

IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
PRINCIPAL BENCH

C.A No.152(PB)/2018 in
C.P. (IB)-202(PB)/2017

IN THE MATTER OF:

Punjab National Bank

.... Applicant/petitioner

Vs.

Bhushan Power & Steel Limited

.... Respondent

Order under Section 7 of Insolvency & Bankruptcy Code, 2016

Order delivered on 23.04.2018

Coram:

CHIEF JUSTICE (RTD.) M.M. KUMAR

Hon'ble President

Sh. S.K. Mohapatra,
Hon'ble Member (T)

Presents:

For the Applicant:

Mr. A.S. Chandhiok, Senior Advocate
Mr. Anand Chibbar, Senior Advocate with Mr. K. Datta, Ms. Prachi Johri, Mr. Gaurav Mankotia, Ms. Pallavi Kumar, Ms. Shweta Kakkad, Mr. Angad Baxi and Mr. Shantanu Parashar, Mr. Sumesh Dhawan, Ms. Charu Sharma and Mr. Shivi Sanyam, Advocates for Applicant- Liberty House Group Pvt. Ltd. in C.A. No. 152(PB)/2018

For the Tata Steel Ltd.

Dr. Abhishek Manu Singhvi, Senior Advocate with Mr. V.P. Singh, Ms. Anindita Roy Chowdhary, Mr. Abhimanyu Chopra, Mr. Avishkar Singhvi, Mr. Aditya Chatterjee, Ms. Nilanjana, Mr. Aditya Jalan, Mr. Priyank, Mr. Siddarth Kalita & Mr. Sidharth Sharma, Advocates.

For the CoC

Mr. Ramji Srinivasan, Senior Advocate with Mr. Abhijeet Dubey, Mr. Bishwajit Dubey, Ms. Spandan Biswal, Ms. Surbhi Khattar, Mr. Tushar, Mr. Naveen Hegde & Mr. Bhupendra Verma, Advocates

For the RP

Mr. Arun Kathpalia, Senior Advocate with Ms. Misha, Mr. Siddhant Kant, Mr. Ranjeev Khatana and Ms. Srisht Khare, Advocates.



M.M.KUMAR, PRESIDENT

ORDER

1. This is an application filed by Liberty House Group Pte. Limited (for brevity 'Liberty House') under section 60(5)(c) of the IBC, 2016 with a prayer that the decision of the Committee of Creditors (for brevity 'CoC') dated 22.02.2018 be declared illegal and set aside. The Committee of Creditors has refused to entertain the resolution plan submitted by the applicant on 20.02.2018 on the ground that it was delayed. The Liberty House has placed on record a copy of the impugned letter dated 22.02.2018 (diary No.1024 dated 23.02.2018) after filing of the application. An additional affidavit dated 01.03.2018 placing on record copies of the affidavits, emails, copies of documents required by Resolution Professional (for brevity 'RP') and confidentiality undertaking sent to the RP were placed on record.
2. In response to notice of motion having been issued reply by RP has been filed on 05.03.2018 (diary number 1178). A separate reply has been filed by Tata Steel Limited (for brevity 'TSL') on 05.03.2018 (diary No.1168). RP had also filed a Caveat application on 22.02.2018 (diary No.983). Another separate reply has been filed on behalf of the CoC on 01.03.2018 (diary No.1156). The applicant has also filed rejoinder to the reply filed by the Resolution Plan Applicant- TSL on 05.03.2018 (diary No. 1179).

3. Before embarking upon the issues raised in the application a brief background of the events needs to be noticed for appreciating the contention raised by the parties. The main application namely CP No.(IB) 202 PB of 2017 was filed by the Punjab National Bank against Bhushan Power and Steel Limited (for brevity 'BPSL') under section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') for initiating Corporate Insolvency Resolution Process (for brevity CIR process) for default of huge amount. The application was admitted on 26.07.2017 and Mr. Mahender Khandelwal was appointed as Interim Resolution Professional (for brevity 'IRP/RP'). The admission order also declared moratorium prohibiting many acts as contemplated by section 14 of the Code. Accordingly, the CIR Process commenced with effect from the date of admission on 26.07.2017 as is provided by Section 5(12) read with section 7(6) of the Code. The IRP made public announcement of CIR Process in the matter of BPSL in Form A as per the requirements of Regulation 6 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (for brevity CIRP Regulations). The public announcement was uploaded on the website of BPSL on 28.07.2017 and duly published in the leading dailies in Hindi and English. Accordingly, the commencement of CIR process received wide publicity and it was known to the world at large. The claims were solicited from

financial and operational creditors in the prescribed forms and the last date for submission of claims announced was 09.08.2017 i.e. 14 days from the date of commencement of CIR Process. Thereafter the IRP constituted the CoC and first meeting of the Committee of Creditors was held on 01.09.2017 and IRP was confirmed as the RP.

4. On 21.09.2017 public notice was issued inviting expression of interest (for brevity 'EOI') which was published in The Economic Times (All India Edition) inviting all prospective investors, lenders and all other interested parties who fulfilled the qualification criteria to put forward its resolution plans in respect of BPSL within the timelines prescribed under regulation 39(1) of CIRP Regulations read with section 25(2)(h) of the Code. The resolution plan applicant-TSL submitted its EOI to participate in the resolution process of BSPL within the time prescribed in the EOI. It is worthwhile to note that any potential Resolution applicant who was desirous of submitting a resolution plan was required to provide relevant documents to establish that it satisfied the qualification requirements on or before 06.10.2017.
5. On 30.10.2017 Information Memorandum as required u/s 29 of the Code was prepared by RP which was supposed to contain all requirements concerning documents and information needed to be supplied to RP by a Resolution applicant to facilitate

submission of proposals/resolution applications. The liquidation value of the assets of BPSL as per Regulation 36 was determined at Rs 9500/- crores (approx).

6. The applicant 'Liberty House' sent its formal EOI dated 12.11.2017 alongwith email dated 13.11.2017. In the email the applicant 'Liberty House' has stated that it is a part of Gupta family group alliance and it would like to participate in the CIR process of BPSL in accordance with the provision of the Code; and that the formal expression of interest was forwarded with a request to RP to place it before the CoC. It was further stated that audited consolidated financial statements for the year ending 31.03.2017 and its latest corporate brochure was being sent in the next two emails due to constraint of size of those documents. It was also stated that they got confused with regard to the deadline and missed out the submission of EOI within the first deadline. Accordingly, it requested the COC to accept its EOI and allow participation in the process of developing BPSL by final resolution plan. The applicant-'Liberty House' also sent its corporate brochure by a separate email along with consolidated financial statements. Both the emails have been placed on record along with details of qualification criteria. The meeting of the COC was held on 17.11.2017.



7. The case pleaded in the application is that 'Liberty House' is a company incorporated in accordance with the law of Singapore and; that the CoC decided not to open and consider the resolution plan of 'Liberty House' claim to have been submitted on 20.02.2018 prior to the meeting of CoC on 21.02.2018 which had agenda to examine the resolution plans. The reason for rejection of Resolution Plan of 'Liberty House' as conveyed by the RP on 22.02.2018 is that its resolution plan has been filed after the deadline set by CoC which expired on 08.02.2018 and that this last date had not been conveyed to Liberty House at any stage. According to the RP it was the last date for submission of the resolution plan.
8. The Liberty House has unfolded its credential by asserting that its paid up capital is US\$ 32,55,61,301 with ordinary share valued at US\$ 1 each. It is wholly owned by Liberty Holding Global Pte Limited, a company incorporated under the laws of Singapore. The turnover of Liberty House is more than US\$ 6.6 billion (Rs.43,000 crores) its net worth is more than US\$ 500 million (3,200 crores). Liberty House and its associate companies are in the international industrial and metal business of providing an integrated solution ranging from global metal trading, model making, processing and distribution to advance engineering. Liberty House is a part of international alliance popularly known

as Gupta family group alliance. It has proven track record of developing steel industry and acquiring a turning around businesses. Gupta family group alliance has been pursuing a significant development programme targeted at evolving UK and Australian Steel Industry.

9. As has been mentioned in the preceding paras the Liberty House sent its EOI on 12.11.2017 along with the email dated 13.11.2017 (annexure-A4 colly). A copy of the qualification criteria has been placed on record (annexure-A5). A copy of an audited financial statement of the applicant for the year ended 31.3.2017 (annexure -A6).
10. The RP vide email dated 18.11.2017 replied to the email of the Liberty House and called upon the applicant to submit documents including **confidentiality undertaking, Memorandum of Association, Article of Association, Incorporation documents** etc. On 20.11.2017 RP expressed his thanks to the Liberty House for submitting its EOI and asked for further information and formalities for issuance of RPF and grant of access to documents. He offered to schedule site visit confirming thereby that the Liberty House was one of the prospective resolution applicant. A copy of email dated 18.11.2017 sent by RP is on record (annexure -7) and email dated 20.11.2017 is also on record (annexure -8).



11. It is claimed by RP and CoC that the Liberty House was aware about the deadline for submissions of a resolution plan which was upto 08.02.2018. However, it had been extended from time to time and finally fixed for 08.02.2018. On 13.2.2018 Liberty House wrote a letter to RP in categorical terms informing that it was in the process of submitting viable and competitive resolution plan for CIR process. It expressed the belief that resolution plan submitted by Liberty House would be considered strongly by the COC and it would be in the interest of all stakeholders, in particular the lenders, as the ultimate goal of the process is to have the best and most competitive resolution plan for the BPSL and that it was in larger Public Interest. A copy of the email has been placed on record (Annexure-9). However, no reply to the email was received by Liberty House. It has been conceded that there was some delay on the part of the Liberty House which was caused by virtue of it being a foreign company. It has also explained that sometime was spent in obtaining internal clearance and approvals; and also to access the business environment in India particularly in respect of steel industry as it has been undergoing stress for quite sometime in the past. It also took sometime to access the future prospects of the BSPL, the nature of its dues etc. It is claimed that considerable efforts were put in to prepare a viable and competitive resolution plan. It eventually



its resolution plan to RP on 20.02.2018 whereas the meeting of the COC was scheduled on 22.02.2018 to consider all other resolution plans. It was ensured that resolution plan was with the RP on 20.02.2018 so that it could be taken up for consideration along with the other resolution plans at the scheduled COC meeting. The RP duly acknowledged the receipt of the resolution plan stating that acceptance and consideration of the plan is subject to approval of the COC. The applicant-Liberty House requested the RP to place its plan before COC which was sent on 20.02.2018 in its next meeting on 22.2.2018. However, it has not been opened and CoC/RP refused to consider the same on account of its delayed submission. The same has been placed before the adjudicating authority in a sealed cover for reason of confidentiality in the same foam as it had been returned to Liberty House unopened.

12. On 21.02.2018 the Liberty House sent an email to RP asking about the deliberations of the COC meeting in respect of its resolution plan (Annexure-11). When the representative of the Liberty House called the RP on phone he was told that COC had decided not to open the Liberty House's resolution plan because it was submitted after the due date and in that regard written communication was to follow.



