IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH

I.A. No.47 of 2019 in
C.P. (IB) No.14/BB/2017
U/S. 33(1) R/w Section 60(5) of IBC, 2016

Mr. Savan Godiawala
Resolution Professional of
M/s. Falcon Tyres Limited
Deloittee Touche Tohmatsu India LLP,
19th Floor, Shapath- V, S.G. Road,
Ahmedabad – 380 015. - Applicant/ Resolution Professional

In the matter of:

M/s. Edelweiss Asset Reconstruction Company Limited - Petitioner

Versus

M/s. Falcon Tyres Limited - Respondent

Date of Order: 30th December, 2019

Coram: 1. Hon'ble Shri Rajeswara Rao Vittanala, Member (Judicial)
2. Hon'ble Shri Ashutosh Chandra, Member (Technical)

Parties/Counsels Present:

For the Applicant : Shri Nischal Dev B.R with
Shri Ameya Gokhale,
Ms. Apeksha,
Mr. Savan Godiawala, RP

For the Petitioner : Shri Vikram Trivedi with
Shri Keerthi Hegde

ORDER

Per: Rajeswara Rao Vittanala, Member (J)

1. I.A.No.47/2019 in C.P.(IB)No.14/BB/2017 is filed by Mr. Savan Godiawala (hereinafter referred to as 'Applicant/ Resolution Professional') under Section 33(1) R/w Section 60(5) of the IBC, 2016, by inter-alia seeking to pass an order requiring the Respondent to be liquidated, in terms of the provisions of Section 33(1) of the Code; to issue a public announcement stating that the Respondent is in liquidation; to direct that a copy of the order be sent to the ROC, at Bengaluru etc.

2. Brief facts of the case, as mentioned in the Application, and subsequent pleadings filed, which are relevant to the issue in question, are as follows:

   (1) M/s. Falcon Tyres Limited, (the Corporate Debtor) was incorporated as a Public Limited Company on 29th November 1973 and engaged in manufacture of tyres and tubes for two and three wheelers, jeeps, LCVs and farm vehicles. In due course of time, on account of labour unrest beyond the control of the management, manufacturing activities of the Corporate Debtor came to a standstill and the Corporate Debtor shut down its operations in 2015. Multiple attempts were made to revive the Corporate Debtor, but to no avail. Eventually, C.P. (IB) No.14/BB/2017 was filed by M/s. Edelweiss Asset Reconstruction Company Limited (EARCL), a Financial Creditor, under Section 7 of the IBC, 2016 R/w Rule 4 of the I&B (AAA) Rules, 2016, by inter-alia seeking to initiate CIRP in respect of M/s. Falcon Tyres Limited (Corporate Debtor) on the ground that it has committed default for an

amount of Rs. 107,95,37,383/-. Thereafter, the Company Petition was admitted by this Adjudicating Authority, vide order dated May 1st, 2018 ('Admission Order') by initiating CIRP, appointing Mr. Vijay Kumar V. Iyer, bearing IBBI Registration No. IBBI/IPA-001/IP-00526/2016-2017/1370 as IRP, imposing moratorium etc. Subsequently, the Adjudicating Authority vide its order dated 19.07.2018 permitted CoC to change RP of the Corporate Debtor and appointed Mr. Savan Godiawala as the Resolution Professional in place of the erstwhile RP.

(2) Subsequent to the appointment of IRP, a public announcement was issued on May 5th, 2018 under Regulation 6 of the Insolvency and Bankruptcy Board of India Regulation, 2016 calling upon the creditors of the Respondent to submit proof of their claims on or before 16.05.2018. After receiving the proof of claims, the CoC was constituted and the first meeting was conducted on 29th May, 2018 by the IRP. Further, a report certifying constitution of the CoC was filed before this Adjudicating Authority in compliance with Regulation 17 of CIR Regulations. In compliance with IRP's duties under Section 25 (2) (h) of the Code, the IRP had issued a public newspaper advertisement dated 9th July 2018. This advertisement was published on the website of the IBBI, the website of the Respondent and editions of the Times of India, Business Standard and Telegraph, inviting from prospective Resolution Applicants to submit Resolution Plan for the Respondent in accordance with the provisions of the Code. As per the original Advertisement the last date for submission of Resolution Plan was 17th August 2018.

