

**NATIONAL COMPANY LAW TRIBUNAL  
HYDERABAD**

SPECIAL BENCH - COURT 1 (HEARINGS THROUGH VIDEO CONFERENCE)

**PRESENT: HON'BLE SHRIMADAN BHALCHANDRA GOSAVI- MEMBER JUDICIAL  
HON'BLE SHRI VEERA BRAHMA RAO AREKAPUDI - MEMBER TECHNICAL**

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING HELD ON 01.09.2021 AT 02:30 PM

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	IA No. 281/2019 in CP (IB) No. 219/7/HDB/2017
NAME OF THE COMPANY	Viceroy Hotels Limited
NAME OF THE PETITIONER(S)	Asset Reconstruction Company (India) Limited
NAME OF THE RESPONDENT(S)	Viceroy Hotels Limited
UNDER SECTION	7 of IBC

**Counsel for Petitioner(s):**

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature

**Counsel for Respondent(s):**

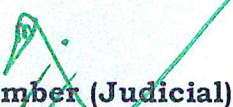
Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature

**ORDER**

Orders passed in IA NO.281/2019, vide separate orders.

However, Shri Raghunandan Rao, name stands removed as he is Hon'ble High Court Judge as on today. It has been wrongly listed in the cause list.

  
Member (Technical)

  
Member (Judicial)

Pavani

**NATIONAL COMPANY LAW TRIBUNAL  
HYDERABAD BENCH -1**

**IA No. 281 of 2019**

**IN**

**CP No. IB/219/7/HDB/2017**

*Application under Section 30(6) and Section 31 of IBC, 2016 R/w  
Regulation 39(4) of the IBBI (IRPCP) Regulations, 2016*

In the matter of **ARCIL vs Viceroy Hotels Limited**

**Between**

Viceroy Hotels Limited  
Plot No. 20, Sector 1,  
Survey No.64, 4<sup>th</sup> Floor, HUDA Techno Enclave,  
Madhapur, Hyderabad – 500 081  
Telangana State

Represented by Karuchola Koteswara Rao Resolution Professional  
...Applicant

**Versus**

ASSET RECONSTRUCTION COMPANY (INDIA) Ltd.,  
(ARCIL)  
The Ruby, 10<sup>th</sup> Floor 29,  
Senapati Bapat Marg, Dadar (W),  
Mumbai – 400 028

...Respondent/  
Financial Creditor

Viceroy Hotels Limited  
Plot No. 20, Sector 1,  
Survey No.64, 4<sup>th</sup> Floor, HUDA Techno Enclave,  
Madhapur, Hyderabad – 500 081  
Telangana State

....Respondent/  
Corporate Debtor

CFM Asset Reconstruction Private Ltd  
REGd Office: A/3, 5<sup>th</sup> Floor, Safal Profitaire  
Near Prahlad Nagar, Garden  
Ahmedaabad-380015

...Respondent/  
Successful Resolution Applicant

**Date of order: 01.09.2021**

Coram:

Shri Madan Bhalchander Gosavi, Hon'ble Member (Judicial)  
Shri Veera Brahma Rao Arekapudi, Hon'ble Member (Technical)

Appearance:

- For Applicant: Shri A. Chandra Shaker, Advocate
- For CoC : Shri S. Ravi, Senior Advocate assisted by Shri Shabeer Ahmed, Advocate.
- For R-3 : Shri L. Ravichander, Senior Advocate assisted by Shri G.Venugopal, Advocate
- For USRA : Shri Yogesh Jagia, Advocate.

**PER: BENCH**

**ORDER**

1. The Application is filed under Sections 30 (6) and Section 31 of Insolvency & Bankruptcy Code, 2016 R/w Regulation 39 (4) of Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 seeking approval of the Resolution Plan submitted by **M/s CFM Asset Reconstruction Private Limited** ("CFM") as approved by the Committee of Creditors (CoC) in respect of Viceroy Hotels Limited.
2. The Corporate Insolvency Resolution Process (CIRP) of the Corporate Debtor was initiated by this Bench by an order on 12.03.2018 and the Applicant herein was appointed as Interim Resolution Professional (IRP). The Committee of Creditors (CoC) in its 1<sup>st</sup> meeting held on 09.04.2018 had confirmed the Applicant as Resolution Professional (RP). The Applicant in compliance of the provisions of the Code and Rules framed there under conducted the CIRP of the Corporate Debtor.
3. As seen from the records, 180 days CIRP period came to an end on 07.09.2018. After granting further extensions and exclusions, the extended period of CIRP expired on 26.03.2019. A total of 18 CoC meetings were convened by the Applicant.
4. During the period of CIRP, a total of 31 Expression of Interest were received by the Applicant, which were placed before the CoC in its 4<sup>th</sup> meeting held on 19.06.2018. Out of 31 EOIs,







five (05) Prospective Resolution Applicants were shortlisted and their respective Resolution Plans were deliberated in the 12<sup>th</sup> CoC meeting held on 11.12.2018. The prospective Resolution Applicants were asked to revise and improve their bids by 17.12.2018.