13. In support of the application the Liberty House has raised following grounds:-

- a. The applicant is a renowned global company, which is evident from its financial credentials and backgrounds as well as the background of the GFG Alliance. The applicant craves leave to refer to and rely on the foregoing paragraphs where details of its networth, turnover and other business expertise are set out. The GFG Alliance of which the applicant is a part, has a proven track record of developing the Steel Industry and acquiring and turning around businesses.
- b. The applicant meets the qualifying criteria furnished to it by the RP and that it is very well placed to act as the resolution applicant and participate in the insolvency resolution process for the BPSL. The applicant has submitted a highly competitive resolution plan and is reasonably sure that if its plan is accorded due consideration the plan would succeed in as much as the applicant is a global giant in the relevant sector of power and steel.
- c. The applicant had put together all information it deemed relevant and on that basis formulated a resolution plan that was submitted to the RP. It is submitted that the resolution plan conforms to all the requirements of the law to the best

///

understanding of the Liberty House. The applicant being a foreign company incorporated in Singapore, it took some time to obtain internal clearances and approvals. The applicant took time to access the business environment in India especially since the steel industry is undergoing stress, the future prospects of the corporate debtor, the nature of its dues, etc. Thereafter, considerable efforts were put into preparing a viable and competitive resolution plan. In view of the foregoing, it took some time for the applicant to finalise its resolution plan keeping in mind the quantum of investment required and other associated factors.

- d. The applicant firmly believes that its resolution plan is on a better pedestal in the overall reorganization of the corporate debtor/ respondent and promotes overall business dynamism. The central element of the corporate insolvency resolution process is resolution plan and/or reorganizations or restructuring of the Corporate Debtor. The idea of restructuring proceedings is to culminate into a successful a reorganization plan. No consideration of a plan due to some delay in submitting the requisite resolution plan defeats the very objectives of 'insolvency resolution' especially if otherwise the plan aims to maximize the possible eventual return to the creditors and provide better



expertise for turn around, as in the present case. Delay, if any, ought and should not be an obstacle to achieving the ultimate goal of 'insolvency resolution', especially when no resolution plan has been approved as yet by the CoC.

- e. The applicant has duly followed best practices throughout its application procedure and has submitted its resolution plan with utmost bona fide. The applicant has always expressed its interest in participating in the insolvency resolution process for the respondent company and the slight delay, if any, in submission of the resolution plan ought not to prevent the CoC from considering the applicant's resolution plan on merits. The delay, if any, was not intentional and was on account of the submissions made in the foregoing paragraphs.
- f. Due consideration of the applicant's resolution plan by the CoC would only aid and benefit the insolvency resolution process of the corporate debtor/respondent which is as per the objective of the Code. No prejudice whatsoever would be caused to any party.
- g. The applicant firmly believes that it has covered all aspects mandated by law in its resolution plan and if on consideration by the CoC any further information is required



to be added and/or the plan itself is required to be updated, the applicant undertakes to do so promptly.

- h. Whilst it was in the midst of putting finishing touches to its resolution plan, the applicant came to know that the deadline for submission of resolution plan, which had been extended from time to time, stipulated as 08.02.2018. Immediately on finding this out, on 13.02.2018, the applicant wrote a letter to the RP categorically intimating that it was in the process of submitting a viable and competitive resolution plan for the corporate debtor/respondent and that it is in a position to submit a resolution plan which the CoC would consider very viable. The applicant further stated that their plan would be in the interest of all stakeholders, in particular lenders, as the ultimate goal of the process is to have the best and most competitive resolution plan for the company in public interest. Having not received any response, the applicant extended further resources and on 20.2.2018 submitted its resolution plan.
- i. The period of 270 days for the corporate insolvency resolution process for the respondent shall expire only on 22.4.2018 i.e. two months from now.



- j. It is submitted that deadlines, if any, put in place by the CoC and/or the RP are not sacrosanct but only procedural in nature to aid the insolvency resolution process. The same is evident from the fact that in the present case, as in other cases, the deadlines for submission of resolution plans have been extended by the CoC from time to time. It is submitted that the ultimate objective of the Code is inter alia to ensure maximisation of the value of assets of the corporate debtor and in order to do so, it is imperative that all credible resolution applicants must be permitted to participate in the process. It is submitted that such deadlines are not envisaged by the Code or under the regulations made hereunder but are put in place only to aid the completion of insolvency resolution process. It is submitted that procedural delays, if any, should not be permitted to have significance over and above the insolvency resolution which would ensure to the benefits of all stakeholders. It is submitted that till such time the resolution plan is not approved by this Hon'ble Adjudicating Authority, the resolution applicants should be permitted to submit a better and viable resolution plan which would enhance and maximise the value of the assets of the corporate debtor.

RP

- k. The rejection of the applicant's plan by the CoC is unwarranted and based on reasons that, in the circumstances of the present case may not be permitted to hold ground. The decision, it is submitted, is arbitrary, without any valid or cogent reason and patently unfair, not only vis a vis the applicant but qua the interest of the stakeholder in the insolvency resolution process.
- l. The applicant is only praying for an impartial and transparent consideration of its resolution plan by the CoC, which has been denied to it by the CoC.
14. Liberty House has also prayed that CIRP for BPSL may not be permitted to be finalized without considering its own resolution plan. It has also pleaded that 270 days of CIRP is to expire only on 22.4.2018
15. After filing of the application Liberty House has also filed a copy of the letter dated 20.02.2018 handed to RP. This was done on 23.02.2018. Thereafter again additional documents were filed on 01.03.2018 which are copies of affidavit required by RP (annexure-12 and annexure-14), emails sent in December 2017 (Annexure-13) and confidentiality undertaking (Annexure-15).

Reply-CoC

16. In the reply filed by COC it is claimed that COC has taken every precaution to ensure a fair, transparent and open process with



the object of maximizing the value and allow for approval of a successful resolution plan within a specified timeline fixed under the Code. Every opportunity has been given to all the interested parties to put forward their interest and claim.

17. Referring to the changes, the COC has averred that some changes were brought about by IBBI with respect to the eligibility of the resolution applicants by amending the Regulation which were incorporated appropriately in the process documents and thereby it ensured compliance with the amended Regulations. It is alleged that Liberty House-applicant has failed to comply with the timeline right from the beginning and acceptance of its application would derail the entire CIR process and prejudice the interest of the existing resolution plan applicants. It will open floodgates' to new resolution applicants to submit resolution plan till the last date of finalisation of resolution plan and that the existing resolution plan applicants may withdraw their resolution plans. Therefore, no successful resolution plan would be possible forcing the Corporate Debtor into liquidation.
18. It is also pleaded that Liberty House failed to supply required documents within the timeline specified by RP. It has failed to submit essential documents enabling the RP to verify its eligibility as a resolution applicant. The resolution applicant is required to submit the resolution plan to RP within time prescribed in s.



25(2)(h) of the Code. The EOI were required to be provided by the interested resolution applicant by 06.10.2017 and the document concerning qualification criteria which included financial statement, proof of address, incorporation document, copy of PAN card, TIN number, Auditors/ Chartered Accountant's certificate. The qualification criteria for resolution applicants was published on the official website of Corporate Debtor. EOI was submitted by Liberty House on 13.11.2017. Vide its email dated 18.11.2017 the RP requested Liberty House to submit its audited financial statements, Memorandum of Association and Article of Association, proof of address, incorporation documents and other documents mentioned above. It also required to submit board resolution authorizing signatories of EOI and confidentiality undertaking. The case of COC is that Liberty House has failed till date to provide those documents which were required by RP by various emails. It is asserted that necessary information in the prescribed format was required to be submitted by Liberty House to participate in the resolution process. On 20.11.2017 RP again sent an email requesting the Liberty House for submission of the required documents along with the confidentiality undertaking and the payment of requisite fee to access Virtual Data Room (VDR) which remained unattended and no response was received.



19. On account of amendment dated 23.11.2017 in the CIRP Regulation the RP had yet again sent an email to the Liberty House on 12.12.2017 for furnishing an affidavit in compliance of section 29A of the Code along with requisite documents because new eligibility criteria for resolution applicants has been provided by way of amendment. This has never been complied with. According to CoC this fact has been concealed from the adjudicating authority-NCLT in these proceedings. A copy of email dated 02.12.2017 has been placed on record. (Annexure A). It has also concealed the fact of another email sent by RP on 08.12.2017. The time for submission of affidavit under section 29A and the required documents was extended for further period of 10 days and it was to end on 18.12.2018. A copy of the email is placed on record (annexure-B). No affidavit till date has been submitted by the Liberty House. It is claimed that on account of the aforesaid non-compliances the Liberty House is not eligible to submit the resolution plan.
20. The process document giving details of the terms and conditions and timelines for submission of resolution plan by the resolution applicant was issued on 14.12.2017 and it was made available to only those who were qualified resolution applicants and had submitted the confidentiality undertaking and the requisite fee of Rs.10 lakh. The Liberty House having not submitted those

17/11

documents and the demanded fee therefore, it was not allowed access the process document.

21. The CoC has also pleaded that the last date for submission of the resolution plan was fixed as 10.01.2018 which was revised to 28.01.2018 vide an addendum dated 3.1.2018. The last date was again revised to 08.02.2018 vide second addendum to the process document was issued on 26.01.2018. The process document is claimed to be a confidential document and it cannot be produced in its entirety. However, some relevant extracts of that document alongwith the first and second addendum have been placed before us (Annexure C).
22. It is after passage of 3 months that Liberty House on 13.02.2018 asserted that it was interested in submitting a resolution plan however it did not seek a copy of the process document which demonstrate that it was not a serious resolution applicant and therefore it became ineligible to submit resolution plan on account of its own negligence and inaction.
23. It has also been pleaded that allowing the consideration of Liberty House's bid would render the whole process unfair and arbitrary. It would thus be opened to various risk and would be subjected to judicial challenge. The fairness and transparency would be jeopardised if the present application is allowed. Liberty House

11

cannot be treated equal to those who have complied with all requirements.

24. Apprehension has been expressed that permitting the consideration of resolution plan of the Liberty house may result into withdrawal of the bids by resolution applicants and the chances of successful resolution plan for the BSPL would be completely diminished.
25. Referring to regulation 39(1) of CIRP Regulation it has been highlighted that RP is entitled to prescribe timeline for submission of resolution plan. The timeline has been prescribed by RP after due consideration of relevant factors such as time for evaluation of resolution plan, negotiation with resolution applicants, approval from lenders etc.
26. The CIR Process is intended to be a time bound process as it has been laid down in the Preamble. It is asserted that the speed is the essence of the CIR Process. It has also been highlighted that the resolution plan submitted within time by resolution applicant were opened on 08.02.2018 and the financial proposal was shared on 14.02.2018 with the COC. The averment made by the Liberty House in its application have been controverted. It is sought to be projected that the Liberty House has been closely watching the development of the CIRP in respect of the BPSL and has deliberately delayed it. It is also denied that applicant has a



strong prima facie case and it has balance of convenience in its favour.

Reply by RP

27. A separate reply by RP has been filed which is similar to the one filed by CoC. It has been reiterated that application of the Liberty House is not maintainable for the following reasons:-

(a) Fulfilment of the prescribed qualification criteria is a sine qua non for consideration of resolution plan.

(b) The consideration of the resolution plan of the applicant received beyond the prescribed deadline would be a prejudicial and arbitrary act on the part of the resolution professional/Committee of Creditors.

(c) No judicial intervention required as the respondent and the Committee of Creditors have followed the due process of law.

(d) The applicant has not disclosed material facts and documents which clearly highlight the shortcomings on the part of the applicant.

28. It has been pleaded that consideration of the resolution plan of the applicant would be complete negation of the time line. The RP has stated that wherever stipulated deadline was matter of procedure and did not affect the propriety of the process, the adjustment were procedural matters and were duly relaxed qua the Liberty house-applicant itself. However when the resolution



plan of other bidders had become a matter of public knowledge it would be unjust to allow the Liberty House to submit its resolution plan at such belated stage which would impair the impartiality, in particular, fairness of the process. The application is complete abuse of the process law. No judicial intervention would be warranted as the RP and CoC have followed the due procedure of law. Reference was also made to the newspaper report to explain as and how it has become a public knowledge. The prayer has been made for dismissal of the application.

