

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 470 of 2019

[Arising out of Order dated 21 January 2019 in MA No. 114 of 2019 in Company Petition No.1417 of 2018 and Order dated 22 February 2019 in MA No. 1599 of 2018 in Company Petition No.1417 of 2018 passed by the Adjudicating Authority/National Company Law Tribunal, Mumbai Bench, Mumbai]

IN THE MATTER OF:

1. **Innovative Construventures Private Ltd**
R/o at Shop No. 106, Spring Avenue
1st Floor, S.No.61, Hissa No.61/P
Club Road, Barave, Khadakpada
Kalyan (W) – 421301 **Appellant No.1**
2. **Innovative Agro Estates Private Ltd**
R/o 2nd Floor, 38/Karuna
Kanthala Road, Behind Cherin Jolly
Manorama Junction, Ernakulam
Cochin, Kerala – 682016 **Appellant No.2**

Versus

1. **Brainer Trade and Fin-Tech Private Ltd**
Address at Kanjmag & Co, It is submitted that
2 Aishwarya Sankul, G.A.
Kulkarni Path, Maharashtra,
Pune – 411038 **Respondent No.1**
2. **Pune People's Co-Opposite Party Bank Ltd**
Through its General Manager
Having its Head Office at 606 Sadashiv Peth
Kunte Chowk, Laxmi Road Pune – 411030 **Respondent No.2**
3. **Jamaseva Sahkari Bank Ltd**
Through its General Manager
Having its Head Office at 156, Gandhi Chowk
Hadapsar, Pune – 411028 **Respondent No.3**

Present:

For Appellant : Mr Dhaval S. Deshpande, Advocate.

For Respondent : Mr Avinash Rajan Khanolkar, Advocate for R-2 & R-3

With

Company Appeal (AT) (Insolvency) No. 486 of 2019

IN THE MATTER OF:

1. **Innovative Construventures Private Ltd**
R/o at Shop No. 106, Spring Avenue
1st Floor, S.No.61, Hissa No.61/P
Club Road, Barave, Khadakpada
Kalyan (W) – 421301 **Appellant No.1**
2. **Innovative Agro Estates Private Ltd**
R/o 2nd Floor, 38/Karuna
Kanthala Road, Behid Cherin Jolly
Manorama Junction, Ernakulam
Cochin, Kerala – 682016 **Appellant No.2**

Versus

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Through its General Manager
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Kunte Chowk, Laxmi Road Pune – 411030 **Respondent No.2**
3. **Jamaseva Sahkari Bank Ltd**
Through its General Manager
Having its Head Office at 156,
Gandhi Chowk, Hadapsar, Pune – 411028 **Respondent No.3**

Present:

For Appellant : Mr Dhaval S. Deshpande, Advocate.

For Respondent : Mr Avinash Rajan Khanolkar, Advocate for R-2 & R-3

CORAM:

Hon'ble Mr Justice M. Venugopal, Member (J)

Hon'ble Mr V. P. Singh, Member (T)

Hon'ble Dr Ashok Kumar Mishra, Member (T)

J U D G M E N T
(Virtual Mode)

[Per; V. P. Singh, Member (T)]

1. Company Appeal No. 470 of 2019 emanates from the Order dated 21 January 2019, passed in MA No. 114 of 2019, filed in CP No.1417 of 2018 by the Adjudicating Authority/National Company Law Tribunal, Mumbai Bench, Mumbai, whereby the Adjudicating Authority has rejected the Application filed U/S 60(5) of the Insolvency and Bankruptcy Code, 2016 (in short '**I&B Code**') seeking direction against the Resolution Professional to receive the Resolution Plan they proposed to submit and to place the same before the Committee of Creditors for their consideration under Section 30 of the Code.

2. The original status of the parties in the company petition represents them in these Appeals for the sake of convenience.

3. The learned Adjudicating Authority had rejected the Application by making an observation that;

"both sides present. It is reported by the RP that the resolution plan/EOI received from the applicant is rejected by COC today, i.e. on 21 January 2019 at 2:30 PM. In view of this, this Application is dismissed as infructuous."

4. On the same day, the learned Adjudicating Authority heard the argument on Miscellaneous Application No 1599 of 2019 filed under Section 33 (2) of the Insolvency and Bankruptcy Code, 2016 for the liquidation of the Corporate Debtor and reserved it for Order. This Application has been allowed by separate Order passed on 22 February 2019, and an Order was passed to

Liquidate the Corporate Debtor, which is under challenge in CA No. 486 of 2019.

The decision of both the Appeals is based on the same set of facts and documents hence taken together for convenience.

5. Appellants Submissions

5.1 The Respondent No. 1 Brainer Trade and Fin-Tech Private Ltd had filed Company Petition being Company Petition No. 1417 of 2018 under Section 10 of the Insolvency and Bankruptcy Code 2016 ("the Code") read with Rule 7 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016, for initiation of Corporate Insolvency Resolution Process.

5.2 The Corporate Insolvency Resolution Process (CIRP) was initiated against the Corporate Debtor by an order dated 25 July 2018 passed by the Ld. Adjudicating Authority on a Section 10 Petition filed by the Corporate Applicant, Brainer Trade and Fin-Tech Private Limited, wherein Mrs Anagha Anasingaraju, was appointed as Interim Insolvency Resolution Professional and later on confirmed by that the Committee of Creditors (CoC) as Resolution Professional (RP).