5. The revised Resolution Plans submitted by 05 prospective Resolution Applicants were again deliberated upon by the CoC in its 15<sup>th</sup> meeting held on 25.01.2019 and a final opportunity was given to them to revise their offers on or before 08.02.2019. The revised offer submitted by the prospective Resolution Applicants were again deliberated in the 16<sup>th</sup> CoC meeting held on 16.02.2019.
6. On 25.02.2019, the Committee of Creditors was reconstituted consequent to the order passed by this Tribunal in IA 250/2018 directing the Resolution Professional to revise the claim submitted by M/s Mahal Hotels Private Limited and its associates by calculating interest on the outstanding balance @ 24% p.a. and then assess the percentage of voting share of Respondent No.3 and its associate companies.
7. In the 18<sup>th</sup> CoC meeting held on 11.03.2019 and 12.03.2019, the CoC members evaluated the resolution plans submitted by the following three Resolution Applicants:-
  1. Unison Hotels Private Limited
  2. Asset Reconstruction Company (India) Ltd
  3. CFM Asset Reconstruction Pvt Ltd
8. As per the Evaluation Matrix and Information Memorandum, Unison Hotels Private Limited was declared as **H1** bidder (UNISON-H1), ARCIL was declared as **H2** (ARCIL-H2) and CFM Asset Reconstruction Pvt Ltd as **H3** (CFM-H3). However, the CoC in its commercial wisdom approved the Resolution Plan submitted by CFM ARC who is H3 bidder. At para 8 (page 13) of the application, the Resolution Professional stated that there is an indication by M/s CFM in the Resolution Plan about investment by M/s Tolaram Inc, Singapore in M/s CFM and the resolution plan also clarified the FDI Policy (Foreign





Direct Investment) by Foreign Investors into Asset Reconstruction Company up to 100% was examined by M/s K. Vijayaraghavan & Associate LLP, Chartered Accountants and certified at paragraph 6.2.18 that the investments made in the Asset Reconstruction Company by foreign investors is not in violation of Foreign Exchange Management Act 1999 r/w Foreign Direct Investment Policy 2015, thereby indicating that M/s Tolaram Inc, Singapore is an investor in M/s CFM and it is not directly related to the resolution plan submitted by CFM.

9. The plan submitted by **M/s CFM Asset Reconstruction Private Limited** ("CFM") was approved by the CoC with **89.15%** votes in favour of it under Section 30(4) of IBC on 19.03.2019 and the Applicant further submits that all the mandatory requirements envisaged under the Code and Rules/Regulations made thereunder have been met. The Resolution Professional/Applicant herein has filed Form-H which is annexed and marked as Annexure-B with an affidavit under Section 29A of the Successful Resolution Applicant. As per the records, the successful resolution applicant was implemented in this IA on 06.05.2020 vide order passed in IA No. 737 of 2019.
10. It is observed from the records that when this IA was pending before this Tribunal, the successful Resolution Applicant i.e **M/s CFM Asset Reconstruction Private Limited** (CFM) has filed addendum to the Resolution Plan, by way of an interlocutory Application bearing **IA No. 537/2020** on 23.06.2020 proposing to make necessary changes compliant with various rules and regulations in order to ease the process. Further they intended to incorporate these amendments into the Resolution Plan without neither changing the Total amount committed in the Resolution Plan nor making any changes with regard to the payments to different categories of claimants.
11. When the Adjudicating Authority took note of the fact that the addendum to the Resolution Plan was not placed before the





CoC for its approval, this Tribunal on 27.11.2020 directed the Resolution Professional to convene a meeting and file report on the addendum. As directed, the Resolution Professional convened CoC meeting on 10.12.2020 and furnished its views on the addendum to the Resolution Plan. Further Resolution Professional submitted his report on 15.12.2020 confirming that **M/s CFM** is eligible to participate in the resolution process.

12. As things stood thus, **M/s Union Hotel Private Limited** (Unsuccessful Resolution Applicant) filed an Application bearing IA (IBC) No. **189/2021** in IA 537 of 2020 for impleading them as a party in the said addendum IA and this Bench passed the following orders on 28.04.2021.

