *Udit Narain Singh Malpaharia v. Member, Board of Revenue, Bihar and Ors.*, AIR 1963 SC 786, while dealing with who the necessary parties are, has held as follows:

> "*That a party against whom relief is sought, should be named in the petition. It is equally clear that all parties affected by that order should also be necessary parties to the petition… It would be against all principles of natural justice to make an order adverse to them behind their back and any order so made could not be effective one. They were, therefore, necessary parties before the High Court.*"

18. Further, the Respondent has drawn attention to the Proviso to Order I Rule 9 of the Code of Civil Procedure, 1908 ("CPC"), non-joinder of necessary party shall prove fatal to a suit. Though the provisions of CPC are not applicable to this Hon'ble Tribunal, it has been held by the Supreme Court, the High Courts and the Company Law Board (erstwhile Company Law Tribunal) in several cases that "*there can be*

no quarrel that the well-recognised principles embedded in the elaborate provisions of the CPC can be invoked to the proceedings before the CLB with a view to suppressing the mischief and advancing the cause of justice. This seems to be purpose of Regulation 44 of the CLB Regulations." It may be noted that Regulation 44 of the CLB Regulations dealt with the inherent powers of the Company Law Board.

19. The Respondent submits that he assumed office of the Resolution Professional of the Corporate Debtor on 27th May 2020. On perusal of relevant records, he noticed the following with regard to the Resolution Process of the Corporate Debtor:

a. The invitation for Expression of Interest ("EoI") for submitting a Resolution Planfor the Corporate Debtor i.e. Form G was published on 18th January 2020.

b. The last date for submission of EoI as per Form G was 10th February 2020.

c. EoIs from fourteen (14) PRA were received by the erstwhile RP before the cut-off date of 10th February 2020.

d. Out of the fourteen PRAs, only four (4) were found to be eligible to submit Resolution Plan. The final list was as follows.

e. The final list of eligible PRAs consisting of 4 PRAs was issued by the erstwhile RP on 6th March 2020. The four (4) eligible PRAs of the Corporate Debtor were:

i) Gangamai Industries and Constructions Limited;

ii) Hemant Hari Dhatrak (Consortium of individuals);

iii) Jai Hind Sugar Private Limited, and,

iv) Sitson India Private Limited

20. The Respondent further submits that the erstwhile RP received an e-mail dated 12th March 2020 from DSKL, expressing its interest to submit a Resolution Plan for the Corporate Debtor. On 12th March 2020 itself, the erstwhile RP summarily rejected the EoI submitted by DSKL on the sole ground of delay in submission of EoI, without going into the merits or eligibility of DSKL to submit a Resolution Planfor the Corporate Debtor.

21. On 23rd March 2020, DSKL addressed an e-mail to the members of the CoC requesting them to re-consider the erstwhile RP's decision in rejecting the EoI of DSKL and to allow it to submit a Resolution Plan for the Corporate Debtor. DSKL also annexed several documents to prove its eligibility and worthiness to participate in the Resolution Process of the Corporate Debtor.

22. The DSKL by way of e-mail dated 2nd April 2020, once again requested the erstwhile RP to reconsider its decision. The erstwhile RP by way of his e-mail dated 2nd April 2020 stated that DSKL's request will be placed for consideration before the CoC during their meeting to be held on 3rd April 2020.

23. During the 7th CoC meeting, which was held on 3rd April 2020, the erstwhile RP, while placing the issue of the belated EoI submitted by DSKL and its request to be allowed to submit a Resolution Plan for

the Corporate Debtor, for the CoC's consideration, stated the following:

i) Accepting the EoI of DSKL would entail issue of fresh Form G resulting in further delay of 45-60 days of CIRP period;

ii) Majority of the shortlisted Resolution Applicants are ready with Resolution Plans who can submit the same immediately after lifting of lockdown;

iii) Farmers are pressing for payment of their cane dues and for restarting the factory at the earliest;

iv) Next crushing season may be delayed, and,

v) Value of plant and machinery may get deteriorated by postponing crushing season.