(3) It is also stated that a process memorandum dated 30th July 2018, which was later amended on October 6, 2018 was prepared for use of potential Resolution Applicants. In compliance with Section 29 of the Code and Regulation 36 of the CIR Regulations, the Resolution Professional prepared an Information Memorandum and uploaded all relevant information on a data room, access to which was provided to all potential Resolution Applicants, who met the minimum eligibility criteria stipulated in the advertisement and had executed the confidentiality undertaking.

(4) The fourth meeting of the CoC was held on 13.08.2018, wherein, the RP proposed that since few investors had shown interest in the resolution of the Respondent, potential Resolution Applicants can be given more time to express their interest. Members of the CoC agreed and decided to extend that the last date for submission of Resolution Plan till September 14th 2018. An advertisement for extension of the last date for submission of Resolution Plan was published on August 17th, 2018, wherein the last date for submission of Resolution Plan was extended till September 14th, 2018. In the seventh meeting of the CoC dated 01.10.2018 with a few more investors showing interest the members of the CoC agreed to extend the last date for submission of Resolution Plan till October 12th, 2018. Accordingly another advertisement for extension of last date for submission of Resolution Pan was published on 03.10.2018.

(5) During the eighth meeting of the CoC held on 15.10.2018, the RP informed the Members of the CoC that one Resolution Plan was submitted by Maple Tree Leather

Goods Private Limited on 12.10.2018. In the ninth meeting of the CoC held on 25th October 2018, the RP briefed the members of the CoC that the Resolution Plan submitted by the Resolution Applicant does not comply with the mandatory provisions of the Code, CIR regulations and the process Memorandum. The Representative of the Resolution Applicant was also invited by the RP for discussions with the members of the CoC. Following discussions with the representative of the Resolution Applicant, the CoC rejected the Resolution Plan submitted by the Resolution Applicant since it was non-compliant and passed a resolution to issue a new invitation for Resolution Plan, if the Adjudicating Authority approves application for extension of the CIRP period. The Adjudicating Authority by an order dated 26th October, 2018 passed in I.A. No.349 of 2018 extended time for CIRP till 26th January 2019. Subsequently, a revised Form G was issued on 28th November 2018, extending the deadlines for submission of Resolution Plans to 28th December 2018. Again Resolution Plan was submitted by the same Resolution Applicant on 28th December 2018. During eleventh meeting of the CoC held on 31st December, 2018, wherein it was inter-alia decided that the First Resolution Plan was non-compliant with the Code, the CIR Regulations and the process memorandum and thus decided that discussion should take place with the Resolution Applicant to make the plan compliant in the interest of the Corporate Debtor and to achieve the objectives of the Code. According, RA was communicated the aspects of non-compliant of Resolution Plan of the provisions of the Code on 4th January, 2019.

During, 12th COC held on 10th January, 2019 also the issue was discussed.

(6) During 13th CoC meeting held on 21st January 2019, wherein it was inter-alia informed to the CoC Members that after communicating the reason for non-compliance of First Resolution Plan, another addendum was submitted by the Resolution Applicant on 18th January, 2019 read with email dated 19th January, 2019. It was also informed by the RP that discussions were held with the Resolution Applicant and his lawyers on the Second Addendum, after which a third addendum to the first Resolution Plan was received by the RP on 21st January 2019. The liquidation and fair value of the assets of the Corporate Debtor was shared with Members of the CoC. Thereafter, representative of the Resolution Applicant was invited for discussions with the members of the CoC. After detailed discussions with Members of the CoC and commercial aspects of the First Resolution Plan, the Representative of the Resolution Applicant agreed to submit another Resolution Plan by 23rd January, 2019. And this was continued on 23rd January 2019. The RP informed the Members of the CoC that fourth addendum to the First Resolution Plan was received by the RP on 23rd January, 2019. The RP invited the representative of the Resolution Applicant for the meeting, who had detailed discussion on the commercial aspects of the Resolution Plan. The Resolution Applicant was not agreeable to address some of the commercial concerns of the members of the CoC. Hence, most of the CoC members were of the view that the First Resolution Plan would be rejected. However, the Resolution Professional decided to put the

matter on electronic voting. On 24th January, 2019, when the electronic voting was open for CoC Members to vote on either in favor of approval of the Resolution Plan or liquidation, another addendum on email was received from the representative of the Resolution Applicant, which revised the commercial aspects of the Plan.