*"The Supreme Court in various judgements has noted that a view has to be taken on liberal side so this AA is not hesitant to say that unsuccessful Resolution Applicant is not only a necessary party but also a proper party for adjudication of the lis involved between the parties. The Bench has a doubt on the legal aspect whether an Asset Reconstruction Company can be a Resolution Applicant or not. This question of law and fact can be cleared by the Unsuccessful Resolution Applicant".*

13. On 05.05.2021 the matter was heard at length and IA 281/2019 and 537/2020 were reserved for orders. Thereafter, the Learned Counsel appearing for successful Resolution Applicant filed IA 230/2021 indicating he wants to assist this Adjudicating Authority in the approval of the Resolution Plan. IA No.537/2020 was re-opened on 11.05.2021 and the Learned Counsel was permitted to make his submissions on 12.05.2021.
14. Aggrieved by the above order of this Adjudicating Authority, dated 28.04.2021 as stated at para 12 supra, the successful Resolution Applicant i.e M/s CFM ARC Private Limited preferred a Writ Petition before Hon'ble High Court, Telangana. On 13.05.2021 and the Hon'ble High Court granted stay on the further proceedings in IA 281/2019 in CP No. 219/2017, pending disposal of WP No. 12381 of 2021, on the file of the High Court and adjourned the matter to 18.06.2021. When IA 281/2019 came up for hearing before the Adjudicating







Authority on 23.06.2021, the Learned Counsel apprised that the stay was not extended by the Hon'ble High Court on 18.06.2021. Accordingly, IA 281/2019 which is filed for approval of the Resolution Plan and IA 537/2020 (Addendum IA) came up before the Bench on 23.06.2021.

15. The Learned Counsel for unsuccessful resolution applicant objected to the manner in which the addendum was filed before the Adjudicating Authority and also prayed to hear him before taking a decision on the resolution plan. The Learned Counsel for unsuccessful resolution applicant was allowed to submit his say in the matter vide order dated 23.06.2021. The Bench made it clear on 14.07.2021 that IA No. 281/2019 would be considered at the first instance and the objections would be considered.
16. On 06.08.2021 when the matter came up for hearing, Learned Senior Counsel representing CoC, Learned Counsel appearing for Unsuccessful Resolution Applicant were present. However, the Learned Senior Counsel representing Successful Resolution Applicant was not present despite clear indication that the matter will be heard on that day. The Learned Senior Counsel representing CoC opened his submissions. The important point for consideration in IA 281/2019 is whether ARC is eligible to submit resolution plans without prior approval of the regulator, under the provisions of IBC.

#### **CONTENTIONS OF COC/RP**

17. The Learned Senior Counsel for CoC has submitted relevant provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (**SARFAESI ACT**) wherein Asset Reconstruction Companies (ARC) came into existence.

Section 2(1) [(ba) defines "asset reconstruction company" which means a company registered with Reserve Bank under section 3 for the purposes of carrying on the business of asset reconstruction or securitisation, or both





Section 2 (1) (b) defines "asset reconstruction" which means acquisition by any 2 [asset reconstruction company] of any right or interest of any bank or financial institution in any financial assistance for the purpose of realisation of such financial assistance;

Section 9 (1) (a) also clearly provides that ARC can take over of, the management of the business of the borrower; 9 (1) (g) talks about conversion of any portion of debt into shares of a borrower company:

He also mentioned proviso to Section 15 (4) which states an ARC shall not be liable to restore the management if it acquires a controlling equity stake in the borrower company upon conversion.

18. The Learned Senior Counsel also juxtaposed the relevant provisions of the IBC, 2016 as under:-

Section 5(25) defines "resolution applicant" which means a person, who individually or jointly with any other person, submits a resolution plan to the resolution professional pursuant to the invitation made under clause (h) of sub-section (2) of section 25;

Section 5(26) defines "resolution plan" which means a plan proposed by 2 [resolution applicant] for insolvency resolution of the corporate debtor as a going concern in accordance with Part II of the Code.

The Learned Counsel for Successful Resolution Applicant drew the attention of the Bench Section 29A lays down category of persons not eligible to be a resolution applicant.

Section 30 (2) – a resolution plan submitted by a resolution applicant along with an affidavit stating that he is eligible under Section 29A of the Code, must not contravene provisions of any other law.

Section 238: The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in







any other law for the time being in force or any instrument having effect by virtue of any such law.

19. The second proviso to clause (c) of Section 29A states that: *“Provided further that nothing in this clause shall apply to a resolution applicant where such applicant is a financial entity and is not a related party to the corporate debtor”*. The proviso shows the clear intention of the Parliament that not only can a financial entity be a resolution applicant but also that the financial entity must be exempt from the disqualification in clause (c) of Section 29A.
20. The Learned Senior Counsel further submits that the Explanation-1 to clause (j) defines the expression ‘connected person’ as mentioned in clause (j) of Section 29A. The first proviso to Explanation-I states that: “Provided that nothing in clause (iii) of Explanation I shall apply to a resolution applicant **where such applicant is a financial entity** and is not a related party of the corporate debtor.” This provides a carve out for financial entities from clause (iii) of Explanation I which covers related parties of persons referred to in clauses (i) and (ii) of Explanation I.
21. That the second proviso to Explanation I states that: **“Provided further that the expression “related party” shall not include a financial entity, regulated by a financial sector regulator**, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares [or completion of such transactions as may be prescribed], prior to the insolvency commencement date.” This once again provides a carve out for financial entities from being considered as a ‘related party’ in a situation where the financial entity’s debt has been converted into equity.
22. The Explanation II to clause (j) defines the expression ‘financial entity’ which shall mean to include(a) a scheduled bank; (b) any entity regulated by a foreign central bank or a securities market regulator or other financial sector regulator of a jurisdiction outside India; (c) any investment vehicle,