5.3 The Resolution Professional caused an invitation in Form 'G' to be published on 28 September 2018, calling for expressions of interest from interested parties to submit a Resolution Plan. After that, the Resolution Professional extended the time and published a revised advertisement in 'Form G' on 23 October 2018.

5.4 As per this last advertisement, the last date for submission of Expression of Interest was 31 October 2018. However, the Appellants were unable to submit a complete Expression of Interest by that date. The Resolution Professional also required the Appellants to file their latest Income Tax Returns and other financial documents. However, due to various reasons beyond the control of the Appellants, they were not able to gather these documents at that time. It may be noticed that the relevant statutory authorities had extended the timelines for filing of Income Tax-related documents till 31 December 2018.

5.5 Ultimately, the Appellants were able to submit a complete Expression of Interest to Respondent No. 1 on 05 January 2019.

5.6 However, meanwhile, the Committee of Creditors of the Corporate Debtor consisting of Respondent No. 2 and 3, decided to apply for its liquidation. The Appellants submit that this step was taken in haste and was premature as there was still the possibility of the Resolution. The Corporate Insolvency Resolution Process of the Corporate Debtor commenced on 25 July 2018. Thus, the initial 180 days' period under Section 12 of the I&B Code expired on 21 January 2019. However, despite that period not being close to over, the Corporate Debtor Committee of Creditors chose to liquidate it.

5.7 The Appellants submit that the Application filed u/s 33(2) of the Code was filed before the expiry of the Corporate Insolvency Resolution Process period. The Appellants also submit that the Resolution Professional and the

Committee of Creditors were acting in haste by choosing to opt for the liquidation of the Corporate Debtor rather than give it a chance for Resolution.

5.8 The Resolution Professional filed an Application being Miscellaneous Application No. 1599 of 2018 before the Adjudicating Authority seeking liquidation of the Corporate Debtor, which was listed on 07 January 2019.

5.9 The Appellants submit that they appeared before the Ld. Adjudicating Authority on 07 January 2019, when the Application filed by the Resolution Professional seeking liquidation of the Corporate Debtor was taken out, the Resolution Professional vehemently opposed the request of the Appellants for a chance to submit a Resolution Plan and stated that the Appellants are, in fact, debtors of the Corporate Debtor, which fact was completely incorrect. The matter then was adjourned to 14 January 2019. The Appellants submit that they are not debtors of the Corporate Debtor. However, two proprietorship concerns named "Innovative Traders" and "Innovative Enterprises" are, in fact, debtors of the Corporate Debtor. The proprietors thereof were earlier members of the Appellants; however, they are no longer so. Therefore, it is an admitted position that the Appellants are not debtors of the Corporate Debtor.

5.10 The Appellants thereafter filed an application being Miscellaneous Application No. 114 of 2019, seeking a direction against the Resolution Professional of the Corporate Debtor to receive the Resolution Plan they proposed to submit and place the same before the Committee of Creditors for their consideration under Section 30 of the Code.

5.11 The Appellants filed the said Application to show their bona fides concerning the resolution plan proposed to be submitted by them. They offered to submit a Resolution Plan to infuse ₹ 13 Crores into the Corporate Debtor for the specific purpose of clearing the dues of the Financial Creditors. Apart from that, the Appellants was also to infuse further funds into the Corporate Debtor to revive its business operations. Further, to show their bona fide, the Appellants were willing to provide a Post-Dated Cheque to the Resolution Professional towards the amounts they propose to infuse as part of the Resolution Plan.

5.12 After that, on 16 January 2019, the Advocate for the Resolution Professional handed over the Minutes of the Meeting of the Committee of Creditors, dated 15 January 2019 and sought explanations about the contents stated in paragraph 5 of the minutes. The matter was thereafter adjourned to 21 January 2019 for further hearing.

5.13 The Appellants vide their E-mail dated 18 January 2019 addressed to the Resolution Professional answering all the issues raised in Para 5 (a) to 5 (h) of the minutes above. According to the Resolution Professional, the said E-mail was forwarded to Respondent No 2 and 3 on 19 January 2019.

5.14 Then the matter was adjourned to 21 January 2019; the Appellants filed an Affidavit confirming the compliance of the Order dated 16 January 2019.

5.15 The Appellants contends that on the date of the hearing on 21 January 2019, Resolution Professional sought to pass over of the matter and, when

the matter was again called out, it was informed to the Ld. Adjudicating Authority that the COC, i.e. the Respondent No 2 and 3 had rejected the EOI of the Appellants and produced two e-mails received by the RP from Respondent No 2 and 3. The E-mail received from Respondent No 2 was dated 21 January 2019 and was sent at 01.35 PM. The E-mail received from Respondent No 3 was dated 21 January 2019 and was sent at time 12.48 PM. The Appellants submits that the said E-mails were sent by Respondent No 2 and 3 hurriedly after the matter was passed over.

5.16 Thereafter the Order about the liquidation of the Corporate Debtor was passed by the Ld. Adjudicating Authority on 22 February 2019.