(7) On the advice of Members of the CoC, the RP convened another meeting on 24.01.2019 via teleconferencing to get view of the members of the CoC on the fifth addendum submitted by the Resolution Applicant. The COC members, who attended the meeting, were not in favor of the approving the Resolution Plan because the Resolution Plan as proposed by the Resolution Applicant does not appear to be credible, capable and genuine. The Resolution Applicant is also not ready to submit the performance guarantee, which is a requirement, as per the Process Memorandum. Further the First Resolution Plan also fails to balance the interest of all stakeholders, and the resolution value proposed by the Resolution Applicant is much below the liquidation value. Considering proposals and counter proposals, the RP has invited views of all COC Members.

(8) EARCL has inter-alia expressed the follow views about the Revised Plan in question during the 14th COC meeting:

> "*Representative of the EARC further stated that the resolution plan does not appear to be credible, capable and genuine. Not only that the plan envisages payment of resolution value after 4 months of its approval by Hon'ble NCLT but also the resolution applicant is not ready to provide the performance security as per bid documents. It is also submitted that the resolution plan under consideration does not meet the expectation of*

CoC and is also balancing the interest of all stakeholders. It was further submitted that they resolution value proposed for stakeholders is far below the liquidation value and thus Resolution Plan was not acceptable to them.

a) *Representative of PNB concurred with EARC's view and stated the amount offered to financial creditor is not acceptable and the upfront payment amount offered is also not acceptable. Hence, the revised offer by the Resolution Applicant was rejected.*

b) *All other creditors concurred with the view of EARC (emphasis supplied)"*

c) *Therefore, the Resolution to reject the Resolution plan , when put it to vote, was approved by COC consisting of 6 members with a majority of 99.3% percent votes and decided to approve and authorize the RP to file an application to this Adjudicating Authority to pass a liquidation order as per Section 33 of the code. In terms of Section 34 of the Code, the members of the CoC agreed to appoint Mr. Velayudham Jayavel (Registration No. IBBI/IPA-001/IP-P01012/2017-2018 / 11663) as the liquidator of the Respondent Company, subject to the approval of this Adjudicating Authority."*

(9) It is stated that CoC has been cast with a duty to ensure a time bound process to better preserve the economic value of the asset. Simultaneously, it is the duty of the COC to ensure that a Resolution Plan approved by it is viable, feasible and maximizes the assets of the Corporate Debtor. And it is for the COC, which has to take a business decision to accept or reject a Resolution Plan and no provision is made in the Code, Rules or Regulations that would enable or enjoin upon the Adjudicating Authority to sit over the resolution of the CoC in rejecting a particular Resolution Plan.

(10) The Hon'ble Supreme Court of India in the case of *K. Sashidhar v. Indian Overseas Bank & Ors. (Civil Appeal No. 10673 of 2018)* has clearly held that if opposition to the proposed resolution plan is purely a commercial or business decision, the same, being non-justifiable, is not open to challenge before the Adjudicating Authority or for that matter the Appellate Authority. The Hon'ble Supreme Court went on to further hold that in such a situation, non-recording of any reason for taking such commercial decision will be of no avail. The Hon'ble Supreme Court held as under:

> *".......33. Besides the commercial wisdom, the COC has been given paramount status without any judicial intervention, for ensuring competition of the stated process within the timelines prescribed by the 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 the 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-justifiable."*

In addition to the above, the Hon'ble Supreme Court of India in *Arcelormittal India Private Limited v. Satish Kumar*

Gupta & Ors. (*Civil Appeal Nos. 9402-9405 of 2018*) while observing that the 'Resolution Applicant' has no vested right or fundamental right to have its 'Resolution Plan' considered or approved held as follows:

> *"...75. What has now to be determined is whether any challenge can be made at various stages of the corporate insolvency resolution process. Suppose a resolution plan is turned down at the threshold by a Resolution Professional under Section 30(2). At this stage is it open to the concerned resolution applicant to challenge the Resolution Professional's rejection? It is settled law that a statute is designed to be workable, and the interpretation thereof should be designed to make it so workable.........*
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> *76. Given the timeline referred to above, and given the fact that a resolution applicant has no vested right that his resolution plan be considered, it is clear that no challenge can be preferred to the Adjudicating Authority at this stage. A writ petition under Article 226 filed before a High Court would also be turned down on the ground that no right, much less a fundamental right, is affected at this stage. This is also made clear by the first proviso to Section 30(4), whereby a Resolution Professional may only invite fresh resolution plans if no other resolution plan has passed muster.*
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> *79. Take the next stage under Section 30. A Resolution Professional has presented a resolution plan to the Committee of Creditors for its approval, but the Committee of Creditors does not approve such plan after considering its feasibility and viability, as the requisite vote of not less than 66% of the voting share of the*

financial creditors is not obtained. As has been mentioned hereinabove, the first proviso to Section 30(4) furnishes the answer, which is that all that can happen at this stage is to require the Resolution Professional to invite a fresh resolution plan within the time limits specified where no other resolution plan is available with him. It is clear that at this stage again no application before the Adjudicating Authority could be entertained as there is no vested right or fundamental right in the resolution applicant to have its resolution plan approved, and as no adjudication has yet taken place."

3. Heard Shri Nischal Dev, learned Counsel for Applicant/ Resolution Professional and Shri Vikram Trivedi, learned Counsel for Petitioner/EARCL. We have carefully perused the pleadings of both the parties and extant provisions of the Code and Rules made thereunder.

4. The learned Counsels, have once again reiterated their respective averments, as briefly stated supra. They have reiterated that they explored all possibilities to get resolution rather than to send the Corporate Debtor for liquidation. However, they failed to get any viable Resolution Plan and the Resolution to seek liquidation of the Corporate Debtor was approved with 99.3%. Therefore, they urged the Adjudicating Authority to order to liquidate the Corporate Debtor under extant provisions of the Code and Rules made thereunder.

5. As stated supra, since the date of admission of case for CIRP on 01st May, 2018, there are 14 CoC meetings are conducted in order to find a suitable Resolution Plan. The Adjudicating Authority has also granted several opportunities to the parties,

as unsuccessful Resolution Applicant as well as Union have intervened in the matter and Government of Karnataka has also expressed interest for revival of the Company in view of lively hood of several workers are going to be effected.

6. The Adjudicating Authority, in addition to granting liberal adjournments, granting extension of time, exclusion of time etc., has also passed an order dated 16.09.2019, pending the order of liquidation, by inter-alia directing RP and EARCL/ Petitioner to file a comprehensive Affidavit/Reply disclosing all material facts of the case which includes the initial loan taken by the Corporate Debtor, subsequent Assignment to EARCL/Petitioner, liquidation and value and Fair value of the Corporate Debtor etc., so as to consider the issue. Accordingly, the following information has been placed on record. Accordingly, they have placed the following information by inter-alia stating that the Banks have assigned their loans granted to the Corporate Debtor to EARCL/Petitioner by way of Assignment Agreements.

Assignor Bank	**Sanction Limit (In Cr)**	**Principal Dues (In Cr)**	**O/s. Dues as on Assignment Agreement (In Cr)**	**Details of Assignment**
Central Bank of India	149.00	132.47	153.88	Registered Assignment Agreement dated 28.03.2014
Syndicate Bank	106.00	96.38	108.76	Registered Assignment Agreement dated 27.06.2014
South Indian Bank	50.00	50.00	86.00	Registered Assignment Agreement dated 30.03.2015
ICICI Bank	290.00	289.60	461.55	Registered Assignment Agreement dated 29.06.2016

TOTAL	**595.00**	**568.45**	**810.19**	

However, the Company Petition was filed by EARCL/Petitioner on the default committed by the Corporate Debtor with respect to the facility granted by South Indian Bank.