registered foreign institutional investor, registered foreign portfolio investor or a foreign venture capital investor; (d) **an asset reconstruction company registered with the Reserve Bank of India under section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;** (e) an Alternate Investment Fund registered with Securities and Exchange Board of India; (f) such categories of persons as may be notified by the Central Government.

From the reading of above definitions of financial entity, the exemptions provided to a 'financial entity' under the above provisos to Section 29A makes it very clear that the legislature envisaged that there is no bar for ARC to submit resolution plans under the IBC. The same fact is reinforced by the definition of 'financial entity' which includes an ARC. Therefore, he vehemently submitted that in the instant case, CFM does not suffer any of the disqualifications as laid out under Section 29A.

23. The Learned Senior Counsel also drew the attention of the Bench to the Report of the Insolvency Law Committee dated 26.03.2018. The key recommendations in this Report are as follows:

(i) ...

(ii) *in order to address the problem of unintended exclusions under section 29A that disqualifies certain persons from submitting resolution plans under the Code, it has been recommended to streamline it so that only those who contributed to defaults of the company or are otherwise undesirable are rendered ineligible. **Moreover, being mindful of the Non-Performing Assets (NPA) crisis in the country, the need to encourage the market for NPAs was felt and accordingly several carve-outs from section 29A have been recommended for pure play financial entities.***

...

14.4. *It was brought to the Committee's attention that given the nature of business undertaken by ARCs, scheduled banks and Alternate Investment Funds, overseas financial institutions, and entities such as Investment Vehicles, registered Foreign Institutional Investors, Registered Foreign Portfolio Investors and Foreign Venture Capital Investors ("Financial Entities"), they are likely to be related to companies that are classified as non-performing assets ("NPA") and consequently be disqualified under section 29A. **The Committee agreed that***

*Mr. [Signature]*

*[Signature]*

**such pure play Financial Entities must be exempt from the disqualification in clause (c) of section 29A of the Code which debars persons who have an NPA account or control or are promoters or in the management of a corporate debtor that is classified as an NPA account from being resolution applicants.**

24. He further stated that the aforesaid report as well as subsequent amendments by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 allows the financial entities (including an ARC) to take part as resolution applicants in the CIRP process and as a consequence, if they suffer any disqualification under Section 29A, they must be exempted.
25. He further drew the attention of the Bench that when the provision makes it abundantly clear that there is no bar for an ARC, one must not thereafter artificially curtail the ambit of the provision by reading restrictions on the basis of the intendment of the amendment. He contended that ARC which is the financial entity does not suffer the bar from submitting the resolution plan. It is not open to restrict it. It will be a discriminatory interpretation hostile to Article 14 of the Constitution of India and must be shunned.
26. Another important point he covered was that Explanation II to section 29A of the code qualifies the enumerated categories of 'Financial entities' with the words '*...which meet such criteria or conditions as the Central Government may, in consultation with the financial sector regulator, notify in this behalf...*'. The argument is admittedly no such criteria or condition is laid down by the Central Government as of now, the whole of the Explanation II is unworkable. Such interpretation would render the entire Explanation otiose and redundant and it should be avoided. He further contended, the Central Government is empowered to lay down criteria and conditions and that just because the same is not laid down the financial entities are not precluded from participating. The Hon'ble Supreme Court has held that when the Statute empowers an authority subject to the Rules framed by a subordinate authority to exercise a power, absence of the Rule does not







invalidate the statute. The power is nonetheless exercisable. He placed reliance in this regard on the Judgement of Hon'ble Supreme Court in **T. Cajee vs U. Jormanik Siem And Another (1961 SCR (1) 750)** and **S.A.L. Narayan Row And Anr. vs Ishwarlal Bhagwandas And Anr. (1966 1 SCR 190)**

