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**IN THE NATIONAL COMPANY LAW TRIBUNAL,  
SINGLE BENCH, CHENNAI**

MA/523/2018

In

CP/689/IB)/CB/2017

(Under Section 60(5) Read with Sections 30 (3), (4) and (5) of the  
Insolvency and Bankruptcy Code, 2016)

In the matter of M/s. Merchem Limited

**Ms. Nitrex Chemicals India Limited**

*...Applicant/Resolution Applicant*

Vs.

**Mr. Ravindra Beleyur and Ors.**

*... Respondents*

*Order delivered on 13<sup>th</sup> December, 2018*

CORAM:

**CH. MOHD SHARIEF TARIQ, MEMBER (JUDICIAL)**

*For Applicant: Ms. Ami Jain, Counsel*

*For RP : Mr. T. Ravichandaran, Counsel*

*For CoC : Ms. Vidyalakshmi, Mr. Vipin Warrior &  
Ms. Anitha, Counsels*

**ORDER**

Per: CH. MOHD SHARIEF TARIQ, Member (J)

1. Under consideration is MA/523/IB/2018 filed in CP/689/IB/2017 by one of the Resolution Applicant against the Resolution Professional viz. Mr. Ravindra Beleyur and Committee of Creditors (CoC) with the prayers as follows:

- i. *Reject the resolution plan of Acme Chem Ltd. Approved by the committee of creditors accorded at the meeting held on 12.09.2018 for any or all grounds and reasons stated herein this application;*
  - ii. *Direct RP to revise his report taking in to account full and true facts and figures with respect to the resolution plan submitted by the applicant and resubmit the same to committee of creditors for further consideration in accordance with the provisions of law;*
  - iii. *Direct RP to conduct open competitive bidding in the interest of transparency and maximization of value of assets for the benefit of all financial and other creditors;*
  - iv. *Pending consideration and disposal of the above application, direct RP and CoC not to act in furtherance of the decision taken at the CoC meeting on 12.09.2018; and*
  - v. *Consideration passing such further and /or other order(s) and / or directions(s) as the facts and circumstances of the matter may warrant.*
2. The factual matrix of the case are that in response to the advertisement published in The Economic Times and Business Standard on 04.06.2018 inviting expression of Interest (EoI) to submit resolution plans for the Corporate Debtor viz. M/s. Merchem Ltd, the Applicant submitted its EoI vide its email dated 13.06.2018 and the Resolution Professional, vide his email dated 21.06.2018, considered the Applicant eligible to submit the resolution plan.
3. It is submitted that the Applicant has submitted its resolution plan along with the declaration u/s 29A of IBC,

2016 vide its E-mail dated 10.08.2018 to the Resolution Professional along with a bank guarantee of Rs. 500 lakhs issued by Standard Chartered Bank. Copy of which is annexed as Exhibit R to the typed set filed with the application.

4. The Applicant has submitted that the Resolution Professional sent an E-mail on 05.09.2018, fixing the CoC Meeting for consideration of the Resolution Plan on 11.09.2018 and subsequently changed the date of CoC meeting to 12.09.2018 and communicated the same to the Resolution Applicant vide his E-mail dated 06.09.2018. The Resolution Applicant therefore requested by E-mail dated 08.09.2018 and 11.09.2018 to fix another date for holding the said CoC meeting as 12.09.2018 did not suit due to religious reasons. The Resolution Applicant has further submitted that the Resolution Professional has mentioned that if the applicant has any difficulty in attending the meeting, he shall keep the applicant informed about the outcome of the CoC meeting by evening of that day. This may suggest that Resolution Professional had pre-determined his mind that (i) applicant's request for

adjournment should not be considered and (ii) applicant should not attend the CoC meeting. The Resolution Applicant has submitted that it is evident from the minutes of the meeting held on 12.09.2018 that the said request of applicant was not placed before CoC for consideration and the Resolution Professional was keen to proceed in the absence of the applicant for obvious reasons.

5. The Applicant sought copies of all minutes of CoC meetings vide its E-mail dated 12.09.2018 to seek legal remedy at the appropriate forum. The RP responded to the said E-mail on 14.09.2018 expressing his inability to share information/documents.