Reply by Tata Steel Ltd.

29. A reply has been filed by TSL. It has stoutly denied all the averments made in the application including the filing of additional affidavit on 01.03.2018. It has been asserted that it is complete misuse of the process as the additional affidavit has been filed to cover up the gap pointed out during the hearing on 26.02.2018 by the Counsel for the RP. According to the averments made such a conduct of filing belated pleadings should not be condoned and information which was required to be placed on record initially should not be permitted to be used as it would be an attempt to cover-up the gap concerning concealment of material facts.
30. In the heading 'Preliminary Submissions' it has been broadly submitted that Liberty House who has not regarded the timeline

AM

as sacrosanct cannot be permitted to join the process at its discretion and make mockery of the same. The Liberty Hose has submitted its bid after all other resolution plans have been opened and bid amounts have been widely reported in the press. Participation of the applicant is in complete disregard of the entire process and therefore it should not be permitted to join the process. The bid of the applicant would materially impact the vested right of TSL for the following reasons:

- a. TSL has participated in the process in a timely manner in accordance with the IBC and the CIRP Regulation as is evident from the following:
 - (i) Submitted its EOI on 29.9.2018, which was before the last date for submission being 06.10.2018; the applicant failed to do so.
 - (ii) Submitted the confidentiality undertaking as well as the non-refundable payment of INR 10,00,000/- for access to the virtual data room when called upon to do so. It appears that the applicant has neither submitted its confidentiality undertaking nor provided the non-refundable payment of INR 10,00,000/- for access to the virtual data room, as required by the resolution professional, despite several reminders throughout the CIRP.
- b. The applicant's bid has come after the last date for submission of bids which was 8.2.2018, as late as on 20.2.2018; and



- c. The sealed Resolution Plan were opened on 8.2.2018 as per the stipulation in the second addendum dated 26.01.2018. The applicant has, with a view to gaining an unfair advantage over other bidders (including TSL), submitted its bid after the other bids have been opened and material information regarding such other bids had already been reported in the press.
31. The whole CIR process would be prejudiced and derailed. It would set a bad precedent in IBC itself and it would in turn open floodgates to whimsical challenges to CIRP thereby leading to a complete breakdown of a time bound process. The following reasons have been given for dismissing the application: -
- a. Entertaining the application would penalize law abiding participants in the CIRP and reward and egregious defaulter and violator- such as Liberty House-the applicant
 - b. Any bid now entertained after full knowledge of pre-existing valid bids would reduce the process to a farce and render useless the very raison d'être of the resolution and bidding process.
 - c. The sequence of dates (as provided below) establishes that the applicant is nothing but a spoiler and a proxy for the debtor whose only object is to delay and scuttle the resolution process;
 - d. Absence of any explanation by the applicant, till date, regarding its non-bidding up to 08.02.2018, should be sufficient to dismiss the application in limine.



- e. The applicant is ex facie unqualified under the mandatory provisions of the IBC read with its allied rules and regulations which do not permit any relaxation to be afforded to parties such as the applicant.
32. Under the caption 'fact in brief' a table of dates and event have been given to argue that CIRP process in this case is divided into two parts. After the eligible part was over then the short listed applicants were permitted to access to VDR and share the process documents which are highly confidential in nature. Some newspaper reports have also been placed on record by TSL (annexure -5 to Annexure -8) Reliance has been placed on the amendment of Regulation 39(1) of the CIRP Regulation read with amended section 25(2)(h) of the Code. It has been submitted that the material placed on record belies the applicant's own case. It is false and smacks of mala fides. An elaborate reference has been made to the dates and events. The conduct of Liberty House reflected in the pleading or in emails sent by the applicant -Liberty House has also been emphasised.
33. The background of TSL's participation in the CIRP process of BPSL has then been depicted and reply on merit has also been filed.

Rejoinder of the Liberty House viz-a-viz TSL

34. Rejoinder by applicant -Liberty House has also been filed reiterating the averments made in the application and additional



affidavit. It is clarified that the TSL in its reply has taken the stand that the bids were opened on 8.2.2018 and the amounts were disclosed which is incorrect and misleading. Referring to the reply filed by CoC & RP it has been mentioned that financial parameters with respect to resolution plan were allegedly disclosed to CoC only on 14.2.2018 and the Liberty House was never aware of the amounts of two financial bids and that the reliance of TSL on various media reports is wholly misplaced. It has been submitted that conflicting and variant reports with regard to the bids amount offered by TSL have been mentioned in the press report ranging from Rs.11,500/- crores to Rs.24,500/- crores. Therefore, it is sought to be emphasised that the press reports do not project the correct bidding amount of the two resolution applicants and therefore the liberty house could not have taken any benefit from those process press reports. The Liberty House would not be able to submit its resolution plan based on the report in the media. The other resolution plans are also at consideration stage and no vested right has come into existence merely by submission of the resolution plan. In any case the highest amount proposed by a resolution applicant is not the sole criteria for declaring resolution applicant as a successful resolution applicant till the time CoC formally approves the resolution plan and adjudicating authority accept the same under section 30 of the Code. TSL cannot claim

PA

any vested right in the present process. TSL in its reply has alleged that Liberty House did not submit its financial report and therefore cannot be regarded as an eligible resolution applicant. It has been asserted that it had sent its email dated 13.11.2017 to RP along with its corporate brochure and the financial statement as on 31.3.2017 which is separately annexed with the application (annexure 6).

35. The *locus standi* of the TSL to appear in these proceedings has also been challenged and its *mala fide* could be gauged from the letter sent to the RP on 22.02.2018 to cancel and reject the bid filed by the Liberty House which is admitted in the reply. The aforesaid letter has been concealed by TSL deliberately. According to the Liberty House the procedure is handmaid of justice and the resolution plan submitted by the Liberty House complied with all the requirements of the code and regulation framed thereunder. The refusal to open the resolution plan submitted by the Liberty House is wholly unfair, arbitrary, unreasonable and contrary to public interest. The deadline fixed by the process document is a matter of convenience and has no sanctity in law either under the Code or Regulation. Any process adopted by the RP or CoC cannot override the objective of the Code which is to maximize the value of asset and take into account the larger public interest. In the expression of interest published by RP on 21.9.2017 no deadline

17

for submission of resolution plan by prospective resolution applicant has been specified. Referring to the regulation as on 21.9.2017 it has been submitted that the resolution plan could be submitted 30 days before the expiry of the maximum period permitted under section 12 for CIRP process i.e. 180 days or 270 days as the case may be. It is claimed that Liberty House is highly qualified and submitted its competitive resolution plan on time; and it has disclosed all material facts so there is no substance in the objection raised by TSL that it has concealed any document particularly when RP has regarded the applicant as a qualified resolution applicant. The period of 270 days is to expire on 22.4.2018. The time was no longer considered as an essence of the process because the CoC and RP have been changing the timeline repeatedly. No prejudice is likely to be caused by considering the resolution plan of the Liberty House which was submitted well before the meeting of CoC on 22.2.2018.

Rejoinder to the reply of CoC & RP

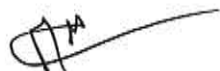
36. Rejoinder has also been filed to the reply filed by COC in the preliminary submissions. The averment made in the application by the Liberty House have been reiterated and it is controverted that the Liberty House is ineligible and a non serious participant. It is claimed that non opening of resolution plan of the Liberty House is prejudicial not only to itself but to all other stakeholders



as it would defeat the purpose of IBC which is to maximize the value of asset. It is also claimed that Liberty House is a 'turnaround specialist' and world renowned player in steel industry. It has globally acquired fame for turning out distress industries while protecting employees and their jobs; and also by creating new jobs. The details of achievement have been listed in a tabulated form. It is also asserted that procedure cannot override the objective of the Code or the larger public interest. It is pleaded that procedure is handmaid of justice and procedural provisions cannot be stretched and considered as mandatory unless it causes serious general inconvenience. A doubt has been raised on the credibility of CoC by submitting that it never deliberated on the resolution plan offered by Liberty House and what was the decision taken on its letter dated 13.02.2018. A reference has been made to the articles published in Print media to show that there is no substance in the submission of the CoC that the bid amount offered by resolution plan applicant like TSL became known. Reference has been made to the article published in Business Standard dated 09.02.2018 where the TSL is stated to have given a bid of Rs.11500 crores and in the same paper in another article dated 15.02.2018. The amount of bid mentioned is Rs.12000 crores. In an article published in the Hindu dated



- 15.02.2018 the amount of bid is Rs.24000 crores. The averment with regard to the opening of floodgate has also been controverted.
37. It has been pleaded that section 29A introduced in the Code vide ordinance dated 23.11.2017 the eligibility requirements and the applicant has taken due care of complying with the eligibility requirement when he filed his resolution plan. The CoC has been reminded of performance of its duties and reliance has been placed on the observation of *Mehrwan Homi Irani & Anr. v. Charity Commissioner, Bombay AIR 2001 SC 2350*
38. It is alleged that CoC did not place on record the minutes of meeting dated 8.2.2018 to show the resolution plan was submitted by other two resolution applicants were opened. According to Liberty House it is falsified by letter dated 20.2.2018 sent by RP where no such fact has been stated or recorded. Reliance has been placed on the observations made in the order dated 9.2.2018 passed by NCLT in the case of Rave Scans Pvt. Ltd. Case No.(IB)-01(PB)/2017.
39. Rejoinder has also been filed to the reply filed by RP and the averments made in the petition have been reiterated. There are no new facts other than the one already pleaded in the rejoinder filed to the reply to the CoC. It is however, pertinent to refer to the assertion that VDR was set up to aid the resolution applicant to make an informed decision before submitting the resolution plan.



The Liberty House has claimed that based on its enquiry, research and information available in public domain, it had formulated and submitted a detailed resolution plan which is in full compliance of requirement of the Code. Therefore, non access to VDR by the applicant could not constitute a basis for non consideration of its resolution plan as no prejudice is caused to CoC or RP. Similar arguments have been advanced with regard to site inspection. It has also been asserted that process document was never ever treated by RP and /or CoC as sacrosanct, mandatory, or binding documents nor the time lines laid down therein has been adhered to. The RP has admitted that the process document was introduced only on 14.12.2017 which is three months after the publication of notice inviting EOI and about four weeks before the resolution plan were to be submitted. Other facts have also been noted in the preceding paras and it would not warrant to repeat the same.

40. We have heard learned counsel for the parties at a considerable length. On behalf of the Liberty House Mr. A.S. Chandhiok, Mr. Anand Chibber and Mr. K. Datta, learned senior counsel have made following submissions:-

- (i) The Liberty House qualifies the 'qualification criteria' and falls in Category A of the pre qualification criteria (annexure-5). In its EOI it has disclosed adequate data



showing fulfilment of pre qualification criteria which shows turnover of more than Rs.43000 crores and net worth of Rs.3200 crores for the year ending 31.03.2017. The audited financial statement disclosed a net worth of about US\$ 508,456,000 which is equivalent to Rs.3200 crores and comprehensive income amounted to profit of US\$ 59,648,000 for the year ending 31.03.2017. The RP has treated the applicant to be qualified in terms of the eligibility criteria when he wrote to Liberty House in November 2017 and has waived the delay if any in the submission of EOI. The RP has accepted the EOI of Arcelor Mittal and Liberty House much after 6.10.2017 which was the last date stipulated in the public notice dated 21.09.2017. Therefore, the deadline of 06.10.2017 was neither sacrosanct nor considered binding. It has been argued that deadlines were changed three times. It is on that basis that correspondence was exchanged between RP & Liberty House which rests with an email dated 20.11.2017. The RP asked the applicant to provide a confidentiality undertaking and make payment of Rs.10 lakhs (non-refundable) to enable the applicant to access the Vedio Data Room (VDR) set up where the prospective resolution applicants were permitted to access data.