24. Based on the factors highlighted by the erstwhile RP, the CoC in the 7th CoC meeting held on 3rd April 2020 resolved that, *"approval of CoC be and is hereby accorded to reject the request of M/s Dwarkadhish Sakhar Karkhana Ltd for submitting the Expression of Interest after the due date i.e. 10th February 2020 as per Regulation 36A (6) and RP be and is hereby authorised to communicate the decision to M/s Dwarkadhish Sakhar Karkhana Ltd accordingly"*.

25. The Respondent states that DSKL should not have been denied the opportunity to submit its EoI in the proper format and to participate in the Resolution Process of the Corporate Debtor, if found eligible, for the following reasons: The object of the Code overrides the Regulations. While, Regulation 36A (6) of the CIRP Regulations states that the RP shall reject the EoI which is submitted after the last

date of submission of EoI, the primary object of the Code is maximisation of value of the assets of the Corporate Debtor in a time-bound manner.

26. The placed reliance upon this Tribunal's order in *ICICI Bank Limited v. Unimark Remedies Limited* (MA. No 1529 of 2018 in C.P. No. 197 of 2018), which held as follows:

> *"7. This Bench after hearing both the parties, looked into the Regulations which would not allow the acceptance of any proposal by any resolution Applicant beyond the date as fixed by the CoC. It is clear that the Resolution Applicant had approached the RP with a proposal at the 12th hour but certainly before accepting or finalization of any Resolution Plan.*
>
> *8. Now the point is whether the Resolution Plan of the Applicant can be considered at this belated hour or should the same be rejected even without looking into the same. In our view of the case and keeping in view the very object of the Code, when there is a clash/ conflict between the Regulations and the Code, the object of the Code is paramount and not the Regulations which are formed only for the just implementation of the Code. Purely on the basis of technicalities, the rejection of Resolution Plan even without looking into its merits, is certainly an act which shall go against the very spirit of the Code and may even result in a huge loss to the Company. Any Regulation which does not anticipate such a situation and if the same comes in the way of proper justification and implementation of the principles of the Code, the same need not be considered nor can be treated as an impediment in the implementation of the Code.*
>
> *9. For all the aforementioned reasons we are of the considered view that the spirit of the Code is first and then comes the other things. The rejection of the Resolution Plan by the CoC even without opening the envelope containing the Resolution Plan on the ground that the same is submitted after the expiry of the stipulated time fixed by the CoC, is certainly against the law/Code and we hereby direct the Respondent to forthwith consider the Resolution plan of the Applicant on its*

> *merits and judicious decision may be taken in the best interest of the parties concerned. The Application is allowed."*

27. The Respondent submits that although the order was in relation to late submission of a resolution plan, the Respondent tried to look at the essence of the order in relation to the fact situation of the Corporate Debtor where the issue was regarding the late submission of EoI by DSKL.

28. The Respondent relied on the order in *State Bank of India v. Impex Metal and Ferro Alloys Limited* (C.A. (IB) No. 641/KB/2018 in C.P. (IB) No. 176/KB/2018), a similar situation had come up for consideration before the National Company Law Tribunal, Kolkata Bench. In the said case, the Resolution Applicant had submitted its EoI even after the last date for receipt of Resolution Plan. In fact, the Resolution Professional, therein, had already received 3 resolution plans. Despite all this, keeping in mind the objective of the Code and noting that the 180 days of CIRP were not over yet, the NCLT directed the Resolution Professional to consider the Resolution Plan submitted by the Resolution Applicant. The relevant portion of the order is as follows:

> *"10. Regulation 36A has recently been amended (July 3, 2018). Sub-regulation (6) of regulation 36A mandates the RP to reject the EoI received after the time specified in the invitation. In this case, last date of submission of EoI was May 30, 2018 and the last date of submission of the RP was June 18, 2018. Admittedly, the applicant did not submit EoI on or before May 30, 2018 and the RP on or before June 18, 2018. The reason for non-submission of EoI in the plan is not at all convincing. Now the question before this authority is whether the authority while invoking its jurisdiction under section 60(5) of the Code can direct the RP to consider the applicant's plan. I have considered this aspect in great details. The CIRP period of*

180 days would be completing on September 5, 2018. No doubt it can be extended further for 90 days but it can be done only if CoC desires. The broad object of the Code is that for insolvency process of corporate persons in time-bound manner for maximization of value of assets of such person. In this case, the RP has already received three plans. In order to have maximization of the value of assets of the corporate debtor on competitive basis, I feel that the RP should be directed to consider the applicant's plan also because CIRP period of 180 days is yet to be completed and more particularly, even further period of 90 days is still at the hands of the CoC. For this reason, I am inclined to allow this Application."