5.17 It is further emphasised that the object of the Insolvency and Bankruptcy Code, 2016, is for the maximisation of the asset value of a Corporate Debtor. This Hon'ble Tribunal has also held that the object of the Corporate Insolvency Resolution Process is to seek a resolution of the Corporate Debtor and not for recovery of money. It is argued that allowing to terminate the Corporate Insolvency Resolution Process of the Corporate Debtor and passing the Order of liquidation without giving the Appellants an opportunity to present their resolution plan has caused grave and irreparable loss and harm to all the stakeholders involved.

5.18 The Appellants submit that given the settled principle of law, every opportunity should be granted to potential resolution Applicants to submit a Resolution Plan to avoid liquidation of a Corporate Debtor. By not allowing the Appellants to submit a Resolution Plan for consideration by the

Committee of Creditors, the Resolution Professional is putting the entire Corporate Insolvency Resolution Process of the Corporate Debtor in jeopardy.

5.19 In the above circumstances, the Appellants had filed an Application seeking direction to the Resolution Professional to accept their Resolution Plan and place the same before the Committee of Creditors for their consideration. It is further emphasised that the Hon'ble Supreme Court of India has already held that a Resolution Professional must place every Resolution Plan received by them before the Committee of Creditors. They are ultimately tasked with approving or rejecting the same. If the corporate debtor is allowed to be liquidated in such a peremptory manner, the Committee of Creditors would be deemed to have failed in their duty. Being aggrieved and dissatisfied by the impugned Order, the Appellants have preferred this Appeal.

6. Liquidator's common Submissions in CA 470/2019 and CA 486 of 2019.

6.1 The Corporate Debtor had itself filed an Application under provisions of Section 10 of the Insolvency and Bankruptcy Code, 2016 for initiation of the Corporate Insolvency Resolution Process (from now on referred as CIRP) before the Hon'ble NCLT.

6.2 The said Application was admitted, and the CIRP commenced vide an Order dated 25 July 2018.

6.3 Mr Anagha Anasingaraju was appointed as Interim Resolution Professional (hereinafter referred as IRP/RP) to initiate the CIRP. Pursuant to

the same, the IRP published an Advertisement for the invitation of claims by the stakeholders of the Corporate Debtor. After collating the claims, the IRP formed a Committee of Creditors comprising the Financial Creditors of the Corporate Debtor viz. Pune Peoples Co-Operative Bank Limited (Respondent No. 2 hence hereinafter as R2) and Janaseva Sahakari Bank Limited (Respondent No. 3 hence hereinafter as R3). In the 1st Meeting of the COC, the IRP was appointed as the RP.

6.4 During the 2nd Meeting of the COC held on 26 September 2018, the criteria for the invitation of Expression of Interest (hereinafter referred to as EOI) and eligibility for the prospective Resolution Applicant were finalised by the CoC. Accordingly, the RP had published 'Form G' on 28 September 2018. Therefore, the last date for submission of EOI was fixed as 15 October 2018.

6.5 In response to the same, the RP had received an initial response requesting further details about the Corporate Debtor for submission of their EOI from the following:

- a) Vyas Advisor through Mr Yogesh Gupta
- b) Innovative Enterprises and Innovative Construventure Pvt. Ltd. (Appellant) through Mr Balasaheb Shinde
- c) Innovative Enterprises and Innovative Construventure Pvt. Ltd. (Appellant) through Mr Nandkumar Patil
- d) M/s Jainco projects through Mr Sumit
- e) M/s. Ashprit Trading through Mr Ghanshyam Chourasia.
- f) Vishwa Developers through Mr Chetan Kadam

- g) The RP accordingly had provided the required details to these persons. However, till the last date of submission, i.e. 15 October 2018, no EOI was received by the RP.

6.6 During the 3rd Meeting of the CoC, it was decided to extend the date for submission of the EoI by 15 days, i.e. up to 31 October 2018. Accordingly, the RP issued a public notice to that effect on 23 October 2018. In addition, the RP also sent an E-mail to the above persons regarding an extension of the timeline for submission of EOI.

6.7 Thereafter, the RP had received one more query from Ms Neha Paul, Asst. Manager for Leverage Capital Group, requesting some documents related to the Corporate Debtor. The RP had shared the required documents with Ms Neha. However, after that, there was no communication either from the end of Ms Neha.

6.8 Since some queries were received for submission of EOI for the revival of the Corporate Debtor, in its 4th Meeting held on 01 November 2018. The CoC decided to further extend the date of submission of EOI only for those persons/entities who have already enquired till 15 November 2018. It was agreed in the said Meeting that no further extension for submission of EOI would be granted in case no EoI is received till the last date.

6.9 The CoC members had advised the RP not to issue any further fresh public notice to this effect. This extension is only for the interested persons from whom certain documents were remained to be received. Hence, on instructions of the CoC Members, the RP sent an e-mail requesting these

potential/interested persons/entities to submit the balance documents on or before 15 November 2018.

6.10 The RP after that received certain documents from (a) Jainco Projects India Limited, (b) M/s Innovative Trading in consortium with Innovative Construventure Private Limited and (c) M/s. Innovative Enterprises in consortium with Innovative Construventure Private Limited. Besides these three interested applicants, no other person has submitted any document to the RP till 15 November 2018. However, these documents were still incomplete, and hence the RP sent e-mails to these three persons requesting them to submit the required documents before the stipulated date of 15 November 2018.