According to the learned counsel the VDR did not have any other information what was already in public domain. Therefore, the resolution plan without VDR could be submitted. It has also been submitted that in any case VDR or site visit is for the benefit of Resolution Plan applicant and no prejudice would be caused to anyone except the Liberty House.

(ii) It was then submitted that RP only sought affidavit in terms of the new regulation 29A of the Code and the amended Regulation 38(3) of CIRP Regulations, 2016. The aforesaid averment is substantiated by email dated 2.12.2018, 8.12.2018 & 16.12.2018. No eligibility or qualifying documents were sought from the Liberty House. The non-mentioning of the aforesaid emails cannot be regarded as suppression of material facts. In any case all the e-mails have now been filed by the Liberty House in the additional affidavit.

(iii) It was vehemently argued that Liberty House has complied with the timeline provided under the Code and Regulation. At the time when advertisement inviting EOI was issued on 21.09.2017 an express reference was made to Regulation 39(1) of the CIRP Regulations 2016.

According to EOI only two requirements were to be

✓

fulfilled namely (i) **that a public invitation for resolution applicant had to be made and (ii) an endeavour was to be made for submitting a resolution plan thirty days before expiry of the maximum period permitted under section 12 of the Code.** The Regulation 39 was amended by the IBBI on 31.12.2017 w.e.f. 01.01.2018. If the provision of new regulation were to be applied then a fresh public notice was required to be issued to highlight the change in section 25(2)(h) and Regulation 39(1). According to amendments made in section 25(2)(h) the RP was required to invite prospective resolution plan applicants who fulfilled such criteria as may be laid down by him with the approval of CoC having regard to the complexity and scale of operations of the business of the corporate debtor. It further provides that such other conditions as may be specified by the IBBI were also required to be fulfilled. In the unamended provisions he was to communicate to the prospective lenders, investors and any other persons to put forward resolution plan a month before the maximum period provided by S.12 of the Code. It was in the then prevailing regime that no timeline was fixed for submission of resolution plan in the advertisement dated 21.09.2017.



The amended regulation 39(1) provides that resolution applicant submitted a resolution plan within time given in the EOI which was made under the then prevailing section 25(2)(h) of the Code. **Moreover advertisement dated 21.09.2017 provided that detail process and deadline for submission of resolution plan were to be separately communicated to the potential resolution applicant and thereafter no other advertisement have ever been issued by RP fixing to any timeline for submission of plan** nor any such information was ever communicated to the applicant or publicly announced. The deadline set up by process document could not be regarded as sacrosanct as it did not have any statutory force. It has never been advertised. Moreover, the initial deadline for submission of resolution plan as per the process document was 10.01.2018, extended to 21.01.2018 and thereafter further extended to 08.02.2018. Reasons for extension orally given is ex-facie false as section 29A was introduced on 23.11.2017. In fact the RP acted arbitrarily while extending the time and placing proposal before CoC. In clause 1.14.13 it is emphasis that discretion for extension of time should be guided by the consideration of obtaining the best

PTA

resolution plan for the company. Reference has also been made **during arguments on clause 1.6.1 of the process document which use the word 'at any time'. It would mean that timeline were not mandatory/sacrosanct as per the confidential process document.**

- (iv) Learned senior counsel has also argued that in the impugned order dated 22.02.2018 the ground for returning the resolution plan without opening it is that the Liberty House has failed to meet the requirement without specifying the details and second ground is that prejudice would be caused to the whole process, what prejudice would be caused has not been specified. Placing reliance on the judgment in case of *Mohinder Singh Gill v. Chief Election Commissioner 1987(1) SCC 405* it has been argued that no additional reason in support of the impugned order could be projected before the court later except the one given in the order itself because such reasons could easily be interpolated in the record after lacuna is disclosed.
- (v) The fair value has not been determined and the amended regulation 2(i) w.e.f 06.02.2018 has been violated. The fair value was required to be determined by appointment of two registered valuers as per section 35 which is



amended on 06.02.2018. It cannot be at the discretion of the RP/CoC to apply one amendment and refuse to apply other.

41. On behalf of RP Mr. Kathpalia learned senior counsel has made following submissions:-

- (a) The applicant has failed to disclose material facts and documents and on that score alone the application is liable to be dismissed. The suppression of material facts and documents is intentional. According to the learned counsel the applicant has attempted to project its actions as act of good faith whereas it has miserably failed to perform its obligation under EOI. Substantiating his arguments learned counsel has submitted that Liberty House had failed to disclose the factum of submitting the EOI beyond the date prescribed in the advertisement; it has concealed its own mail dated 20.11.2017, acknowledging the email sent by RP on 18.11.2017. It was stated in its mail that RP asked the Liberty House to furnish additional documents and confidentiality undertaking in accordance with the CIRP Regulation and it had undertaken to do the needful. Liberty House failed to submit the affidavits in the format prescribed concerning the provisions of section 29A despite repeated reminders from the RP on 02.12.2017, 08.12.2017 and 16.12.2017. In this regard



Mr. Kathpalia has placed reliance on para 10 of the judgment rendered by Hon'ble the Supreme Court in the case of S.J.S. Business Enterprises (p) Ltd. v. State of Bihar and Ors (2004) 7 SCC166 and para 32 of the judgment rendered in Prestige Lights Ltd. v. State Bank of India (2007) 8 SCC 449. Controverting the argument of Liberty House urging that the liquidation value and fair value have not been disclosed, it has been submitted that it runs contrary to the scheme of the Code and CIRP regulation which were specifically amended to provide that the liquidation and fair value should only be disclosed to the Members of CoC. In that regard reference has been made to Regulation 35 (2) of CIRP Regulation.

- (b) It has also been submitted that the Liberty House was aware of the last date of submission of bids and the name of the entities submitting the bids which is evident from the letter dated 13.2.2018. It has also been submitted that presentation of document stipulated in the Confidentiality Process document by the Liberty House raises a doubt about its *bona fide* that it has unauthorised access to the process document. In that regard reliance has been placed on the judgment of NCLT Kolkata Bench rendered in the case of Punjab National Bank v. Divya Jyoti Sponge Iron Private Limited CA (IB) No.363/KB/2017 (see para 12-14).

AT

- (c) On merit Mr. Kathpalia has argued that fulfilment of qualification criteria prescribed by the RP in consultation with CoC was a *sine qua non* for consideration of an application of the Liberty House. The prospective investors who meet the qualification requirements published on the website of the Corporate Debtor were invited to submit resolution plan. The qualification criteria required minimum tangible net worth of the resolution plan applicants to be Rs.1000 crores at a group level and every applicant was inter-alia required to submit a certificate from Chartered Accountant/Auditor certifying that applicant meets the qualification criteria. The EOI was submitted by Liberty House much beyond the due date on 13.11.2017 and yet it failed to furnish qualification documents including the mandatory Chartered Accountant Certificate certifying the net worth. As the entire process was at nascent stage no prejudice would have been caused subject to the applicant submitting all eligible documents prescribed in the format dated 21.9.2017 which he failed to submit. The RP repeatedly sought the aforesaid documents and also requested the necessary confidentiality undertaking in accordance with section 29A of the code along with a deposit of Rs.10 lacs to enable access to VDR containing all the documents with

17/11

respect to Corporate Debtors necessary for resolution applicant to prepare his comprehensive resolution plan. For a period of 3 months from November to February 2018 no steps were taken by the Liberty House. It is only after crossing the barrier of qualification criteria that stage A of the process is completed and those who qualify were permitted to be promoted to the next stage B. A detailed process and timeline for submissions of resolution plan was to be communicated only then as per the terms of the public notice. All this was done to ensure the timeline and the evaluation matrix was examined which was set up by RP in consultation with CoC. The process document and the VDR were made available only to the serious applicants who have successfully answer the qualification criteria whereas the one who fail to fulfil the qualification criteria were not permitted to have access to process document or to VDR and other information. Liberty House even failed to submit eligibility affidavit.

- (d) It has further been argued that the pre-qualification criteria and the instructions issued by the RP cannot be given a go by as it would result in discrimination arbitrariness and favouritism which would totally oppress Rule of Law and our constitutional scheme. In that regard reliance has been placed on para 24 of the judgement of Hon'ble the Supreme

AM

Court in *WB State Electricity Board v. Patel Engineering Co. Ltd. & Ors.* (2001) 2 SSC 451; paras 8 and 16 of the judgement of *M/s G.J. Fernandez v. State of Karnataka & Ors.* (1990) 2 SSC 488 and paras 12 and 30 of the judgment of *Laxmi Sales Corporation v. Bolangir Trading company and others* (2005) 3 SSC 157.

- (e) It has then been argued that the fundamental principles applicable to bids or tenders are equally applicable with respect to the resolution plan under the Code as public element is present in such cases. It involves huge amount of money of public and private sector Banks and other Financial Institutions. In that regard it has been submitted that tender is akin to invitation to offer and if the conditions stipulated in the tender notice provided a particular date and time for submission then the same is required to be strictly adhered to and no deviation is permissible. In that regard reliance has been placed on a catena of judgements; para 84 of the judgment of *Tata Cellular v. Union of India* (1994) 6 SCC 651; para 13 of *Process Systems and Ors v. Agency for Non Conventional Energy and Rural Technology (ANERT) & Ors* AIR 2000 Ker 209; Para 35 of the judgment of *Ramana Dayaram Shetty v. International Airport Authority of India & Ors* (1979) 3 SCC 489. It has been contended that CoC along with RP



have acted within its jurisdiction while laying down eligibility criteria as per the CIRP Regulations.

- (f) Mr. Kathpalia learned counsel also submitted that acceptance of the resolution plan of the Liberty House beyond prescribed deadline would result into a prejudicial and arbitrary act on the part of the RP/CoC. According to the advertisement a proposed document dated 14.12.2017 was provided to all the potential resolution applicants who qualified the qualification criteria.
- (g) Mr. Kathpalia however submitted that those who fulfilled the qualification criteria were provided the 'process document' dated 14.12.2017. It was clearly mentioned in the process document that resolution plan were to be submitted on or before 10.1.2018. This date was later extended twice for those who fulfilled the qualification criteria. The first addendum added with the process document was issued on 3.1.2018 and second addendum was issued on 26.1.2018 which was on account of amendments to the Code and CIRP Regulations. In that regard reference has been made to the Insolvency and Bankruptcy Amendment Ordinance, 2017 which came into force w.e.f. 23.11.2017 and Insolvency and Bankruptcy (Amendment) Act, 2018 w.e.f. 19.1.2018 along



with the various corresponding amendments in CIR Regulations.