29. The Respondent submits that in these unprecedented times of global economic slowdown, particularly in India, it is going to be difficult to find adequate number of resolution applicants to rescue corporate persons as it is even sits on India Private Limited, one of 4 eligible PRAs of the Corporate Debtor, dropped out from the Resolution Process on 6th May 2020 due to undisclosed reasons. Therefore, it is in the interest of the Corporate Debtor to receive as many Resolution Plans as possible from eligible PRAs for maximisation of value of its assets and for arriving at the most viable plan to rescue the Corporate Debtor.

30. The 180 days of CIRP of the Corporate Debtor has not expired yet in view of the lockdown. The Order dated 30th March 2020 passed by the NCLAT in *Suo motu – Company Appeal (AT) (Insolvency) No. 01 of 2020* and the Regulation 40C of the CIRP Regulations, permits for the period of lockdown to be excluded while computing the timeline of CIRP of the Corporate Debtor. In the State of Maharashtra, the lockdown lasted for 99 days i.e. from 24th March 2020 to 30th June 2020. Upon exclusion of the said period of lockdown, the 180th day of

CIRP of the Corporate Debtor stands extended from 2nd May 2020 to 9th August 2020.

31. Upon the request of the Resolution Applicants, the last date for submission of Resolution Plan for the Corporate Debtor was also extended from 5th April 2020 to 13th July 2020. If the belatedly submitted EoI of DSKL were to be accepted, DSKL would still have 30 days to submit its Resolution Plan and there would be no requirement to extend the last date of submission of resolution further any further from 13th July 2020.

32. Therefore, consideration of the EoI submitted by DSKL or allowing DSKL to submit a Resolution Plan would neither disturb nor prove fatal to the CIRP of the Corporate Debtor.

33. Since the EoI of DSKL was accepted beyond the last date for submission of EoI, in deviation to Regulation 36A (6) of the Regulations, there is no extension of the last date for submission of EoI. Therefore, no fresh Form G was required to be published.

34. The Respondent submits that the issue of late submission of EoI by DSKL and DSKL's eligibility to submit a Resolution Plan for the Corporate Debtor was included in the agenda for the 9th CoC meeting to be held on 13th June 2020. During the meeting, the Respondent apprised the members of CoC regarding the situation and proposed that DSKL be allowed to participate in the Resolution Process of the Corporate Debtor. The Respondent also submitted before the CoC that, under the law, the Resolution Professional was not required to take express permission from the CoC to issue a Request for Resolution Plan ("RFRP") to an eligible PRA. However, in the present case, since the CoC had already passed a resolution rejecting the EoI of DSKL to take part in the Resolution Process of the

Corporate Debtor, it was considered appropriate by the Respondent to seek CoC's consent for allowing DSKL to take part in the Resolution Process.

35. The Respondent submits that the said agenda item was voted upon by the members of the CoC. The CoC passed a resolution with 100% vote, of those present and voting, in favour of allowing DSKL to participate in the Resolution Process of the Corporate Debtor and submit a Resolution Plan despite the late submission of EoI.

36. The Respondent submits that in addition to the objections of Applicant similar objections were raised by the other two PRAs *viz.* Hemant Hari Dhatrak (consortium of individuals) and Jai Hind Sugar Private Limited by way of their e-mails dated 18th June 2020 and 20th June 2020, respectively. The objections raised by the PRAs were limited to the intention of legislature under Regulation 36A (6) of the CIRP Regulations. No other objections were raised, or any supporting documents were produced by the PRAs. The Respondent duly responded to the objections raised by Hemant Hari Dhatrak and Jai Hind Sugar Private Limited by way of his e-mails dated 19th June 2020 and 20th June 2020, respectively.

37. The Respondent, after giving due consideration to the objections raised by Hemant Hari Dhatrak and Jai Hind Sugar Private Limited, decided to reject them as well and proceed with the inclusion of DSKL in the prospective list of eligible PRAs.