7. The Adjudicating Authority, vide its order dated 20th June, 2019 passed in I.A. No. 294 of 2019, has granted exclusion of 194 days from computation of statutory period of CIRP in question, as a special case, as the statutory period of 270 days lapsed as early as on 22.01.2019, on various grounds viz., livelihood of several hundred workers depend on the Company, Govt. of Karnataka also shown its interest for revival of the Company, unsuccessful Resolution Applicant has also Application seeking to accept their Resolution Plan etc. Therefore, basing on various offers/contention made by Resolution Applicant in question, the issue was again re-considered by the COC by calling a meeting of financial creditors on 25th September, 2019 to discuss the revised financial offer submitted by the Resolution Applicant. However, it is found that revised offer is not Rs. 370 Cr., as contended by Resolution Applicant and it is only Rs. 100 Cr. And there is no change for Financial Creditors, no comfort has been given to them with respect to upfront payment which will be paid by the and no performance bank guarantee has been furnished securing the payment promised by the Resolution Applicant. The Financial Creditors insist they should get latest Rs. 170 Cr., apart from compliance of provisions of Code and the Rules made thereon. However, the Resolution Applicant has not proved its bonafide even at the stage of offering their terms and

conditions of plan and trying to get confidential information in respect of Fair and Liquidation values of Corporate Debtor and thus trying to bargain for Resolution Plan. We have perused the Fair and Liquidation values of the Corporate Debtor produced by Resolution Professional and found that the contentions raised by the Resolution Applicant and Union not to be correct.

8. It is settled position of law, by various judgements, as relied upon by the Resolution Professional, as stated supra, Court/ Tribunal is not empowered intrude into the commercial wisdom of Committee of Creditors either in approving/rejecting Resolution Plan in question, except in cases, where CoC acted arbitrary in taking those decisions; violating principles natural justice, violation provisions of Code and the Rules made thereunder etc. As stated supra, the Adjudicating Authority has granted sufficient time to both the parties to explore possibility of getting Resolution Plan and also examined rival contentions raised in the issue and found that there is no arbitrariness in the decision taken by the CoC in rejecting the Resolution Plan in question. Therefore, only possibility now is that the parties may explore possibilities of revival of business of Corporate Debtor during liquidation process.

9. The Adjudicating Authority, after carefully analyzing the in debtness of the Corporate Debtor (CD), admitted the case on 1st May, 2018 by initiating CIRP, appointing IRP, imposing moratorium etc., so as to see whether any revival of operations of Corporate Debtor is possible during CIRP period. It is also to be noted here that Corporate Debtor has availed several Financial Facilities from several Banks viz., Central Bank of India (Rs.149 Cr.), Syndicate Bank (Rs.106 Cr.), South Indian

Bank (Rs.50 Cr.), ICICI Bank (Rs.290 Cr.) amounting to Rs. 595 Cr. All these Banks have assigned their respective Loan Accounts with CD in favor of EARCL by executing separate Assignment Agreements dated 28.03.2014, 27.06.2014, 30.03.2015 and 29.06.2016 respectively. However, the Petition (C.P.(IB)No.14/BB/2017) was filed by EARCL with respect to default for an amount of Rs.107.95 Cr. committed by Corporate Debtor in respect of South Indian Bank. One of objects of code is that only one Application/Petition seeking to initiate CIRP in respect Corporate Debtor would lie, and after initiation of CIRP, all Financial Creditors and Operational Creditors of such Corporate Debtor would be covered by such CIRP. In the instant case, there are several claims from Banks, Commercial Dept., Operational Creditors, Workers etc., running into more than Rs 2000 Cr.