- (h) Mr. Kathpalia then submitted that no judicial intervention would be warranted as the RP and CoC have followed the due process of law and complied with all the requirements laid down by the Code. According to the learned counsel IBC is a complete Code and it is prerogative of RP and CoC to finalize the process condition and timelines. It is an essential 'Commercial Function' and scope of the judicial intervention is extremely limited. According to the learned counsel the intervention by the Adjudicating Authority would be warranted if it is found that there was arbitrariness in procedure, the decision of RP/CoC were irrational and *mala fide*. In that regard reliance has been placed on para 22 of the judgement of *Jagdish Mandal v. State of Orissa and Ors.* (2007) 14 SSC 517 and para 19 of the *Michigan rubber (India) Ltd. v. The State of Karnataka* (2012) 8 SCC 216. A person who has taken part in the process is estopped from challenging the same as has been held in paras 12 and 15 of the judgement rendered in the case of *Ashok Kumar and Ors v State of Bihar* (2017) 4 SSC 357; para 16 of the judgment of *H. C Pradeep Kumar Rai & Ors. v. Dinesh Kumar Pandey & Ors.* (2015) 11 SCC 493 and paras 14 & 15 of the judgment of

✓

Larsing M.V. Meghalaya Tourism Development Corporation Ltd. & Anr. (2009) 3 GLR 847. A cognate argument has been raised that the legislature in its wisdom has categorically omitted the jurisdiction of the Adjudicating Authority to examine and review the reasons for rejection of a resolution plan. The argument seems to be that commercial wisdom of the CoC cannot be subjected to judicial review and in that regard reliance has been placed on para 13 of the judgment of *Western India Erectors Ltd. M.A. No.524 in C.P.31.I&BP/2017 (Mumbai)*, paras 37 & 38 of the judgment *ICICI Bank Ltd. v. Innoventive Industries, MANU/NC/2398/2017* and paras 5 to 7 of the judgment of *Vivek Vijay Gupta v. Steel Konnect (India) Pvt. Ltd., C.P (IB) No.5/7/NCLT/HM/2017 (Ahemdabad)*. It has also been submitted that as long as the provisions of section 31 of the Code are complied with a resolution plan must receive approval of the Adjudicatory Authority-NCLT.

- (i) Mr. Kathpalia concluded his argument by submitting that the principles applicable in the erstwhile regime of winding up cases are not attracted on account of paradigm shift brought about by the Code. Under old regime Corporate Debtor was *custodia legis* of the asset of a company under liquidation and the custody of the assets has now been shifted to the CoC and

AT

RP. The Code has ensured adequacy of the price by creating an eco-system wherein subsequent to a default in repayment of a debt the creditors are put in control of the company with the assistance of specialised Insolvency Professionals and are guided by a specialised regulator who are familiar with the realities of commercial world. It has therefore been submitted that the satisfaction of CoC regarding adequacy of price is of paramount importance. In that regard reference has been placed on Sections 18, 25 and 28 of the Code. Referring to the judgement in the case of *Divya Jyoti Manufacturing Pvt. Ltd. (Supra)* it has been argued that the aforesaid view has now been considerably water down by a recent judgment of Hon'ble the Supreme Court rendered in the case of *Vedika Procon Private Limited v. Balleshwar Greens Pvt. Ltd. AIR 2015 SC 3103* and *Valji Khimji and Company v. Official Liquidator of Hindustan Wipro Products (Gujarat) Limited (2008) 9 SSC 299*.

42. On behalf of CoC Mr. Ramji Srinivasan learned Senior Counsel has made following submissions:-

- (i) Mr. Srinivasan has reiterated that CoC & RP is empowered to lay down criteria of selection concerning timeline for submission of resolution plan. Both under the pre-amended and post amended provisions of section 25(2) (h) of the Code



the difference is recognised between prospective Resolution Applicant and Resolution Applicant which means an applicant who successfully crosses a threshold of eligibility criteria and would become eligible to participate in the next stage of resolution process namely submission of a resolution plan. Therefore, it is permissible to RP & CoC to undertake stage-wise evaluation and divide the process in two stages.

- (ii) It would advance the object of the Code enabling efficient and speedy consideration of serious and eligible application. The failure to adhere to strict time lines of 180 days or 270 days would cause a severe prejudice to the Corporate Debtor, the lenders and other stakeholders.
- (iii) Liberty House did not submit the documents required for qualification and there was non-compliance of section 29 A.
- (iv) Judicial review is limited to IBC process.
- (v) Liberty House was well aware of the last date of submission of resolution plan. The terms of tender have to be strictly construed and submission of bids beyond deadline would not only derail the entire process but would result into injustice to other bidders. In that regard reliance has been placed on paras 10, 14, 15, 27 & 28 of the judgment in *Sorath Builders v. Shreejirupa Buildcon Ltd. & Anr.* (2009) 11 SCC 9 and para



20, 23 & 26 of the judgment of *Modi Corp Ltd. v. Union of India and Anr.* 2002 SCC online Del 119.

- (vi) Allowing the present application would open floodgates for other resolution applicants. It would therefore be an endless process. Reliance has been placed on the judgement of *Innoventive Industries Ltd. v. ICICI Bank and Ors* (2018) 1 SCC 407-page 425-426 and argued that speed is essence of IBC. In that regard reliance has also been placed on para 24 of the judgement rendered in the case of *Official Liquidator U.P and Uttarakhand v. Allahabad Bank & Ors.* AIR 2013 3 SC 1823 and para 17 of the judgment of *Meerut Development Authority v. Association of Management Studies – AIR 2009 SC 2894.*
- (vii) Mr. Srinivasan then argued that there were good reasons to extend the last date of submission of resolution plan application. On 3.1.2018 the submission date was revised to 10.1.2018 and then to 21.1.2018 (page 57-58 of CoC reply). Reasons for extension is that CoC in its meeting held on 26.12.2017 accorded approval for more time for CIRP Process by 90 days and the period was extended for submitting resolution plan from January 10 to January 29, 2018. On 26.1.2018 second addendum to the process document was issued and the last date for submission of resolution plan was revised to 8.2.2018. The reason is one of the qualified

AA

6.
resolution applicant – Tata Steel requested that on account of national holiday the date may be changed. Mr. Srinivasan also submitted that he adopt all the submission made by Mr. Kathpalia who has appeared on behalf of the RP.

43. Dr. A.M. Singhvi, learned senior counsel appearing for the TSL has prefaced his arguments by giving few snippets. According to Dr. Singhvi on principle any individual who takes liberty with law and does not submit to its mandate should not be rewarded by accepting a challenge on his behalf. A tilt in favour of such a mischief-monger would marginalized the bid system which have developed around Article 14 of the Constitution under the Tender law, Company law and the Insolvency and Bankruptcy Code. The bid system according to authoritative judgments of Hon'ble the Supreme Court rendered in the cases like 2G Spectrum namely *Subramanian Swamy v. A. Raja*, (2012) 11 S.C.R. 873 must be fully applied. The tender principles are the species of the same genus and there is marriage of private and public law because it involves the larger public interest. Reliance has also been placed on the judgment rendered in the case of *M/s Synergy Steels Limited v. Petroleum and Natural Gas Regulatory Board*, W.P. (C) No. 5195/2015 & CM No. 9435/2015 dated 09.10.2015 & *M/s. Nayak Infrastructure Pvt. Ltd. v. State of J&K and Ors.*, 2013 SCC



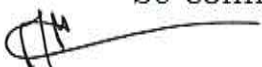
Online J&K 272 to argue that a person who come after the deadline has no *locus standi* to challenge the tender conditions. It has also been highlighted that once it is found that a level playing field has been created according to the norms laid down in Article 14 of the Constitution any party requesting to create a non level playing field must not be heard. An entity like Liberty House should not be allowed to take benefits of its own wrong because it would result into penalizing the law observer like TSL and awarding the law breaker. In any case once the bids submitted by other entities have reached the hands of the Resolution Professional then no one else could be allowed to participate after the due date because the principles of secrecy would be breached. It has also been submitted that participation in a bid is neither a statutory right nor it is a constitutional right. However, it may be a right in a limited sense couched in the limitation of the process and its eco system. Likewise, the object of maximization the assets cannot ipso facto be accepted as a principle in isolation unless it is sought to be achieved within the inbuilt parameters set out in the process.

44. It has also been pointed out that speed is an essence of such a process under the Insolvency and Bankruptcy Code and grant of extension of time does not make it less sacrosanct. The Liberty House-applicant cannot enter the process like a bull in china shop

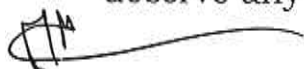


which may result into damaging the whole edifice created by the Resolution Professional and Committee of Creditors by hard labour over the months. It has further been submitted that the provisions of Section 29 (A) read with 25 (2) (h) of the Code would stand violated and it would be violation of the statutory process contemplated by the aforesaid provisions if the application filed by the Liberty House is ordered to be considered. According to Dr. Singhvi the stand taken by the applicant is self-contradictory in a number of ways for example with regard to the time limits and the knowledge about the last date.

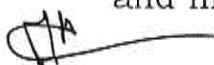
45. On fact learned counsel has argued that the startling facts can be divided into three parts namely before 'Expression of Interest' was floated, second before the bid date and last after the bid date. The Resolution Professional floated expression of interest where the potential Resolution Applicant were required to submit the relevant documents concerning qualifications on or before 06.10.2017 which was the deadline fixed. The Liberty House-applicant admittedly failed to adhere to the last date and filed his expression of interest on 13.11.2017 whereas TSL submitted its expression of Interest before the closing date. On the examination of the expression of interest submitted the eligibility was to be determined and in terms of the public notice the time line was to be communicated to the qualified potential Resolution Applicant



only. After the expression of interest, the Committee of Creditors in its meeting dated 11.11.2017 and 17.11.2017 authorized Resolution Professional to issue process document setting out the deadline, process and criterion for submission of resolution plans. Despite the fact that Resolution Professional kept on asking the Liberty House-applicant to submit confidential undertaking and various other documents like audited financial statements, Memorandum of Association, Articles of Association, Proof of address, incorporation documents, copy of PAN Card/Tax identification number, a Chartered Accountant certificate stating that qualification criteria is met and a Board Resolution authorizing the signatory of the Expression of Interest. The Resolution Professional again sought the aforesaid documents on 20.11.2017. The Liberty House promised to comply with all the requirements but never replied till 13.02.2018. The last date for submission of resolution plan fixed by the Resolution Professional was 10.01.2018 and by first addendum to process document it was changed to 29.01.2018. The second addendum to process document extended this date to 08.02.2018. On account of ordinance issued adding Section 29A, affidavits were sought. According to the learned Senior Counsel the applicant has violated the disciplinary process at every step and therefore, does not deserve any concession at the hands of this Tribunal.




46. Dr. Singhvi has argued that in the cases of auction sale under the Companies Act once the auction sale notice has been given adequate publicity then one's failure to participate would simply result into his absence and later on he cannot be permitted to come forward with a higher bid. In that regard reliance has been placed on the observations made by Hon'ble the Supreme Court in paras 11, 12 & 28 in the case of *Valji Khimji and Company v. Official Liquidator of Hindustan Nitro Product (Gujarat) Limited and Ors.*, (2008) 9 SCC 299. According to the learned Senior Counsel such a sale could be challenged on a very limited ground like fraud etc. Reference has been made to the provisions of Regulation 35 dealing with disclosure of liquidation value to the Resolution plan applicant which conform to the provisions of the Code and the Corporate Insolvency Resolution Process Regulations. Likewise, reliance has been placed on a judgment of Hon'ble Delhi High Court rendered in the case of *Modi Corp Limited v. Union of India & Another*, 2002 (62) DRJ 542 (para 5, 20, 21 & 26) where as a part of disinvestment process of VSNL the expression of interest was floated and the Modi Corp Ltd. with its consortium members wanted to submit expression of interest after the time fixed was over which failed. Emphasizing the object of the Insolvency and Bankruptcy Code it has been pointed out that speed is the essence and maximizing the value of the assets of the company could be



achieved only in a time bound manner. In that regard reliance has been placed on the observations made by this Bench in an order dated 15.02.2018 passed in the case of *Clutch Auto Limited*, (IB) No. 15(PB)/2017, Dr. Singhvi has argued that paradigm shift between the earlier regime and the post Insolvency and Bankruptcy Code has been noted to be the time line which is associated necessarily with the value of the assets which deplete very fast. Based on the observations made in the aforesaid order Dr. Singhvi has highlighted that acceptance of commercial decisions of Committee of Creditors ought to be a rule and interference with it should be an exception. Likewise, reliance has been placed on similar observations made in the order dated 19.12.2017 rendered in the case of *Bank of India v. Tirupati Infraprojects Private Limited*, (IB) No.104(PB)/2017 to argue that allowing the participation of a person after the deadline would amount to changing the rules of the game after the game has begun. Expanding his argument, it has been submitted by Dr. Singhvi that if a rule provides where a power is given to do a certain thing in a certain way then that thing must be done in that way or not at all. Other methods of performance are necessarily forbidden. In that regard reliance has been placed on the observations made by the Privy Council in its judgment rendered in the case of *Nazir Ahmad v. King-Emperor*, 1936 (44) L.W. 583.