38. On 20th June 2020, the Respondent issued the updated final list of eligible PRAs of the Corporate Debtor to the CoC of the Corporate Debtor, in compliance with Regulation 36A (12) of the Regulations. The Respondent submits that the updated final list of eligible PRAs now had an inclusion of DSKL's name and the exclusion of the name

of Sitson India Private Limited. The updated final list of eligible PRAs of the Corporate Debtor is:

a. Gangamai Industries and Constructions Limited;
b. Hemant Hari Dhatrak (Consortium of individuals);
c. Jai Hind Sugar Private Limited, and,
d. Dwarkadhish Sakhar Karkhana Limited.

39. On 21st June 2020, Jai Hind Sugar Private Limited once again raised objections to the inclusion of DSKL the objections raised in the e-mail were the same as those raised in their e-mail dated 20th June 2020. On 22nd June 2020, the Respondent by way of an e-mail responded to the objections raised to the effect that the right of a PRA to raise objection to the inclusion or exclusion of an individual/ entity as a PRA of the Corporate Debtor arises from sub-regulation 11 of Regulation 36A of the Regulations. Regulation 36A (11) of the CIRP Regulation states that such objections shall be raised within 5 days from the date of issue of the provisional list of eligible PRAs by the resolution professional. The Respondent had issued the provisional list of eligible PRAs on 13th June 2020. Therefore, effectively the time for raising any objection expires on 18th June 2020. The period of 5 days as envisaged under Regulation 36A (11) had expired and therefore, the Respondent was not obligated to respond to the objections raised by it. However, the Respondent once again addressed the objections and rejected the objections after giving it due consideration.

Submissions made by Applicant by way of Rejoinder:

40. The Applicant submits with regard to the contention of the Respondent that the person who has filed this Application has no

authority that, this Application is filed by the Managing Director of the Company and Section 2 (54) of Companies Act 2013 specifically provides; *"managing director" means a director who, by virtue of an agreement with the Company or of a Resolution passed by the Company in general meeting or by its Board of Directors or, by virtue of its Memorandum or Articles of Association, is entrusted with substantial powers of management which would not otherwise be exercisable by him, and includes a Director occupying the position of a Managing Director.* Furthermore, the Hon'ble Karnataka High Court in Wasava Tyres A Partnership Firm Vs. The Printers (Mysore) Private Limited, reported in (2008) 86 SCL 171 (Kar), has held as follows:

> *"The words "substantial powers of management" specifically excludes certain acts from its preview. Therefore, except the excluded acts the managing director has power and privilege of conducting the business of Company in accordance with the Memorandum and Articles of Association of the Company. The institution of the emit on behalf of the Company by the managing director is deemed to be within the meaning of "substantial powers of management" since such a power is necessary and incidental for managing the day-today affairs and business of the Company. Therefore, by virtue of provisions of Section 26 the suit instituted by the Managing Director is deemed to be within his power and authority. The suit is obviously filed for the benefit of the Company. In that view of the matter, the contention that the Managing Director had no authority to file a suit is untenable and the same is rejected"*

41. Further, the Applicant submits that on 24.06.2020 a Board Resolution was passed by the board of directors of the Company authorizing Mr. Ranjeet Mulay to be file proceedings on behalf of Gangamai Industries & Constructions Limited before this Hon'ble Tribunal but

the same was inadvertently missed to be annexed in the Interlocutory Application.

42. The Applicant with reference to contention of non-joinder of necessary party and DSKL is not impleaded as a necessary party submits that, in the instant Application DSKL's conduct is not challenged, rather the decisions of the Respondent is challenged. Furthermore, the Respondent has relied upon the Hon'ble Supreme Court's judgement in Udit Narain Singh Malpaharia v. Member, Board Revenue, Bihar and Ors., AIR 1963 SC 786 the Applicant submits that impleading of a necessary party comes into the picture only when a specific relief is sought against it. The Applicant has not sought any relief against DSKL. Its presence is not required for adjudication of this Application. Without prejudice to the above, it is submitted that as per the provisions of CPC, no suit should fail or dismissed for non-joinder of a party, if this Tribunal comes to a conclusion that it is important that DSKL should be impleaded then the Applicant will implead them.