6.11 The RP received certain further documents from the following persons in response to the e-mail reminder. The RP had accordingly carried out due diligence on the documents submitted by the following persons:

- i. **Consortium I:** Innovative Enterprises & Innovative Construventure Pvt. Ltd.
- ii. **Consortium II:** Innovative Trading & Innovative Construventure Pvt Ltd.
- iii. Jainco Projects India Limited.

6.12 For Consortium I and Consortium II:

- i) Each evaluation matrix criteria was evaluated in detail in respect of EOI submitted by these two persons. It was observed that these persons did not submit certain documents requested by the RP. Also,

in the declaration / Affidavit submitted by these two persons regarding compliance with Section 29A, it was stated that the Corporate Applicant is an MSME; hence, certain clauses of Section 29A are not applicable.

ii) Therefore, the RP sent an e-mail to both these persons to submit the supporting documents stating that "the Corporate Applicant is registered under provisions of MSME" and further the pending documents.

iii) However, no reply was received till the date of the COC Meeting. The RP also sent an e-mail to the erstwhile Directors of the Corporate Applicant requesting them to confirm the status of the Corporate Applicant as MSME.

iv) Mr Malay Biswas, erstwhile Director of the Corporate Applicant, confirmed by telephone that the Corporate Applicant is not registered under MSME.

v) Further, the RP also questioned these two persons about their amount to the corporate applicant. The Innovative group, i.e. M/s. Innovative Enterprises (₹ 13.5 crores) and M/s. Innovative Trading Co. (₹ 7.2 crores) together owe an amount of about ₹ 21 crores to the Corporate Applicant, as per the books of the Corporate Applicant.

vi) Previously, the RP had sent letters to the Innovative group to pay the debt due to the Corporate Applicant.

vii) The RP then sent an e-mail to these persons who are also debtors of the Corporate Debtor, seeking a response as to why the said debtors prefer to file a Resolution Plan instead of repaying the amount due to the Corporate Debtor. However, no reply was received from them to the date of the last Meeting of the COC.

viii) All these facts were discussed in the last COC Meeting. After a detailed discussion, the COC members noted that neither these persons had submitted the required pending documents as demanded by the RP despite reminders, nor have they responded to various e-mails. Therefore, they do not meet the eligibility criteria for submission of a Resolution Plan. Accordingly, these two persons were declared ineligible to participate in this process.

6.13 For Jainco Projects India Limited:

I. The RP informed the CoC that said person had not clarified the position of the committed funds and reasons for the turnover decline, as the said person's turnover has drastically come down since last year.

II. Therefore, the CoC then decided to give an opportunity of being heard to Jainco on documents received before deciding on the eligibility in the process.

III. CoC members accordingly directed the RP to send an e-mail requesting a representative to remain present for the next COC meeting and bring along the latest audited or unaudited Financials up to 31 October 2018 to check the availability criteria of committed funds.

IV. Accordingly, the CoC extended the date for submission of pending documents only for Jainco Projects India Limited till 06 December 2018 so that they can appear in person before the CoC.

V. The RP had also requested Jainco, vide an e-mail, to bring supporting documents to verify the availability of committed Funds and reasons for the decline in turnover in last year and the latest audited or unaudited financials up to 31 October 2018.

VI. In response to this e-mail, the RP received an e-mail from Jainco requesting an Information Memorandum and details about the company under CIRP.

VII. The RP then informed Jainco that the RP had not yet shortlisted the Jainco as a Potential Resolution Applicant. Since Jainco does not meet specific eligibility criteria, the CoC would like to offer an opportunity to Jainco before deciding on shortlisting or otherwise.

VIII. The RP further informed Jainco that the (Information Memorandum in short 'IM', etc., will be shared once the Jainco is shortlisted as PRA and requested the representative to remain present accordingly in the next CoC meeting.

IX. In response, the RP received an e-mail from Jainco seeking information about the required information/documents. The RP had informed Jainco that support was required to show the availability of

committed funds as also reasons for the drastic fall in turnover of Jainco.

X. In reply to the above e-mail, the RP had received following e-mail from Jainco:

"Please find hereunder our revert on your observations:

1.(i) Fund raising capacity. Minimum Committed funds ("Committed Funds") available for investment/ deployment in Indian companies or Indian assets of INR 5 crores (Rupees Five crores) during preceding financial year-Your kind attention is drawn towards our ABS 2018 Note 13 wherein advances receivable by the company in cash and kind is mentioned as Rs. 3.44 cr. Further we are also enclosing NSDL demat report covering valuation of our liquid investment at Rs. 2.23 cr. Hence clubbing both only we can say that we already have liquid short term fund available for disposal with us for minimum Rs. 5.67 cr.

2. Reduction in turnover - We have taken shut down in some of the manufacturing unit which we were operating during last year resulting in reduction in turnover due to bad market conditions.