- The aforesaid view has been reiterated by Hon'ble the Supreme Court in the case of *Macquarie Bank Limited v. Shilpi Cable Technologies Limited*, 2017 SCC Online SC 1493 (para 41) and has argued that the statutory provision must be strictly complied with.
47. It is further submitted that level playing field is an essential concomitant of Article 14 and in that regard, reliance has been placed on the judgment of Hon'ble the Supreme Court rendered in the case of *Reliance Energy Limited and Another v. Maharashtra State Road Development Corporation Limited and Ors.*, (2007) 8 SCC 1. Drawing our attention to the observations made in para 36 learned Senior Counsel has argued that level playing field has now developed as a constitutional doctrine which is embodied in Article 14 and 19 (1) (g) of the Constitution. The doctrine provides space within which equally placed competitors are allowed to bid so as to subserve the larger public interest.
48. The time is essence of the contract and reliance in that regard has been placed on the judgments under Section 55 of the Contract Act in the cases of *Arosan Enterprises Ltd. v. Union of India and another*, (1999) 9 SCC 449 (para 13) and *Kailash Nath Associates v. Delhi Development Authority and Another*, (2015) 4 SCC 136.
49. Learned Senior Counsel then placed reliance on the provisions of Regulation 38 of the Corporate Insolvency Resolution Process Regulations. Regulation 38 (1A) was incorporated on and w.e.f.
- 

05.10.2017. According to Regulation 38 a resolution plan must contain various features and if a resolution plan does not comply with the requirements of time limits then it is liable to be rejected. Likewise, there is a radical amendment brought in Regulation 39 w.e.f. 07.11.2017 which provide that only those resolution plans could be approved which meet the requirement of Regulation 39 therefore, the time limit fixed by the Resolution Professional in consultation with the Committee of Creditors assumes character of statutory requirement. Any prospective bidder violating the time line would not be eligible. Our attention has also been invited to the provisions of Section 29A where list of persons not eligible to submit resolution plan have been detailed. Therefore, the time line finalized by the Resolution Professional in consultation with the Committee of Creditors was required to be adhered to. Dr. Singhvi has then drawn our attention to para 27 of the judgment rendered in the case of *Sorath Builders v. Shreejikrupa Buildcon Limited and Another*, (2009) 11 SCC 9 and has argued that their Lordships of Hon'ble the Supreme Court upheld the time schedule attached to the notice inviting tenders and did not permit a late comer to participate in the tendering process. Likewise, reliance has been placed on para 66 of the judgment rendered in the case of *B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. and Ors.*, (2006) 11 SCC 548.

AP

50. Learned Counsel has made a pointed reference to the general principles which have been summarized by Hon'ble the Supreme Court namely (a) all essential conditions must be followed, unless there is a power of general relaxation no relaxation is to be given and (b) the bidder cannot form a cartel; (c) and that they may be give an offer to match with the rates quoted by the lowest tenderer in public interest. Attacking the antecedents and conduct of the Liberty House-applicant, learned Senior Counsel has placed reliance on an order passed by the Chandigarh Bench of the NCLT in the case of *Corporation Bank v. Amtek Auto Limited*, CP (IB) No. 42/Chd/Hry/2017 where it has participated in the Corporate Insolvency Resolution Process. The order was delivered on 24.07.2017 and the plea of self pity put forward by the applicant to gain sympathies is thus liable to be rejected because the Liberty House is fully aware of the processes and the markets in India and in order to defeat the Corporate Insolvency Resolution Process in the present case their interfering like a bull in china shop.

51. Having heard learned counsel for the parties we find that it would first be necessary to have a general survey of the Code with special reference to its chapter-II. After flagging the objects and definitions, the Code goes on to deal with the Corporate Insolvency Resolution Process in chapter-II under Sections 6 to 32 of the Code. It exhaustively deals with the procedure and progressive



steps to advance the Corporate Insolvency Resolution Process (for brevity 'CIR Process'). It is pertinent to mention that after the Corporate Insolvency Resolution Process is triggered then the broad time line of 180 days or extended period of 270 days is fixed by Section 12 of the Code. The term of the Interim Resolution Professional according to S. 16 (5) of the Code 'shall not exceed thirty days from the date of his appointment. During his tenure of 30 days he is required to make a public announcement in terms of Section 13(1)(b) of the Code immediately after his appointment. The word immediately has been explained by Explanation to Regulation 6 to mean 'not later than three days from the date of his appointment. The public announcement must contain various information as per the requirements provided by Section 15 of the Code. An Interim Resolution Professional is required to perform his/her duties under Section 17, 18 & 20 of the Code. There are various other obligations cast on the IRP including the duty of constituting a CoC as per the requirement of S. 21 r/w S. 18 (1) C of the Code. Its first meeting is to be held within seven days of its constitution (S.22). An IRP may then be appointed as RP by the CoC if not less than 75% of the voting share of Financial Creditor resolve to appoint him. Thereafter he is to conduct CIR Process by managing the affairs and operations of the Corporate Debtor (S. 23) and conduct meetings of the CoC as per the procedure



postulated in S. 24 of the Code. Section 25 (1) of the Code has listed various duties of the Resolution Professional. The RP is under a sacred obligation of preserving and protecting the assets of the Corporate Debtor including its business operation. S. 25 (2) has enumerated numerous other duties cast on the RP.

52. Before 23.11.2017 S. 25 (2) (h) of the Code stood differently. In term it meant that for the purposes of preserving and protecting assets of the Corporate Debtor the RP was to 'undertake the following actions, namely (h) invite prospective lenders, investors, and any other persons to put forward resolution plans'. This is in fact what was made known in the print media by the RP. The 'invitation seeking Resolution Plans for BPSL' as published in the press on 21.09.2017 reads as under:-

**INVITATION SEEKING RESOLUTION PLANS FOR BHUSHAN
POWER & STEEL LIMITED**

The undersigned has been appointed as the resolution professional ("RP") by the committee of creditors of **Bhushan Power and Steel Limited ("Corporate Debtor")** pursuant to the e-voting conducted under Regulation 26 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("**CIRP Regulations**"). Pursuant to the duties vested upon the RP under the terms of Section 25(1)(h) of the Insolvency and Bankruptcy Code, 2016 ("**IBC**"), the RP hereby invites all prospective investors, lenders and other interested parties ("**Potential Resolution Applicants**") who meet the qualification requirements available on the website of the Corporate Debtor (www.bhushanpowersteel.com) to put forward resolution plan in respect of the Corporate Debtor within the time lines prescribed under



Regulation 39(1) of the CIRP Regulations. Any Potential Resolution Applicant who is desirous of submitting a resolution plan as above, is required to provide the relevant qualification documents to establish satisfaction of the qualification requirements, on or before October 6, 2017 at BDO Restructuring Advisory LLP. The Palm Spring Plaza, Office No. 1501-8, Sector-54, Golf Course Road, Gurgaon-122001 Haryana. Such Potential Resolution Applicant would also be required to submit a duly stamped confidentiality undertaking as per the requirements of the IBC and CIRP Regulations as a condition for receiving the information memorandum and other relevant information in relation to the Corporate Debtor.

Please note that the RP shall present to the committee of creditors for its approval under the IBC, such resolution plans which conform to the conditions set out under Section 30 (2) of the IBC read along with Regulation 38 of the CIRP Regulations. All Potential Resolution Applicants who are desirous of submitting a resolution plan in respect of the Corporate Debtor must read, understand and comply with all requirements under IBC, CIRP Regulations and any other applicable regulations under IBC that are in force now or which may come into force subsequently, for resolution plan and all matters under, in pursuant to, in furtherance of or in relation to, this invitation.

The consideration, evaluation and approval of resolution plan submitted by RP to the committee of creditors is within the powers of committee of creditors under the provisions of the IBC and CIRP Regulations. The committee may specify evaluation criteria separately for evaluation of the resolution plans. The detailed process and timeline for submission of resolution plans shall be separately communicated to the Potential Applicant who meet the qualification requirements as mentioned above.

For clarifications, if any, please contact: mkipbpsl@bdo.in

Please note that RP reserves the right to amend or modify the Invitation without assigning any reason and without incurring any liability of whatsoever nature. Any amendment or modification shall be posted on the website of the corporate debtor www.bhushanpowersteel.com. Potential Resolution Applicants are requested to regularly visit the aforesaid website for regular updates.

Sd/-

Mahender Kumar Khandelwal

Resolution Professional – Bhushan Power & Steel Limited

53. After this public notice to the whole world no other public notice has been issued specifying a different date for submission of a Resolution Plan. It is admitted case at all hands that the process has been kept internal on the ground that those who meet the qualification requirements were alone entitled to further informations.
54. In the aforesaid backdrop we proceed to examine the provisions of law as existed on 21.09.2017 when the Resolution Plans were invited and duly published vide public notice in the newspapers. It is necessary to read Section 12 and 25(2)(h) of the Code and Regulation 38 and 39 of the CIRP Regulations which were in vogue at the time of inviting resolution plan and the aforesaid provisions at that time as enacted originally were as under:-

Section 12

Time-limit for completion of insolvency resolution process.

12. (1) Subject to sub-section (2), the corporate insolvency resolution process shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process.



(2) The resolution professional shall file an application to the Adjudicating Authority to extend the period of the corporate insolvency resolution process beyond one hundred and eighty days, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of seventy-five per cent. of the voting shares.

(3) On receipt of an application under sub-section (2), if the Adjudicating Authority is satisfied that the subject matter of the case is such that corporate insolvency resolution process cannot be completed within one hundred and eighty days, it may by order extend the duration of such process beyond one hundred and eighty days by such further period as it thinks fit, but not exceeding ninety days:

Provided that any extension of the period of corporate insolvency resolution process under this section shall not be granted more than once.

Section 25 (2) (h)

“Duties of Resolution professional.

25. (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)
- (b)
- (c)
- (d)
- (e)
- (f)

(h) invite prospective lenders, investors, and any other persons to put forward resolution plans;”



Regulation 38

Mandatory contents of the resolution plan.

38. (1) A resolution plan shall identify specific sources of funds that will be used to pay the –

(a) insolvency resolution process costs and provide that the insolvency resolution process costs will be paid in priority to any other creditor;

(b) liquidation value due to operational creditors and provide for such payment in priority to any financial creditor which shall in any event be made before the expiry of thirty days after the approval of a resolution plan by the Adjudicating Authority; and

(c) liquidation value due to dissenting financial creditors and provide that such payment is made before any recoveries are made by the financial creditors who voted in favour of the resolution plan.

(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.

Regulation 39 (1)

“Approval of resolution plan.