10. After verification of claims, 6 Financial Creditors EARCL (Rs.1,253 Cr./82.65%), SBI-GF (Rs.97.27 Cr./6.43%), PNB (Rs.67.66 Cr./4.47%), SBI (Rs.59.41 Cr./3.93%) OBC (Rs.25.02 Cr./1.65%) and Amondz Finanz Limited (Rs. 9.91.Cr/0.66%) alone entitled for total amount of Rs.1512.63 Cr. Apart from above Financial Creditors, Commercial Tax dues are to the tune of Rs.379 Cr., apart several crores of rupees due to operational Creditors, workers etc. And the operation of Company was stated to have been suspended as early as April, 2015 due to various reasons. Therefore, various contentions raised by Applicant that its Resolution Plan is most viable, alternative to revive operations of the Company etc., are not all tenable and baseless and thus they are liable to be rejected. The COC has dispassionately considered the issue vis a vis the object of code, interest of all

stake holders, and thus found that the Resolution Plan in question is not at all tenable and the same was view was almost unanimously approved by it. Therefore, there is no arbitrariness and any violations of provisions of Code and the Rules made thereunder, in rejecting the case of Applicant.

11. As per provisions of the Section 33 of the Code, the Adjudicating Authority has to pass an order for liquidating the Corporate Debtor in the manner as laid down in the Code, to issue public announcement that Corporate Debtor is in liquidation process etc., provided the Adjudicating Authority, do not receive any Resolution Plan during the time granted by the Adjudicating Authority (180 days + 90 days as the case may be). In the instant case as stated supra, the statutory period including exclusion of time was over as early as on 03.08.2019 and the Resolution Plan in question was rejected by CoC with 99.3%. And further Shri Shivadutt Bannanje, Insolvency Professional, bearing registration No. IBBI/IPA-002/IP-N00266/2017-18/10779 to act as Liquidator in respect of the Corporate Debtor, who is also filed his written consent Under Section 34 of the IBC, 2016 dated 08.08.2019, by inter-alia declaring that he has registered with the Board as an insolvency professional; he is eligible to be appointed as an Independent Director on the Board of the Corporate Debtor, Under Section 149 of the Companies Act, 2013 (18 of 2013); he is not related party of the Corporate Debtor; he has not been an employee or proprietor or a partner; of a firm auditors or Secretarial Auditors or Cost Auditors of the Corporate Debtor or; of a legal or consulting firm, that has or had any transactions with the Corporate Debtor contributing 10% or more of the gross turnover of such firm, in the last three

financial years; he is undertake to disclose the existence of any pecuniary or personal relationship with the concerned Corporate Debtor or any of its stakeholders as soon as he become aware of it, to the Board and the Adjudicating Authority; he is not a member of any Insolvency Professional Entity.

12. The aforesaid reasons and circumstances clearly established that the Resolution Professional and the COC have made all efforts to revive the operations of CD but in vain. As stated supra, the Adjudicating Authority has also exercised its discretion in granting sufficient time in order to exhaust all possibility of getting solution to the issue in question. Therefore, there is no other alternative for the Adjudicating Authority except to initiate Liquidation proceedings, as per extant provisions of Code, in respect of Corporate Debtor, and the delay occurred till this date is deemed to be condoned in the interest of justice.

13. In the result, I.A. No.47 of 2019 in C.P.(IB) No.14/BB/2017 is hereby disposed of with the following directions:

(1) We hereby ordered that M/s. Falcon Tyres Limited (Corporate Debtor herein), to be liquidated in the manner as laid down in Chapter III (Liquidation Process) of Part II of the Code;

(2) We hereby appointed Shri Shivadutt Bannanje, Insolvency Professional, bearing registration No.IBBI/IPA-002/IP-N00266/2017-18/10779 as Liquidator for the Corporate Debtor;

(3) We hereby directed the Liquidator to issue immediate public announcement by stating that the Corporate Debtor is in liquidation;

(4) The Registry is directed to communicate this order to the Registrar of Companies, Karnataka for information and necessary action.

(5) The liquidator is directed to strictly adhere to the extant provisions of the Code and the Rules made there under framed by IBBI from time to time and also directed to take expeditious steps to complete the liquidation process in the light of various orders.

(6) Since the instant Application is kept pending due to various the reasons as stated supra, delay for passing for orders, including all actions taken by the Resolution Professional till date deemed to be condoned and actions protected.

(7) Consequently, IAs, if any pending, also stands disposed of. No order as to costs.

(ASHUTOSH CHANDRA)
MEMBER, TECHNICAL

(RAJESWARA RAO VITTANALA)
MEMBER, JUDICIAL

Shruthi