3. We are also enclosing our NBFC certificate for your kind perusal."

XI. The RP informed the CoC that based on the above reply from Jainco, the NSDL certificate was from 01 January 2018 to 31 January 2018 and not for the current period. Thus, it is impossible to verify the available funds on the date of submission of EoI or even for the

preceding year. Also, there is no confirmation about the realisation of the loans and advances as claimed by Jainco. Further, the RP also observed that the NBFC certificate was the certificate of registration given by RBI to carry on the business of Non-banking financial institutions in 1998, while Jainco was also in the business of manufacturing. Further, the latest audited or unaudited financials up to 31 October 2018 were not submitted by Jainco for checking the eligibility criteria. Jainco had also informed the RP that financials were not yet prepared and are not being prepared monthly. Further, the representatives of Jainco refused to remain present at the CoC meeting,

XII. The RP also brought to the notice of the CoC that Jainco, a listed Company, could have submitted the financials up to 30 September 2018, which Jainco did not do. Further, as per disclosures made by Jainco on the BSE website, the turnover of Jainco till 30 September, 2018 was ₹ 7,30,000/-.

XIII. In light of the above facts, the RP informed the CoC that Jainco had not submitted the complete Expression of Interest as required by the Invitation documents.

XIV. Since the RP and the CoC members could not verify all the criteria for Jainco as discussed above, it was decided that Jainco does not meet the eligibility criteria and has not submitted pending documents despite various reminders. Accordingly, Jainco was declared ineligible to be PRA for this process.

XV. Since no eligible Potential Resolution Applicant had submitted the EOI, the CoC Members decided that the RP should not issue the provisional list and do other compliances about this process.

XVI. In the 6th CoC Meeting held on 06 December 2018, the CoC Members then discussed the further course of action since there was no eligible potential Resolution Applicant. The CoC members observed that a sufficient number of extensions were granted for the submission of documents. However, despite the same, the interested persons have failed to provide a complete set of documents. Further, even Jainco did not avail of the opportunity granted by the CoC to remain present in person.

7 The issues that arise for our consideration in these appeals are as under;

- a) Can the committee of creditors reject the opportunity to submit the Resolution plan merely based on the contents of EoI, which was only a gist of the resolution plan?
- b) Whether the Committee of Creditors can reject the EoI summarily without the formal Meeting of CoC?
- c) Whether the Application filed by applicant/appellant of being numbered as MA 114 of 2019 in CA for 470 of 2019 filed U/S 60(5) of the Insolvency and Bankruptcy Code, 2016 seeking direction against the Resolution Professional to receive the Resolution Plan and place the

same before the Committee of Creditors for their consideration was maintainable?

d) Whether the Committee of Creditors was authorised to close the Corporate Insolvency Resolution Process even before the expiry of the statutory period for completion of CIRP, i.e. 180 days and resolve to liquidate the Corporate Debtor without further effort for Resolution of the Corporate Debtor?

8. Discussion and Findings

8.1 The Appellant has challenged the Order of the Adjudicating Authority mainly on the ground that he failed to appreciate that the expression of interest has to be analysed based on criteria as laid down under Section 25 (2) (h) read with Regulation 36 A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and in the absence of any criteria the Resolution Professional should issue a provisional list of resolution applicant for submission of detail Resolution Plan.

8.2 The Appellant's were able to submit a complete Expression of Interest to Respondent No. 1 on 5 January 2019. But the Committee of Creditors of the Corporate Debtor consisting of Respondent No. 2 and 3 decided to apply for its liquidation. The CIRP commenced on 25 July 2018. Thus the initial 180 days set out under Section 12 of the IBC expired on 24 January 2019. The Appellants submit that this step was taken in haste and was premature

as there was still a possibility for the Resolution of the Corporate Insolvency of the Corporate Debtor. Accordingly, the CIRP expired on 21 January 2019.

8.3 The Appellants contend that on the date of the hearing on 21 January 2019, Resolution Professional sought Passover of the matter. When the matter was again called out, the Resolution Professional informed that COC, i.e., Respondent No. 2 and 3, had rejected the EOI. The Appellant had produced two e-mails received by the Resolution Professional from Respondent No. 2 and 3. The e-mail received from Respondent No. 2 was of dated 24 January 2019 and was sent at 1:35 PM. The e-mail received from Respondent No. 3 was dated 24 January 2019 and was sent at 12:48 PM. The Appellant submits that the said e-mails were sent by Respondent No. 2 and 3 hurriedly after the matter was passed over.

8.4 Before proceeding further, it is necessary to go through the statutory provisions about the powers of the Committee of Creditors, which also provides the stage at which the resolution plan may be accepted.

25. Duties of Resolution professional.—(1) *It shall be the duty of the Resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.*

(2) *For the purposes of sub-section (1), the Resolution professional shall undertake the following actions, namely—*

(a) *take immediate custody and control of all the assets of the corporate debtor, including the business records of the corporate debtor;*

- (b) *represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings;*
- (c) *raise interim finances subject to the approval of the committee of creditors under Section 28;*
- (d) *appoint accountants, legal or other professionals in the manner as specified by Board;*
- (e) *maintain an updated list of claims;*
- (f) *convene and attend all meetings of the committee of creditors;*
- (g) *prepare the information memorandum in accordance with Section 29;*
- [(h) ***invite prospective resolution applicants, who fulfil such criteria as may be laid down by him with the approval of committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Board, to submit a resolution plan or plans;***]
- (i) *present all resolution plans at the meetings of the committee of creditors;*
- (j) *file application for avoidance of transactions in accordance with Chapter III, if any; and*
- (k) *such other actions as may be specified by the Board.*

33. Initiation of liquidation.—

- (1) *Where the Adjudicating Authority,—*

(a) before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate insolvency resolution process under Section 12 or the fast track corporate insolvency resolution process under Section 56, as the case may be, does not receive a resolution plan under sub-section (6) of Section 30; or

(b) rejects the resolution plan under Section 31 for the non-compliance of the requirements specified therein, it shall—

(i) pass an order requiring the corporate debtor to be liquidated in the manner as laid down in this Chapter;

(ii) issue a public announcement stating that the corporate debtor is in liquidation; and

(iii) require such Order to be sent to the Authority with which the corporate debtor is registered.