27. The Learned Senior Counsel by relying on the order of Hon'ble NCLAT in Company Appeal (AT) (Insolvency) No. 429 of 2018) in the matter of **Canara Bank vs. Sri Chandramoulisvar Spinning Mills Private Limited & Anr** submits that if any of the provisions of the SARFAESI Act, 2002 are inconsistent with the IBC, the provisions under IBC shall prevail. Section 238 of the IBC provides for an overriding effect of IBC. As such ARC facing an alleged bar, if any under the SARFAESI Act, 2002 in submitting a Resolution Plan, must pay attention to the statutory sanction of the IBC (in terms of Section 29A), which permits an ARC to take part in the CIRP process as a Resolution Applicant.
28. He also submitted that the Reserve Bank of India which is a statutory body and purportedly under the mandate of the SARFAESI Act, has no jurisdiction in a matter involving the CIRP of the Corporate Debtor under the IBC which is a self-contained Code. The Learned Senior Counsel further states that the legislative mandate in the form of the IBC must necessarily prevail over the powers of a statutory body like RBI under the SARFAESI Act.
29. He also brought to the knowledge of this Bench that the Resolution Plans submitted by various ARCs have also met judicial approval of various Adjudicating Authorities. He also placed reliance on the Hon'ble Delhi High Court in the matter of **UV Asset Reconstruction Company Limited vs. Union of India & Ors (WP (C) 9537/2020)** wherein a stay was granted to the Show-Cause Notice issued by the Reserve Bank of India which premised that the Petitioner – UV Asset Reconstruction Company Limited is not permitted to submit a Resolution Plan.

30. In the instant case too, CFM-ARC has proposed to collaborate and submit a Resolution Plan along with Tolaram Inc. as a co-resolution applicant for infusing equity into the Corporate Debtor and not CFM ARC as per the plan.
31. In the light of above submissions, he prayed that CFM ARC is eligible Resolution Applicant and the resolution plan submitted by it along with co-applicant Tolaram Inc is not in violation of any provisions of law and prayed for early disposal of the resolution plan.

**CONTENTIONS OF UNSUCCESSFUL RESOLUTION APPLICANT**

32. Per contra, the Learned Counsel appearing for Unsuccessful Resolution Applicant submits that out of five resolution applicants only CFM and Unison Hotels were left in fray. He also submitted that CFM originally submitted its plan jointly with Delta Tri Pvt Ltd but subsequently, Delta Tri Pvt Ltd was dropped being ineligible under Section 29 A of the Code and CFM submitted the plan alone, which was approved by the CoC. When the instant IA was pending for approval of the resolution plan by this Tribunal, M/s CFM filed IA 537/2020 seeking modification of the resolution plan including modification to make Tolaram Inc as joint resolution applicant. He submits the amendments made by M/s CFM proposing Tolaram Inc goes to show that CFM as ARC is not permitted to submit resolution plan under IBC without prior permission of RBI which is mandatory under Section 30 (2) (c) of the Code, read with Regulation 38A of CIRP Regulations.
33. He further drew the attention relating to legal provisions i.e Section 5(25), Section 5(26) and Section 29A of IBC, 2016 referred at para 18 supra.
34. The Learned Counsel submits Section 29A of IBC is a restrictive clause and to strictly enforce the said provision, any person acting jointly or in concert with persons defined in sub clause (a) to (j) are to be barred from submitting the Resolution





Plans. The persons ineligible to be a resolution applicant under Section 29A of Code are:-

- a) *is an undischarged insolvent;*
- b) *is a willful defaulter in accordance with the guidelines of the RBI issued under the Banking Regulation Act, 1949;*
- c) *at the time of submission of the resolution plan has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949) or the guidelines of a financial sector regulator issued under any other law for the time being in force, and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor.*
- d) *has been convicted for any offence punishable with imprisonment;*
- e) *is disqualified to act as a director under the Companies Act, 2013*
- f) *is prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets;*
- g) *has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the Adjudicating Authority under this Code,*
- h) *has executed a guarantee in favour of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code and such guarantee has been invoked by the creditor and remains unpaid in full or part;*
- i) *is subject to any disability, corresponding to clauses (a) to (h), under any law in a jurisdiction outside India; or*
- j) *has a connected person not eligible under clauses (a) to (i);*

*Abhishek*

*M*

35. He further states that the above restrictions under Section 29A are subject to two explanations

Explanation no. I deals with **“connected person”** and Explanation no. II defines **“financial entity”** as stated in proviso to sub clause (C) of sub section 29A of the IBC Code, 2016.

36. A proviso was added to sub-clause © of Section 29A vide amendment Act No. 26 of 2018 w.e.f. 06.06.2018 permitting the financial entity which is not a related party to the Corporate Debtor to be exempted from the rigor of Section 29A.
37. Explanation no. II to Section 29A while defining financial entity, in sub explanation (d) includes Asset Reconstruction Company registered with Reserve Bank of India, which means that ARC exemption provided by amendment of 06/06/2018 will be applicable to ARC also if ARC is financial creditor.
38. He further submits that any resolution applicant to become successful resolution applicant requires to satisfy two criterions:-
- 1) entry point criterion under Section 29A of Code.
  - 2) eligible to submit resolution plan by satisfying Section 30 (2) of Code read with Regulation 38A of CIRP Regulations, 2016.
39. He further stated that ARC will be ineligible to be resolution applicant under section 29A on satisfaction of following conditions –