39. (1) A resolution applicant shall endeavour to submit a resolution plan prepared in accordance with the Code and these Regulations



to the resolution professional, thirty days before expiry of the maximum period permitted under section 12 for the completion of the corporate insolvency resolution process.

55. A perusal of Section 12 of the Code would show that initial time limit for completion of Corporate Insolvency Resolution Process is 180 days from the date of admission of the application which is extendable to 270 days if the Committee of Creditors by a vote of 75% of voting share passes a resolution to that effect. The provisions of Regulation 39 of CIRP Regulations as stood on 21.09.2017, postulate that a resolution applicant shall endeavour to submit a resolution plan 30 days before the expiry of the maximum period permitted under Section 12 for completion of the CIR Process. It is evident that a resolution applicant could submit its plan 30 days before expiry of the maximum period permitted under Section 12. It is also noteworthy that Regulation 39 uses the word 'endeavour' which according to the dictionary meaning implies that sincere and earnest efforts are required to be made. It leaves a room for further concession of a day or two. Section 25 (2) (h) highlights an other notable feature. It is considered a duty of the Resolution Professional to invite prospective lenders, investors and any other person to put forward resolution plans. There is no provision made by Section 25 indicating that a Resolution Professional needs to go to the Committee of Creditors



to seek its permission for inviting resolution plans for the Corporate Debtor or it is required to seek approval of the basic qualification to be eligible for a resolution applicant. It may be true that after amendment made w.e.f. 23.11.2017 in Section 25 (2) (h) a Resolution Professional is under obligation to invite prospective resolution applicant to submit a resolution plan who fulfil a criteria as may be laid down by him with the approval of the CoC 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 IBBI. The amended provisions of Section 25 (2) (h) would read as under:-

Section 25 (2) (h)

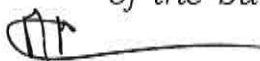
“Duties of Resolution professional.

25. (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)*
- (b)*
- (c)*
- (d)*
- (e)*
- (f)*

(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.

56. It is significant to notice that after issuance of public notice in print media on 21.09.2017 (supra) the Resolution Professional has not issued any other public notice notifying the criteria which might have been laid down by the Committee of Creditors. If no new public notice notifying the criteria finalized by CoC in terms of amendment is issued, then the original public notice would prevail with regard to the period for receipt of Resolution Plan application.
57. In the aforesaid context it would be necessary to make a brief survey of the minutes of meeting of Committee of Creditors. The first meeting of the Committee of Creditors was held on 01.09.2017. There was no discussion with regard to inviting Resolution Plan Applicants to file the resolution plans as at that stage the RP was not supposed to seek any approval from the CoC to qualification requirement or any other criteria because unamended S. 25 (2) (h) of the Code did not oblige him to do so. However, two other significant resolutions passed in the first meeting may be noticed for other purposes. Firstly, the Insolvency Resolution Professional was appointed as Resolution Professional by item No. 12 and vide item No. 9 approval was accorded to the appointment of registered valuer and professional in accordance



with Regulation 27(a) and Regulation 33 of the CIRP Regulations.

The names of two companies are as under:-

| SR. No. | Name of the Registered Valuer | Fees agreed with the valuers/professional |
|----------------|--------------------------------------|---|
| 1 | Duff & Phelps India Private Limited | ₹ 1,05,00,000/- (Inclusive of all Out of Pocket Expenses) plus applicable taxes) |
| 2 | Price Waterhouse & Co. LLP | ₹ 55,00,000/- (Inclusive of all Out of Pocket Expenses) plus applicable taxes) |

58. After the first meeting the invitation seeking resolution plans was published in the print media on 21.09.2017 which clearly highlights that the Resolution Professional as per the unamended provision has proceeded to perform his duties cast on him by Section 25 (2) (h) of the Code. The public notice dated 21.09.2017 has already been set out in the preceding para.

59. A perusal of the invitation for resolution plans reveal few silent features. It uses the language of Section 25 (2) (h) [wrongly printed as 25 (1) (h)?]. It also lays down the qualification requirement and refers to the website of the Corporate Debtor for that purpose. It is significant to note that the resolution plan by the Resolution Plan Applicant could be submitted within the time line prescribed under Regulation 39 (1) of the CIRP Regulations. The deadline for



submitting the relevant qualification document to satisfy the qualification requirement is on or before 06.10.2017. Such Potential Resolution Applicant were also required to submit a duly stamped confidentiality undertaking as per the requirement of the Code and the CIRP Regulations which was stated to be a condition for receiving the information memorandum and other relevant information concerning the Corporate Debtor. It also makes clear that the RP was to place before the Committee of Creditors for its approval such resolution plans which conform to the conditions set out under Section 30 (2) of the Code read with Section 38 of the CIRP Regulations. It also clarifies that consideration, evaluation and approval of resolution plan was to be submitted by RP to the Committee of Creditors and that it was within the power of the Committee of Creditors under the Code and CIRP Regulations. It provides further that the CoC was to specify an evaluation criteria separately for evaluation of the resolution plans. It is significant to note that the public notice clearly specifies that 'the detailed process and timeline for submission of resolution plans shall be separately communicated to the Potential Resolution Applicant who meet the qualification requirements as mentioned above.'

60. The Liberty House submitted its formal expression of interest on 13.11.2017 (Annexure A/4). In the third meeting of the CoC held



on 31.10.2017 under item No. 9 the Resolution Professional pointed out that seven expression of interest were received from the Resolution Applicants and their names were furnished which are as under:-

| Sr. No. | Resolution Applicants |
|----------------|--|
| 1 | Vedanta Limited |
| 2 | Tata Steels Limited |
| 3 | JSW Steel Limited |
| 4 | AION Capital Management Limited |
| 5 | Mohammed Ayub Shikh Mohammed Shahid |
| 6 | Middle East Integrated Steel Limited |
| 7 | Shri Sanjay Singal & Others – the existing Promoters |

61. The members of the team of the Resolution Professional brought to the notice of the CoC members that a call has been received from Liberty Group a day before the date of meeting showing interest in the Corporate Debtor company and participation in the CIR Process. The matter was discussed and the team of the Resolution Professional suggested that any interested party may submit their resolution plan till the end of 150th day of the CIRP period even if Resolution Professional refuses to extend the time



beyond 06.10.2017. The concluding portion of item No. 9 in the minutes sheet is as under:-

“The Chairman informed the members that since the common consensus is that the EoI of Liberty Group or any other interested party should not be accepted post the cut-off date for receiving EoI, it is better not to accept the EoI of Liberty Group. However, the Chairman clarified that this would not stop any party other than 6 RAs from submitting a resolution plan and that the members may consider the resolution plan of any other party if and when they submit the same before the 150th day of the CIRP.”

62. The aforesaid facts put it beyond any iota of doubt that a CIR Process in this case has proceeded on the assumption that a resolution plan could be submitted 30 days before expiry of maximum period permitted under Section 12 for completion of the CIR Process which means 150th day or 240th day as the case may be.

63. Mr. A.S. Chandhiok, and Mr. Anand Chibbar and Mr. K. Dutta, learned Sr. Counsel have vehemently argued that in the absence of any public notice contrary to the one issued on 21.09.2017 no other time line could be fixed and the refusal of CoC to open the ‘Resolution Plan’ and its rejection on the ground of delay was based on the process which was internal affairs.



64. The resolution plan in the present case was submitted on 20.02.2018. The period of 180 days was extended to 270 days on an application filed by the Resolution Professional under Section 12 (2) vide order dated 22.12.2017. The period of 270 days admittedly would be expiring on 22.04.2018. If we apply the aforesaid yardstick then the decision of the CoC in its meeting dated 21.02.2018 would not be sustainable. Under item No. 9 discussion took place on the resolution plan submitted by Liberty House and reference was made to an email sent by it to the RP on 13.02.2018. The Resolution Professional also informs the CoC in its meeting dated 21.02.2018 that he received a resolution plan on 20.02.2018 although it was after the expiry of the time line prescribed in the process document, i.e., 1400 hours IST on 08.02.2018 (internal process). The Resolution Professional also disclosed to the CoC that the packet is stated to contain a Resolution Plan, the Liberty House has submitted another envelope which is stated to contain two drafts of Rs. 25,00,00,000/- (Rupees Twenty Five Crores) and Rs. 10,00,000/- (Rs. Ten Lacs Only) respectively. The Resolution plan in the original sealed envelope as received by the RP was placed before the members of the CoC. It was further pointed out that in the light of the amended provisions of Regulation 39 (1) of the CIRP Regulations all Resolution Applicants were required to submit



their resolution plan in terms of the time line given in the public notice inviting the expression of interest. It was also pointed out that Liberty House submitted their bids after the other two bids had been received which were under evaluation. In the aforesaid facts and circumstances the legal counsel advised the Members of the Committee of Creditors that the unopened bid should be returned to the bidder Liberty House on the ground that it has come after the stipulated timelines, when the other two bids have been opened and were under Evaluation. The other members raised some queries and objections. However it seems that the Committee of Creditors decided to return the packet unopened on the following two grounds as given in the letter sent to Liberty House by the Resolution Professional:-

- “(i) fair opportunity was given to all interested parties to participate in the corporate insolvency resolution process of BPSL by complying with the requirements of the *Advertisement*. After following a fair and transparent process of shortlisting of Potential Resolution Applicants, Process Document was issued to complaint Potential Resolution Applicants for submitting the resolution plans. *The Process Document was not issued to those who (including Liberty House) failed to submit all necessary documents and undertakings*, and therefore after shortlisting the complaint Potential Resolution Applicants, running the



process for more than three months and receipt of the resolution plans under the Process Document, CoC would not accept resolution plans which are not in compliance with the *Advertisement* and the Process Document.

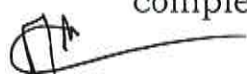
- (ii) once the resolution plans submitted under the Process Document have already been opened and the financial proposal disclosed to CoC, it would completely prejudice the process which has been stipulated under the Process Document and be discriminatory against the resolution applicants who have submitted in accordance with such process if the resolution plan is accepted now. CoC would maintain the transparency and fairness of the process being followed to select the successful resolution applicant in accordance with the Process Document and would proceed with evaluation of only those complaint resolution plans which have been submitted on the Proposal Due Date in accordance with the requirements of the Process Document.

Therefore, CoC, in the aforesaid meeting held on February 21, 2018, has decided against opening the Submitted Document and have instructed the Resolution Professional to return the Submitted Documents unopened.



In light of the aforesaid, I am hereby returning all the Submitted Documents unopened. Kindly take receipt of the same by personally visiting the office of Bhushan Power & Steel Limited at F-Block, 1st Floor, International Trade Tower, Nehru Place, New Delhi-110019 today i.e. 22nd of February 2018, otherwise the same shall be sent to you by registered post to your abovementioned address.”