(2) Where the Resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors [approved by not less than sixty-six per cent of the voting share] to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

[Explanation.—For the purposes of this sub-section, it is hereby declared that the committee of creditors may take the decision to liquidate the corporate debtor, any time after its constitution under sub-section (1) of Section 21 and before the confirmation of the resolution plan, including at any time before the preparation of the information memorandum.]

36. Information memorandum.—[(1) Subject to sub-regulation (4), the Resolution professional shall submit the information memorandum in electronic form to each member of the committee within two weeks of his appointment, but not later than fifty-fourth day from the insolvency commencement date, whichever is earlier.]

(2) The information memorandum shall contain the following details of the corporate debtor—

[(a) assets and liabilities with such description, as on the insolvency commencement date, as are generally necessary for ascertaining their values.

Explanation—"Description" includes the details such as date of acquisition, cost of acquisition, remaining useful life, identification number, depreciation charged, book value, and any other relevant details.]

(b) the latest annual financial statements;

(c) audited financial statements of the corporate debtor for the last two financial years and provisional financial statements for the current financial year made up to a date not earlier than fourteen days from the date of the Application;

(d) a list of creditors containing the names of creditors, the amounts claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims;

(e) particulars of a debt due from or to the corporate debtor with respect to related parties;

(f) details of guarantees that have been given in relation to the debts of the corporate debtor by other persons, specifying which of the guarantors is a related party;

(g) the names and addresses of the members or partners holding at least one per cent stake in the corporate debtor along with the size of stake;

(h) details of all material litigation and an ongoing investigation or proceeding initiated by Government and statutory authorities;

(i) the number of workers and employees and liabilities of the corporate debtor towards them;

(j) [* * *]

(k) [* * *]

(l) other information, which the Resolution professional deems relevant to the committee.

(3) A member of the committee may request the Resolution professional for further information of the nature described in this Regulation and the Resolution professional shall provide such information to all members within reasonable time if such information has a bearing on the resolution plan.

[(4) The Resolution professional shall share the information memorandum after receiving an undertaking from a member of the committee [* *] to the effect that such member or resolution applicant shall maintain confidentiality of the information and shall not use such information to cause an undue gain or undue loss to itself or any other person and comply with the requirements under sub-section (2) of Section 29.]*

Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016

[36-A. Invitation for expression of interest.—*(1) The Resolution professional shall publish brief particulars of the invitation for expression of interest in Form G of the Schedule at the earliest, not later than seventy-fifth day from the insolvency commencement date, from interested and eligible prospective resolution applicants to submit resolution plans.*

- (2) The Resolution professional shall publish Form G—*
- (i) in one English and one regional language newspaper with wide circulation at the location of the registered office and principal office, if any, of the corporate debtor and any other location where in the opinion of the Resolution professional, the corporate debtor conducts material business operations;*
 - (ii) on the website, if any, of the corporate debtor;*
 - (iii) on the website, if any, designated by the Board for the purpose; and*
 - (iv) in any other manner as may be decided by the committee.*
- (3) The Form G in the Schedule shall—*

(a) state where the detailed invitation for expression of interest can be downloaded or obtained from, as the case may be; and

(b) provide the last date for submission of expression of interest which shall not be less than fifteen days from the date of issue of detailed invitation.

(4) The detailed invitation referred to in sub-regulation (3) shall—

(a) specify the criteria for prospective resolution applicants, as approved by the committee in accordance with clause (h) of sub-section (2) of Section 25;

(b) state the ineligibility norms under Section 29-A to the extent applicable for prospective resolution applicants;

(c) provide such basic information about the corporate debtor as may be required by a prospective resolution applicant for expression of interest; and

(d) not require payment of any fee or any non-refundable deposit for submission of expression of interest.

[(4-A) Any modification in the invitation for expression of interest may be made in the manner as the initial invitation for expression of interest was made:

Provided that such modification shall not be made more than once.]

(5) A prospective resolution applicant, who meet the requirements of the invitation for expression of interest, may submit expression of interest within the time specified in the invitation under clause (b) of sub-regulation (3).

(6) *The expression of interest received after the time specified in the invitation under clause (b) of sub-regulation (3) shall be rejected.*

(7) *An expression of interest shall be unconditional and be accompanied by—*

(a) *an undertaking by the prospective resolution applicant that it meets the criteria specified by the committee under clause (h) of sub-section (2) of Section 25;*

(b) *relevant records in evidence of meeting the criteria under clause (a);*

(c) *an undertaking by the prospective resolution applicant that it does not suffer from any ineligibility under Section 29-A to the extent applicable;*

(d) *relevant information and records to enable an assessment of ineligibility under clause (c);*

(e) *an undertaking by the prospective resolution applicant that it shall intimate the Resolution professional forthwith if it becomes ineligible at any time during the corporate insolvency resolution process;*

(f) *an undertaking by the prospective resolution applicant that every information and records provided in expression of interest is true and correct and discovery of any false information or record at any time will render the applicant ineligible to submit resolution plan, forfeit any refundable deposit, and attract penal action under the Code; and*

(g) *an undertaking by the prospective resolution applicant to the effect that it shall maintain*

confidentiality of the information and shall not use such information to cause an undue gain or undue loss to itself or any other person and comply with the requirements under sub-section (2) of Section 29.