43. The Respondent had submitted that he assumed the office on 27th May 2020. He however has deliberately failed to mention in the Reply that, the Respondent was present as an invitee on 3rd April 2020 when DSKL's EoI was rejected in the 7th CoC meeting. The Respondent had consented to the rejection by stating that "*The decision of RP is aligned with the Regulation 36A (6) of the CIRP regulations for the corporate persons.*" The applicant submits that *if bias was not the reason for change of Respondent's heart later then what could it be*.

44. Further with reference to contentions with regard to the conduct of previous RP, rejection by the COC, should not have been denied the opportunity to submit its EoI in proper format, it is submitted that on

12th of March 2020 the erstwhile RP received an EoI from DSKL and on the same day he rejected the EoI on ground of delay. Thereafter on 23rd March 2020 and on 2nd April 2020 DSKL once again addressed emails to the erstwhile RP and the CoC members for re-consideration of the erstwhile RP's decision to reject its EoI.

45. Subsequently on 2nd April 2020 the erstwhile RP by way of his email stated that DSKL's request shall be placed for consideration before the CoC. The Respondent further contended that during the 7th CoC meeting held on 3rd April 2020, the erstwhile RP and the CoC member after considering the issue of the belated EoI submitted by DSKL and their request to be allowed to submit a Resolution Planfor the Corporate Debtor stated that *"accepting the EoI of DSKL would entail issue of fresh Form G resulting in further delay of 45-60 days of the CIRP period……"*

46. Thereafter giving due considerations to the aforesaid points the CoC resolved that "approval of CoC be and is hereby accorded to reject the request of M/s DSKL for submitting the Expression of Interest after due date i.e 10th February 2020 as per Regulation 36A (6) and RP be and is hereby authorized to communicate the decision to M/s DSKL accordingly". And subsequently via an email dated 9th April 2020 the erstwhile RP communicated the CoC's decision to DSKL.

47. With reference to contention that no express or implicit extension is taking place and no fresh form G is required and the inclusion will not affect others, The Applicant submits that, when the Respondent is changing the rules as per his own whims and fancies then at the same time such changes are needed to be in a uniform and fair manner to everyone. It is a trite law that the rules of the games cannot be changed in between. The Applicant also submits that if the

Respondent want to twist and turn the procedures then he should might as well have given a chance to all other PRA who had submitted their EoI's and which did not make the Provisional/ Final list or by issuing a fresh Form G more people would got attracted and would have led to more competition and not only give such a red-carpet entry to DSKL.

48. The Applicant submits that the unfair and bias decision to accept DSKL's EoI at such later stage will definitely prejudice the other Resolution Applicants as after seeing the Respondent's conduct, the Resolution Applicants are now apprehensive for the fate of their Resolution Plans once submitted as there is always a commercial obligation which the Resolution Applicants must abide by for example the Performance Guarantee, Earnest Money Deposit etc. as mentioned in the Process Flow Document.

49. The Applicant submits with reference to decision making and permission/approval, it is submitted that the Respondent in para 18 has pleaded that "*After being sure that no such prejudice would be caused to any party to the CIRP of the Corporate Debtor the* ***Respondent arrived to the decision to include DSKL in the Resolution process for the corporate debtor."*** the Respondent in his communication dated 5th June 2020, wherein he has conveyed to DSKL that he is a new Resolution Professional of the Corporate debtor and he has expressly said that "***I am inclined to grant you an opportunity to resubmit your EoI in format as laid down in the Process Flow Document".*** The Respondent even before taking the same to the CoC for approval decided that DSKL should be given a fair opportunity to participate in the Resolution Process for the Corporate Debtor decision to give DSKL an opportunity to resubmit their EoI when the CoC in its 7th meeting had explicitly

rejected to give an opportunity to DSKL. It is submitted that the *section 25 (2) (h) of the Code and Regulation 36A (3) and (4) of the Regulations* clearly shows that the approval has to precede the decision is taken by the Respondent.

50. We have heard the rival arguments in the matter at length and also examined the facts.

51. With regard to preliminary objection of RP i.e. the IA is filed without authority and DSKL was not made as a necessary party, we are satisfied with the reply, submissions of the applicant that the Managing Director could file the Application. Since no relief is claimed against DSKL, it would not be a necessary party to the Application. The Application can very well be decided in its absence.