- (a) ARC is a related party to the corporate debtor
- (b) ARC is acting in concert or jointly with person ineligible to act as resolution applicant as defined under clause (a) to (j) of section 29A of Code;

The resolution plan submitted by the Resolution Applicant need to satisfy conditions of Section 30 (2) of the Code, read with Regulations 38A of CIRP Regulations as detailed below:-

Section 30(2) mandate the resolution professional to examine each resolution plan received by him and to confirm that each resolution plan:



- a) .....[Not relevant for present issue]
- b) .....[ Not relevant for present issue]
- c) provides for the management of the affairs of the Corporate debtor after approval of the resolution plan;
- d) the implementation and supervision of the resolution plan
- e) does not contravene any of the provisions of the law for the time being in force
- f) conforms to such other requirements as may be specified by the Board”.

40. Further, he stated that IBBI in exercise of the power conferred under section 30(2)(f) specified following additional requirements as provided under Regulations 38 of the CIRP Regulations, 2016 which inter alia reads: -

*“38. Mandatory contents of the resolution plan.*

- (1) *The amount payable under a resolution plan - (a) to the operational creditors shall be paid in priority over financial creditors; and (b) to the financial creditors, who have a right to vote under sub-section*
- (2) *of section 21 and did not vote in favour of the resolution plan, shall be paid in priority over financial creditors who voted in favour of the plan.*

*1A) A resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors, of the corporate debtor.*

*(1B) A resolution plan shall include a statement giving details if the resolution applicant or any of its related parties has failed to implement or contributed to the failure of implementation of any other resolution plan approved by the Adjudicating Authority at any time in the past.*

- (2) *A resolution plan shall provide:*
  - (a) *the term of the plan and its implementation schedule;*
  - (b) *the management and control of the business of the corporate debtor during its term; and*
  - (c) *adequate means for supervising its implementation.*
- (3) *A resolution plan shall demonstrate that –*
  - (a) *it addresses the cause of default;*
  - (b) *it is feasible and viable;*
  - (c) *it has provisions for its effective implementation;*
  - (d) *it has provisions for approvals required and the timeline for the same; and*
  - (e) *the resolution applicant has the capability to implement the resolution plan.”*

41. While the IBC stipulates mandatory requirements, he drew the attention of the Bench to the provisions governing the ARC under SARFAESI Act. The objective of the SARFAESI Act is to







facilitate bank and financial institutions to take over secured assets and cause sale of the same without the intervention of the court have expeditious recovery.

42. Going by the objective and provisions of both these acts, it is crystal clear that SARFAESI objective is faster recovery by secured creditor by selling security interest only. He further relied on various provisions of SARFAESI Act, 2002 i.e. Section 2(b), 2(b), Section 9, 10, 15 to establish that ARC without prior approval of the Reserve Bank of India, stipulated in Section 10(2) of SARFAESI Act, is not permitted to carry on any business other than Asset Reconstruction which is confined to the asset reconstruction of the **"borrower"** for the purpose of causing the recovery and any resolution plan submitted by ARC without requisite prior approval of RBI is contrary to Section 30 (2) of Code and is ineligible for even consideration by CoC. He further apprised these provisions establish that the condition precedent to carry out the business of Asset Reconstruction is the relationship of lender and borrower whereas when the Asset Reconstruction Company submit resolution plan, relationship may not be solely of lender and borrower and purpose is not to take over secured assets for causing sale to recovery of loan advanced. On the contrary, purpose of IBC is not recovery but a resolution of the insolvency to permit the company to run as a going concern and relied on the judgement of Hon'ble Supreme Court in para 33 of innovative observed as under: -

***"The scheme of the Code, therefore, is to make an attempt, by divesting the erstwhile management of its powers and vesting it in a professional agency, to continue the business of the corporate body as a going concern until a resolution plan is drawn up, in which event the management is handed over under the plan so that the corporate body is able to pay back its debts and get back on its feet....."***

He further stated that taking countenance of the mandatory requirements of the resolution plan as provided under section 30(2) of the Code, read with regulations 38 of the CIRP Regulations, 2016 there is no quarrel that ARC without prior