(8) The Resolution professional shall conduct due diligence based on the material on record in order to satisfy that the prospective resolution applicant complies with—

(a) the provisions of clause (h) of sub-section (2) of Section 25;

(b) the applicable provisions of Section 29-A, and

(c) other requirements, as specified in the invitation for expression of interest.

(9) The Resolution professional may seek any clarification or additional information or document from the prospective resolution applicant for conducting due diligence under sub-regulation (8).

(10) The Resolution professional shall issue a provisional list of eligible prospective resolution applicants within ten days of the last date for submission of expression of interest to the committee and to all prospective resolution applicants who submitted the expression of interest.

(11) Any objection to inclusion or exclusion of a prospective resolution applicant in the provisional list referred to in sub-regulation (10) may be made with supporting documents within five days from the date of issue of the provisional list.

(12) On considering the objections received under sub-regulation (11), the Resolution professional shall issue the final list of prospective resolution applicants within ten days of the last date for receipt of objections, to the committee.]

[36-B. Request for resolution plans..—

(1) *The Resolution professional shall issue the information memorandum, evaluation matrix and a request for resolution plans, within five days of the date of issue of the provisional list under sub-regulation (10) of Regulation 36-A to—*

(a) every prospective resolution applicant in the provisional list; and

(b) every prospective resolution applicant who has contested the decision of the Resolution professional against its non-inclusion in the provisional list.

(2) *The request for resolution plans shall detail each step in the process, and the manner and purposes of interaction between the Resolution professional and the prospective resolution applicant, along with corresponding timelines.*

(3) *The request for resolution plans shall allow prospective resolution applicants a minimum of thirty days to submit the resolution plan(s).*

(4) *The request for resolution plans shall not require any non-refundable deposit for submission of or along with resolution plan.*

[(4-A) The request for resolution plans shall require the resolution applicant, in case its resolution plan is approved under sub-section (4) of Section 30, to provide a performance security within the time specified therein and such performance security shall stand forfeited if the resolution applicant of such plan, after its approval by the adjudicating Authority, fails to implement or contributes to the failure of implementation of that plan in accordance with the terms of the plan and its implementation schedule.

Explanation I.—For the purposes of this sub-regulation, "performance security" shall mean security of such nature, value, duration and source, as may be specified in the request for resolution plans with the approval of the committee, having regard to the nature of resolution plan and business of the corporate debtor.

Explanation II.—A performance security may be specified in absolute terms such as guarantee from a bank for Rs X for Y years or in relation to one or more variables such as the term of the resolution plan, amount payable to creditors under the resolution plan, etc.]

(5) Any modification in the request for resolution plan or the evaluation matrix issued under sub-regulation (1), shall be deemed to be a fresh issue and shall be subject to timeline under sub-regulation (3):

[Provided that such modifications shall not be made more than once.]

(6) The Resolution professional may, with the approval of the committee, extend the timeline for submission of resolution plans.

(7) The Resolution professional may, with the approval of the committee, re-issue request for resolution plans, if the resolution plans received in response to an earlier request are not satisfactory, subject to the condition that the request is made to all prospective resolution applicants in the final list:

Provided that provisions of sub-regulation (3) shall not apply for submission of resolution plans under this sub-regulation.]

8.5 Based on the above statutory provisions, it is clear that the explanation attached to Sub-section (2), of Section 33, of the Insolvency and Bankruptcy

Code, empowers the Committee of Creditors to decide to liquidate the Corporate Debtor, any time after its constitution under sub-section (1) of Section 21 and before the confirmation of Resolution Plan, including at any time before the preparation of the Information Memorandum.

8.6 Therefore, it cannot be said that the Committee of Creditors has taken steps in haste and was premature, as there was still a possibility for the Resolution of the Corporate Debtor.

8.7 The learned Counsel for the Appellant argued that the Corporate Insolvency Resolution Process of the Corporate Debtor commenced on 25 July 2018. Thus, the initial 180 days set out under Section 12 of the IBC expired on 24 January 2019. However, even when the CIRP period was not close to over, the Committee of Creditors chose to liquidate it. Since the COC was authorised to exercise its power under the explanation attached to Sub-section (2) of Section 33 of the I&B Code, its action cannot be questioned.

8.8 It is important to mention that Hon'ble Supreme Court in the case of *ArcelorMittal India (P) Ltd. v. Satish Kumar Gupta*, (2019) 2 SCC 1: 2018 SCC OnLine SC 1733 at page 86 has clearly explained the powers of the Resolution Professional in submitting the Resolution Plan before the Committee of Creditors. In this case, it is held that;

"79. 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.