65. The aforesaid decision of the CoC would stare in the face of the stand taken by the RP while discussing item No. 9 in the third meeting of the Committee of Creditors dated 31.10.2017. There the Resolution Professional equivocally clarified that non acceptance of expression of interest by Liberty Group would not debar the Liberty Group or any other party from submitting a resolution plan if the same is submitted before 150th day of the CIRP (30 days before the expiry of the maximum period of 180 days). However, this period of 180 days was extended in the present case to 270 days vide order dated 22.12.2017 which has already been noted in the preceding paras. It needs to be emphasized that this period could not be curtailed until and unless a public notice is issued in the print media with regard to the last date to receive a resolution plan to provide a level playing field to all. The process after receipt of ‘expression of interest’ is completely opaque and has been confined to only those who are



found to have satisfied the pre-qualification criteria. The pre-qualifications have not been approved by the CoC. There is no intimation to the rest of the World with regard to the last date for receipt of resolution plan despite clear stipulation in the invitation dated 21.09.2017 saying the detailed process and timeline for submission of resolution plans was to be separately communicated to the Potential Resolution Applicants who meets the qualification requirements as mentioned in the invitation. The Liberty House fulfilled the eligibility criteria and the only argument raised was that it failed to submit a certificate from the Chartered Accountant with regard to its eligibility. However, such a trivial lacuna may not constitute the basis for rejecting the expression of interest shown by a prospective Resolution Applicant. Moreover, there is no intimation given to 'Liberty House' showing that it lacked eligibility. The only document demanded were certificates from the Chartered Accountant, confidentiality statement and some draft/cheque. All that can now be considered as the Resolution Plan has been submitted thirty days before the expiry of maximum period provided by S. 12 of the Code. Therefore, we are inclined to issue direction for consideration of a resolution plan submitted by the Liberty House within the period specified in the advertisement/public notice dated 21.09.2017.



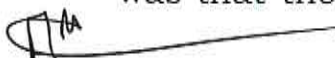
66. We expected the Resolution Professional to place all facts before the Tribunal without treating it as an adversarial litigation. We were amazed when on behalf of RP the stand taken in the pleadings and during the course of argument was that the TSL was to walk away from the CIR process if the Tribunal was to entertain the application of Liberty House. Such a stance by a RP is wholly untenable and there is nothing in the minutes of meeting of the Committee of Creditors to support such a stance. An RP is expected to act as an impartial umpire and is not supposed to have taken a stance which is not true. Even the Committee of Creditors spoke in the same tone which again is not borne out from the minutes of the meeting of the CoC. The majesty of Courts cannot be put to ransom by veiled threat of this nature nor the administration of justice could be thwarted by any such insinuation.

67. There cannot be any quarrel with the propositions put forward by learned senior counsel Mr. Arun Kathpalia, Mr. Ramji Srinivasan and Dr. A.M. Singhvi for RP, CoC and TSL respectively that there should be level playing field for each of the participants. In the present case the level playing field was provided by inviting resolution plan within the period specified in the public notice dated 21.09.2017 and the Liberty House has filed its resolution plan 30 days before the expiry of maximum period provided under



Section 12 of the Code. The aforesaid period cannot be curtailed by any internally involved mechanism especially when pre-qualification criteria did not have approval of CoC at that stage. The principle laid down in the judgments like **Valji Khimji and Company (supra)** would have no application to the facts of the present case as in that case higher bid was offered after confirmation of the bid in a process which was found to be wholly lawful. In the present case the whole process is at a nascent stage. It is also true that commercial wisdom of the Committee of Creditors must be respected as has been observed by us in **Clutch Auto Limited's (supra)** case. What is to happen if you firstly held out to the whole world that resolution plan is to be submitted by a particular date and then the aforesaid time is shortened by a process which has no statutory backing. This area brings forward a legal issue where CoC stumbled. There cannot be any doubt that the rules of the game cannot be changed after the game has started which in the present case started on 21.09.2017 and the process for submission of resolution plan was to conclude 30 days before the expiry of the maximum period provided by Section 12 of the Code. Any other change would attract the application of the observations made in the **Clutch Auto Limited (supra)**.

68. Another argument raised by the learned counsel for respondent was that the resolution plan submitted by others like TSL have



been opened on 08.02.2018 and after opening of the resolution plan no other plan should be considered including the one submitted by the Liberty House because all the facts and figures have become known to the general public. In support of the aforesaid submission learned counsel have placed reliance on the newspaper reports. We are afraid that the aforesaid argument would not merit acceptance. Firstly, the newspaper reports cannot be regarded authentic in the absence of authentication process by the Reporter and the newspaper itself. Moreover, the bid amount quoted by the newspaper and imputed to TSL widely varies as has been shown by the applicant. Therefore, we regret our inability to accept the aforesaid argument and hereby reject the same.

69. We are further of the view that the IBC does not permit the division of the process firstly by inviting 'expression of interest' and then by asking to file the resolution plans. If the speed is the essence of the whole process then it must be remembered that one consolidated process is better suited to CIR Process than splitting the process in various parts. In the present case the process which has started on 21.09.2017 could not be concluded by 21.02.2018 on account of unnecessary complications created in conducting the process by inviting expression of interests. It is worthwhile to notice that the fashionable phenomena 'expression of interest' is resorted to in cases where thousands of applicants are expected



to participate. In a case where the number is not likely to exceed more than ten then such process seems to be un-necessary. In most of the cases under the IBC the number of resolution applicants are not more than ten. The reasons for such small number are evident. Firstly, most of the time it is a specialized business and the number of such person participating in the CIR process is likely to be limited as the experience has shown so far. Secondly when the magnitude of assets involved is enormous then the number is likely to be limited as is evident from the facts of the present case. We find support to the aforesaid view from the observations made by Hon'ble the Supreme Court in paras 16 & 17 in the case of **B. Ramakichenin @ Balagandhi Vs. Union of India and Ors.**, (2008) 1 SCC 362 which read as under:-

“16. Even if there is no rule providing for short-listing nor any mention of it in the advertisement calling for applications for the post, the Selection Body can resort to a short-listing procedure if there are a large number of eligible candidates who apply and it is not possible for the authority to interview all of them. For example, if for one or two posts there are more than 1000 applications received from eligible candidates, it may not be possible to interview all of them.

In this situation, the procedure of short- listing can be



resorted to by the Selection Body, even though there is no mention of short-listing in the rules or in the advertisement.

17. However, for valid short-listing there have to be two requirements -

(i) It has to be on some rational and objective basis. For instance, if selection has to be done on some post for which the minimum essential requirement is a B.Sc. degree, and if there are a large number of eligible applicants, the Selection Body can resort to short-listing by prescribing certain minimum marks in B.Sc. and only those who have got such marks may be called for the interview. This can be done even if the rule or advertisement does not mention only those who have the aforementioned minimum marks, will be considered or appointed on the post. Thus the procedure of short-listing is only a practical via-media which has been followed by the courts in various decisions since otherwise there may be great difficulties for the selecting and appointing authorities as they may not be able to interview hundreds and thousands of eligible candidates; (ii) If a prescribed method of short-listing has been mentioned in the rule or advertisement then that method alone has to be followed."



70. The aforesaid judgment pertains to the area of service law. It clearly proceeds on the principles of Article 14 of the Constitution which is genus and Article 16 (1) is its species. We believe that these principles would be equally applicable to invitation for submission of Resolution Plan.
71. The aforesaid view has been followed and applied by a Division Bench of Bombay High Court in the case of ***Flemingo Duty-Free Shop Pvt. Ltd. and Mr. Vivek S. Bhatt v. Union of India and Ors.***, 2008 (4) ALLMR 663. In the present case only seven applicants have come forward. As a matter of fact, no expression of interest was warranted and the vital time spend in this process could have been saved.
72. We are further of the view that the object of the Insolvency and Bankruptcy Code is to reorganize and evolve insolvency resolution of, inter alia, Corporate persons in a time bound manner for maximization of the value of assets of such person. The aforesaid statement of object is evident from para 2 of the long title of the Code which reads as under:-
- “The objective of the Insolvency and Bankruptcy Code, 2015 is to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability



of credit and balance the interests of all the stakeholders including alteration in the priority of payment of government dues and to establish an Insolvency and Bankruptcy Fund, and matters connected therewith or incidental thereto. An effective legal framework for timely resolution of insolvency and bankruptcy would support development of credit markets and encourage entrepreneurship. It would also improve Ease of Doing Business, and facilitate more investments leading to higher economic growth and development.”

73. In the new regime consideration of a Resolution Plan of another competitor would advance the object of the Code in maximisation of the assets of the Corporate Debtor and may provide better solution in restructuring the stressed assets. The packet in sealed cover has been kept intact so that it may be seen by CoC and RP. The bench officer shall hand it over to RP or his counsel.
74. During the course of arguments, we found that the Committed of Creditors wanted to proceed with the consideration of resolution plan on 14.03.2018 when we were in the midst of hearing the arguments. Learned counsel for the Liberty House brought to our notice about the forthcoming meeting of the Committee of Creditors. We expected a statement from the RP and also from CoC stating that no such meeting would be held. However, we

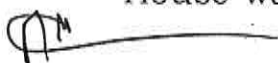


were left with no option except to pass the following order on 13.03.2018:-

“The instant matter is being heard for the last few days and the hearing by the respondent has commenced on 8th March, 2018. However, the hearing on behalf of the Resolution Professional could not be concluded today. Thereafter, Counsel for the COC and other non-applicants are to address arguments. When we are at the stage of adjourning the matter as part heard for tomorrow, i.e. on 14.03.2018, we were informed that COC meeting to consider Resolution Plan is fixed tomorrow, i.e. on 14th March, 2018, which has not been denied as a fact by the learned Senior Counsel for the COC.

At the first blush we are constraint to observe that as a matter of propriety deference to court hearing in a sub judice matter should have been shown by not taking up the agenda of Resolution Plan of any other applicant. We do not understand the stance of RP or COC. Accordingly, we direct the R.P. and COC not to proceed with any consideration of Resolution Plan of any other entity as the matter is sub-judice before us. The consideration of any Resolution Plan at this stage may result into prejudice to the right of the applicant especially when there is still time as the period of 270 days is to expire on 22.04.2018. In any case, the period which is consumed in the litigation would not *prima facie* be part of the period prescribed for CIRP under the IBC.”

75. It has come on record that the period of 270 days for CIR process is to expire on 22.04.2018. The present application by Liberty House was filed on 22.02.2018 and it is being decided on today



(23rd April, 2018). The period from 22.02.2018 till date would thus stand excluded from the period of 270 days and the process may now be concluded by 23.06.2018. For the aforesaid view we draw support from the judgment of the Hon'ble National Company Law Appellate Tribunal rendered in the case of **Quantum Limited v. Indus Finance Corporation Limited**, Company Appeal (AT) (Insolvency) No. 35/2015 dated 20.02.2018. In that case the Mumbai Bench of NCLT had dismissed an application filed by RP under Section 12 of the Code for extension of time beyond 180 days. Learned National Company Law Appellate Tribunal set aside the order of Adjudicating Authority/NCLT and also proceeded to exclude the period of litigation by observing as under:-

“For the aforesaid reasons, we set aside the impugned order dated 18th December, 2017 and extend the period of resolution process for another 90 days to be counted from today. The period between 181th day and passing of this order shall not be counted for any purpose and is to be excluded for all purpose. Now the Adjudicating Authority will proceed in accordance with law.


The appeal is allowed with the aforesaid observations.

No cost.”

76. For the reasons aforementioned this application is allowed and the following directions are issued:-



- (a) The period spend on this litigation stands excluded. The whole process may now be concluded before 23.06.2018.
- (b) The Resolution Professional shall place the unopened sealed cover apparently containing the resolution plan of the Liberty House before the next meeting of the CoC.
- (c) The Resolution Plan of the Liberty House shall not be rejected on the ground of delay emanating from process document or any other document internally circulated by the RP or the CoC. The rejection shall be on some substantive ground as against flimsy one.
- (d) Since resolution plan is under consideration and yet to be decided by CoC and as there is still considerable time left for completion of resolution process, it is expected that CoC will take appropriate commercial decision in terms of the Code, Rules and Regulations in order to achieve the object of the Code as quoted above.


(M.M.KUMAR)
PRESIDENT


(S.K. MOHAPATRA)
MEMBER (TECHNICAL)

23.04.2018
Vineet