- permission of RBI is not permitted to submit resolution plan and conclusively any resolution plan submitted by ARC without requisite prior approval of RBI being contrary to section 30(2) (c) of code will not be eligible for even consideration by CoC.
43. While dealing with the arguments raised by the CoC and the Resolution Professional, the Learned Counsel for Unsuccessful Resolution Applicant has contended that Section 238 of the Code is non obstante provision and being latest in law prevail upon SARFAESI Act. He further contended that there is no quarrel on the proposition raised but by virtue of Section 30 (2) (e) the resolution plan should not contravene any of the provisions of the law for the time being in force, then the contentions raised become non germane and bereft of consideration.
44. He also rebutted the submissions made by the Resolution Professional and the CoC that CFM along with M/s Tolaram Inc are eligible to be Successful Resolution Applicant under Section 29A of the Code. Tolaram Inc was never been a resolution applicant and CFM on realizing that CFM being ARC is not eligible to be Resolution Applicant, has sought amendment of resolution plan submitted by bringing Tolaram Inc as joint applicant, which is not permissible under law.
45. As per Section 5(25) of the Code, CFM is the only resolution applicant but through amendment, a back door entry is being sought to make single applicant as joint applicant wherein it is proposed that equity of Corporate Debtor will be taken over by Tolaram Inc and that this amendment is nothing but an attempt to come out of the restrictions of Section 30 (2) of the Code.
46. The Learned Counsel further brought to the attention of the Bench that there is a case pending before Hon'ble High Court of Delhi in the matter of **UV Asset Reconstruction Company Vs Union of India** on the issue whether ARC without prior approval of RBI can submit the resolution plan or otherwise.





The Hon'ble High Court after verifying the provisions of Section 29A of Code and Section 10 of the SARFAESI Ac

***"This issue has arisen in the context of the Petitioner Company which is an asset reconstruction company, participating in the Corporate Insolvency Resolution Process of Aircel entities i.e. Aircel Limited, Dishnet Wireless Limited and Aircel Cellular Limited, before the NCLT. The resolution plan submitted by the Petitioner is stated to have already been approved by the NCLT, vide order dated 9th June, 2020 in CP (IB) No.298/MB.II/2018 and connected applications. The NCLT had, vide the said order, directed the Petitioner to obtain an approval of the Reserve Bank of India. The order of the NCLT reads:***

***"6.6.2. The RA is an asset reconstruction company, having been licensed to act as such by RBI. Hence, RA will require approval of RBI to acquire shares in the corporate applicants. The RA submits that it shall apply for such approval after the Resolution Plan is approved by this Adjudicating Authority."***

***The Reserve Bank India denied the approval and a show cause notice has been issued on 12th November, 2020, as to why action ought not to be taken for violating section 10 of the SARFAESI Act. It is this show cause notice, issued by the Reserve Bank of India, which has been challenged by the Petitioner in the present petition. Vide order dated 27th November 2020, the show cause notice dated 12th November 2020 was stayed by this Court".***

47. The Learned Counsel for Unsuccessful Resolution Applicant/UNISON Hotel Private Limited has vehemently argued that even if CFM ARC is eligible to submit the resolution plan, it cannot do so without the prior approval of RBI. The Learned Counsel placed reliance on para 85 of Hon'ble Supreme Court judgement in the matter of ***Manish Kumar vs Union of India [(2021) SCC Online SC 30]***, which is reproduced hereunder:-

***"The resolution professional has to examine each resolution plan received by him on the basis of the invitation made by the resolution professional under Section 25(h) and ascertain whether the plan is in conformity with the various criteria mentioned in Section 30(2) of the Code. The matter is thereafter put up by the resolution professional before the committee of creditors. All resolution plans which conform with the conditions in sub-section (2) of Section 30 are, in fact, to be placed before the committee of creditors. The committee of creditors may approve the resolution plan after considering its feasibility and viability, the manner of distribution proposed, which may take***

*Abraham*

*(Signature)*

*(Checkmark)*

into account the hurdles, priority amongst creditors as laid down in sub section(1) of Section 53 including the priority and the value of security interest of secured creditors and such other requirements as may be specified by the Board". Copy of the judgment is annexed and marked as **Annexure - 2.**

## **FINDINGS**

48. We heard Shri S. Ravi, Learned Senior Counsel appearing for CoC and Shri Yogesh Jagia, Learned Counsel appearing for unsuccessful Resolution Applicant/Unison Hotel Private Limited. The Learned Senior Counsel appearing for the COC and Learned Counsel appearing for Unsuccessful Resolution Applicant filed their written submissions.
49. We observed from the records that the prayers made in the instant IA by the Resolution Professional are as under:-
- (a) Allow the instant application.
  - (b) Approve the resolution plan dated 18.03.2019 under Section 31 (1) submitted by M/s CFM Asset Reconstruction Private Limited in terms of Section 30 (1) of IBC, 2016 and as approved by the Committee of Creditors.
  - (c) Condone the delay in submission of resolution plan, if any as per provisions of Regulation 39 (4).
  - (d) Pass such other and further orders and / or directions as this Hon'ble Tribunal may deem fit and proper.

In the same IA at para 8 of the Application, the Resolution Professional submitted, M/s CFM ARC has indicated in the Resolution Plan about investment by M/s Tolaram Inc, Singapore. But it never spoke of any co-applicant along with M/s CFM, thereby concealing that M/s Tolaram Inc was a co-applicant along with M/s CFM ARC. It appears to us that after contentions were raised by the Unsuccessful Resolution Applicant, M/s CFM ARC unilaterally, even without the knowledge of the CoC, has filed IA 537/2020, purportedly to be an addendum to the original resolution plan, making M/s Tolaram Inc as Co-Applicant. Even the reliefs sought never indicated the same. They never mentioned Tolaram Inc as co-applicant in the original Resolution Plan submitted to this Adjudicating Authority.