80. However, it must not be forgotten that a Resolution Professional is only to "examine" and "confirm" that each resolution plan conforms to what is provided by Section 30(2). Under Section 25(2)(i), the Resolution Professional shall undertake to present all resolution plans at the meetings of the Committee of Creditors. This is followed by Section 30(3), which states that the Resolution Professional shall present to the Committee of Creditors, for its approval, such resolution plans which confirm the conditions referred to in sub-section (2). This provision has to be read in conjunction with Section 25(2)(i), and with the second proviso to Section 30(4), which provides that where a resolution applicant is found to be ineligible under Section 29-A(c), the resolution applicant shall be allowed by the Committee of Creditors such period, not exceeding 30 days, to make payment of overdue amounts in accordance with the proviso to Section 29-A(c). **A conspectus of all these provisions would show that the Resolution Professional is required to examine that the resolution plan submitted by various applicants is complete in all respects, before submitting it to the Committee of Creditors. The Resolution Professional is not required to take any decision, but merely to ensure that the resolution plans submitted are complete in all respects before they are placed before the Committee of Creditors, who may or may not approve it. The fact that the Resolution Professional is also to confirm that a resolution plan does not contravene any of the provisions of law for the time being in force,**

including Section 29-A of the Code, only means that his prima facie opinion is to be given to the Committee of Creditors that a law has or has not been contravened. Section 30(2)(e) does not empower the Resolution Professional to "decide" whether the resolution plan does or does not contravene the provisions of law. Regulation 36-A of the CIRP Regulations specifically provides as follows:

"36-A. (8) The Resolution professional shall conduct due diligence based on the material on record in order to satisfy that the prospective resolution applicant complies with—

- (a) the provisions of clause (h) of sub-section (2) of Section 25;
- (b) the applicable provisions of Section 29-A, and
- (c) other requirements, as specified in the invitation for expression of interest.

(9) The Resolution professional may seek any clarification or additional information or document from the prospective resolution applicant for conducting due diligence under sub-regulation (8).

(10) The Resolution professional shall issue a provisional list of eligible prospective resolution applicants within ten days of the last date for submission of expression of interest to the committee and to all prospective resolution applicants who submitted the expression of interest.

(11) Any objection to inclusion or exclusion of a prospective resolution applicant in the provisional list referred to in sub-regulation (10) may be made with

supporting documents within five days from the date of issue of the provisional list.

(12) *On considering the objections received under sub-regulation (11), the Resolution professional shall issue the final list of prospective resolution applicants within ten days of the last date for receipt of objections, to the committee."*

8.9 Based on the above proposition of law as laid down by the Hon'ble Supreme Court, it is clear that the Resolution Applicant has no vested right that his Resolution Plan is considered. No challenge can be preferred to the Adjudicating Authority at this stage. The Resolution Professional is only authorised to examine and confirm that the Resolution Plan conforms to the Code provided under Section 30 (2). It is also clarified that the Resolution Professional is required to examine that the Resolution Plan submitted by the various applicants is complete in all respects before submitting it to the Committee of Creditors. The Resolution Professional is not required to take any decision but merely to ensure that the Resolution Plan submitted is complete in all respects before they are placed before the Committee of Creditors, who may or may not approve it. The Resolution Professional is also to confirm that the Resolution Plan does not contravene any of the provisions of law for the time being in force, including Section 29 A of the Code. It means prima facie opinion is to be given to the Committee of Creditors that the law has not been contravened.

8.10 In the instant case, the Resolution Professional preferred an Application before the Adjudicating Authority under Section 33 (2) of the Code prays for

a liquidation order of the Corporate Debtor. The RP had brought to the notice of the Adjudicating Authority that an amount of about ₹ 21 crores is receivable to the corporate debtor from two partnership/proprietors firms, i.e. M/s Innovative Enterprises and Innovative Trading Company. They were interested persons for submitting the expression of interest (EOI). These are group entities of the Appellants. Thus the RP had prayed before the Adjudicating Authority to direct the debtors to make the payment. The learned Adjudicating Authority has recorded the said fact in its Order dated 07 January 2019. The learned Adjudicating Authority has stated in the Order that the consortium's plan will be considered provided the consortium pays off the dues of the Corporate Debtor.

8.11 On perusal of the Minutes of the COC, it appears that the RP called the COC Meeting on 15 January 2019 wherein the Expression of Interest (EOI) as submitted by the Appellant was placed before the COC members along with the evaluation by the RP. After discussion, it was decided by the COC members that the Appellant's do not fulfil the eligibility criteria. Therefore, the COC has reiterated its decision to put the Corporate Debtor into liquidation. However, the COC has rejected the expression of interest submitted by the Appellant's and has not allowed additional time to submit a Resolution Plan. The COC was fully empowered to take such a decision under its commercial wisdom. Under the explanation attached to Sub-section (2) of Section 33 of the I&B Code, 2016, the COC, at any stage after its formation and before the approval of the Resolution, was empowered to resolve to liquidate the Corporate Debtor.

8.12 Based on the above discussion, we find that both the appeals sans merit hence deserves to be dismissed.

ORDER

Appeal No's CA (AT)(Ins) No.470 & 486 of 2019 are dismissed. No Order as to Costs.

[Justice M. Venugopal]
Member (Judicial)

[Mr. V. P. Singh]
Member (Technical)

[Dr. Ashok Kumar Mishra]
Member (Technical)

NEW DELHI
25th November 2021

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