52. The Hon'ble NCLAT in the matter of ***Kotak Investment Advisors Limited Vs. Mr. Krishna Chamadia (Resolution Professional in the matter of Ricoh India Limited) and Ors. CA (AT) (Ins) No. 344 – 345 of 2020 decided on 05.08.2020*** observed as under.

> *"23. The Resolution Plan submitted by the Appellant was opened on 9th January 2019, and the fundamentals of the plan and offer made by Appellant were disclosed to all the participants, including the Resolution Professional. After this, no further fresh bid or offer could have been accepted or considered. But, the RP illegally and unlawfully received EoI from Kalpraj Dharamshi & Rekha Jhunjhunwala on 27th January 2019, i.e. after the expiry of the deadline for submission of EoI."*
>
> *"27. It is also noticed that two Resolution Plans which were submitted within the deadline, were under consideration before the CoC. But before taking any decision on these Plans, the Resolution Professional accepted two other Resolution Plans, after the expiry of the deadline for submission of the Resolution Plan. If the Resolution Professional, on the advice of CoC had decided to extend the timeline for submission of bids, then it was mandatory to issue a notification in Form-G, for*

inviting EoI and in compliance of subregulation (5) of Regulation 36A of the CIRP Regulation. Only after publication of fresh invitation in Form-G and fixing a deadline, the Resolution Plan could have been accepted with the consent of CoC. It cannot be said that as per Process Memorandum, the Resolution Professional was entitled to accept any Resolution Plan at any point of time, without following the due process under the guise of maximization of value. The alleged act of the Resolution Professional in accepting the Resolution Plan after the expiry of the deadline for submission of Resolution Plan is arbitrary, illegal and against the principle of natural justice and cannot be treated as an act within the commercial wisdom of the CoC."

53. We are of the considered opinion that after the expiry of the deadline for submission of Resolution Plan, the Resolution Professional, with the approval of CoC, was fully authorized to invite fresh invitation for Expression of Interest for submission of Resolution Plan. Thereby fair opportunity would have been available to all other Prospective Applicants to participate in the process thereby creating more healthy competition. Accepting one EoI, Resolution Plan from one party whose EoI had earlier been rejected by CoC after due deliberation is prejudicial and beyond the scope of the Code and the Regulations. When EoI is invited, then public notices are published. The Resolution Professional had earlier issued public notices in Form-G as per Regulation 36A of the Regulations whereby public and open offer was made to submit EoI/Resolution Plan.

54. We fail to understand as to why the current Resolution Professional Mr. Pankaj Joshi had deviated from the earlier procedure of publication of notice for the invitation of EoI with the approval of CoC. Per contra, the Resolution Professional has accepted the Resolution Plan of the DSKL after the expiry of the deadline for submission of Resolution Plan without following the due process. The act of the Resolution Professional to accept the Resolution Plan after

opening the other bids, which were all submitted within the deadline cannot be justified by any means and is a blatant misuse, misconduct on the part of Resolution Professional. We also note that CoC in its 7th meeting rejected the EoI of DSKL but in the 9th meeting approved it with 100% vote share. The action of the RP and CoC is in violation of the express provisions of the Code and Regulations made thereunder. However, if the CoC wanted to extend the timeline, it should have done so within the procedure prescribed there for. By providing a special treatment, back door entry for accepting the Resolution Plan of the DSKL's the Resolution Professional and the CoC have deviated from the norms prescribed under the Code and the Regulations framed there under, which vitiates the Corporate Insolvency Resolution Process and caused prejudice to the other PRAs. Such a practice has been strongly deprecated by the Hon'ble NCLAT cited above.

55. In view of the above facts and circumstances and the discussions supra the Interlocutory Application deserves to be allowed.

56. The present **IA No. 1029 of 2020 in C.P. (IB) No. 2156 /MB/C-II/2019 is allowed on contest**. The Respondent's decision in accepting the EoI of DSKL and including it in the list of PRAs is set aside. The list of PRAs prepared by the former RP on 6th March 2020 is held to be valid and accepted. There would however be no order as to costs.

Sd/-	**Sd/-**
JANAB MOHAMMED AJMAL	**RAVIKUMAR DURAISAMY**
MEMBER (JUDICIAL)	**MEMBER (TECHNICAL)**

01.03.2021
SAM