50. Further, after considering the submissions put forth by both the parties, we are of the considered view that any resolution applicant to become successful resolution applicant requires to satisfy two criteria as under;

- 1) entry point criterion under section 29A of code.
- 2) eligible to submit resolution plan by satisfying section 30(2) of code read with regulation 38A of CIRP Regulations, 2016.

And shall demonstrate that it is feasible and viable under Regulation 38 (3) (b) and the resolution applicant has the capability to implement the resolution plan under Regulation 38 (3) (e) of the CIRP Regulations. In the instant case before us, M/s CFM ARC cannot submit resolution plan without the prior approval of RBI under Section 10 (2) of SARFAESI Act. Therefore, we are of the view that prima facie even though the entry point under Section 29A is satisfied, the Successful Resolution Applicant has to satisfy that they are capable of implementing the resolution plan, even if the Adjudicating Authority is giving approval without the prior permission of the RBI.

51. The contention of the RP and CoC that Section 238 of the Code is non-obstante provision and shall prevail over the SARFAESI Act. Even though this proposition is a valid proposition, however when the latest law i.e. IBC, 2016 itself by virtue of Section 30 (2) (e) clearly stipulates that the resolution plan shall not contravene any of the provisions of the law for the time being in force, the contentions become non-germane and bereft of consideration.

52. It is curious to note that the unsuccessful Resolution Applicant was declared as H1 bidder by the CoC. However, H3 bidder was selected as Successful Resolution Applicant by the CoC, thereby failing to adhere to the fundamental objective of the Code i.e. resolution of the CD as a going concern is paramount rather than realization of the dues. It is further interesting to note, in the prayers sought in IA No. 281/2019 by the Resolution Professional for approving the plan, the name of M/s Tolaram Inc was not mentioned as a

Co-Applicant for approval of the resolution plan in terms of Section 30 (1) of IBC, 2016. Further, in the guise of helping the Adjudicating Authority, the successful Resolution Applicant has filed another IA No. 537/2020 in the form of an Addendum. When the IA came before this Bench, we observed that the modifications/amendments made by the successful resolution applicant was never placed before the CoC for their consideration/approval. Hence, the same was referred back to the CoC for their consideration/views. On the directions of this Bench, the CoC once again met and considered the modifications suggested by the successful resolution applicant. However, most of the modifications were negated by the CoC. In our view the above methodology adopted by the successful resolution applicant in itself is unacceptable as the CoC was never kept in the loop about the modifications/amendments, which goes to show change of goal posts after the approval of the resolution plan by the CoC.

53. We feel that the successful resolution applicant has tried to circumvent the provisions of the Code, by purportedly including M/s Tolaram Inc, Singapore as a co-applicant when there was no such mention in the original resolution plan submitted by the Resolution Professional. It was only mentioned that M/s Tolaram Inc was an investor in M/s CFM only. They were never a co-applicant as per the resolution plan. Our view was reinforced after verifying the record before us, wherein the Hon'ble NCLAT vide order dated 18.11.2019 was just short of taking action against the Resolution Professional. Despite that, in the instant case, there was no change in the attitude and the acts of the Resolution Professional and we are not hesitant in recommending to the IBBI to investigate into the entire process and the acts of the Resolution Professional in the matter. At the same time, we are also taking strong exception to the acts of the members of the CoC. We recommend to the management of the financial institutions to look into the acts of their members, who apparently acted in a partisan manner to support the successful resolution applicant which are detrimental to the









interests of other resolution applicants. Prima facie, it looks like the entire CoC and Resolution Professional have bulldozed the entire resolution process to favour one resolution applicant who is apparently not eligible to submit the resolution plan under IBC and CIRP Regulations as stated supra. We also feel the resolution plan submitted by the CoC before the Adjudicating Authority has become a conditional resolution plan subject to the approval of RBI as Regulator of ARCs. As such, we are not inclined to consider such conditional resolution plan for resolution of the Corporate Debtor.

54. As sequel to above, we dismiss **IA 281/2019**. Accordingly the resolution plan submitted by **M/s CFM Asset Reconstruction Private Limited** ("CFM") for the Corporate Debtor/ Viceroy Hotels Limited stands rejected. Since IA No. 281/2019 is dismissed, **IA No. 537/2020** which is filed as addendum to the Resolution Plan also stands dismissed. Consequentially, **IA No. 621/2020** filed by unsuccessful Resolution Applicant becomes infructuous and stands disposed of.

  
(Veera Brahma Rao Arekapudi)  
Member (Technical)

  
(Madan B Gosavi)  
Member (Judicial)

*Binnu*