6. The Applicant has contended that the Resolution Professional /CoC did not grant the opportunity of being heard to the applicant and thus the conduct was not only in violation of the principle of natural justice but also against the statutory mandate of maximizing the value of assets and the participation by all the participants in the transparent manner. The Applicant has further submitted that the entire process relating to approval of the resolution

plan in favour of Acme Chem Ltd. was carried behind the back of the applicant and hence, must be quashed and set aside and started afresh. The reference is invited to the order passed by the NCLT, Kolkata in the matter of ***Binani Cement Ltd Vs Mr. Vijaykumar V Iyer***, wherein it was held that denying an opportunity to hear the applicant is quite unjust and arbitrary. The Applicant has made reference to the decision of NCLAT dated 15.05.2018 ***in re: Rajputana Properties Pvt. Ltd. Vs. Ultratech Cement Ltd & Ors*** wherein it was held that if Section 24 is read with Section 30, it is clear that the following persons are to take part in the meeting of Committee of Creditors at the time of approval of one or other resolution plan: (a) members of CoC (b) members of the (suspend) Board of Directors or the Partners of the Corporate persons (c) Operational Creditors or their representatives if the amount of their aggregate dues is not less than ten percent of the debt [clause (a), (b), (c) of Section 24 (3)]; and **(d) Resolution Applicant(s) when resolution plan of such applicant(s) are placed for consideration [Section 30(5)]**

7. The Resolution Applicant has submitted that the conduct of the corporate insolvency resolution process by the RP does not appear to be above board. The possibility of accommodating the successful resolution applicant in June 2018 itself cannot be ruled out as the RP, in a span of about seven hours, decided to reduce the eligibility threshold for all resolution applicants in respect of their average turnover for the past three years from Rs. 200 crores to Rs. 160 Crores. The reason for doing so by Resolution Professional became apparent only on 11.09.2018 when the applicant learnt that the CoC was to finalise the resolution plan of Acme Chem Ltd, whose average turnover was less than Rs. 200 crores. The Applicant has submitted that the average annual turnover for last three years for Acme Chem Limited is only Rs. 15158 lakh as reflected in the Balance Sheet which is attached as Exhibit JJ 1 to the typed set filed along with the petition. It is thus crystal clear that Acme Chem Limited does not fulfil even revised criteria of 16000 lakh. Despite non-eligibility on the ground of requisite turnover by Acme Chem Ltd, the Resolution Professional placed its



Resolution Plan for consideration approval by the CoC. This is glaring example of favours to Acme Chem Limited.

8. The Resolution Applicant has submitted that full disclosure in regard to the offer made by the applicant was not made available to the CoC, especially in regard to the additional offer of the applicant to pass on to the financial creditors the following:-

- i. Recovery of insurance premium of Rs. 198 lakhs;
- ii. Excess increase in RP cost of Rs. 108 lakhs;
- iii. Recovery from promoters on account of reduction in unsecured loans Rs. 569.04 lakhs;
- iv. Current assets valuing Rs. 1476.61 lakhs.

The RP mentioned in addendum 4 that wages to workers etc., to be considered at Rs. 559.17 lakhs in the resolution plan as against admitted claim of Rs. 1319.53 lakhs against amount of Rs. 3413.99 lakhs. Applicant accordingly provided the same but Acme Chem Ltd. was allowed to reduce the said figure drastically which had the effect of financial creditors getting higher amount in its case. Similarly, dues payable to statutory and operational

creditors have been slashed significantly in case of Acme Chem Ltd and this is one of the mechanism adopted to show higher amount being paid by ACME to financial creditors. RP incorrectly stated in Minutes of CoC meeting of 12.09.2018 that if CoC accepted the revised plan, the absolute value as well as net present value of the proposal went down substantially in case of NITREX.

9. The applicant has submitted that the RP declined to give the papers discussed at the CoC meeting as also the minutes thereof and thus prevented the resolution applicant from effective representation as he is kept in the dark in regard to the entire process relating to consideration and approval of the resolution plan.

10. The applicants submitted that the entire procedure adopted in ranking the resolution applicants is vitiated and is in violation of the provisions of the Code as well as the regulation and as against the scheme of the Code. The Applicant further submitted that the non-consideration of uniform for giving reduction of the debt due to various creditors including unsecured and operational creditors in



the plan submitted for approval is amounting to discrimination. Similarly, different amounts allowed to be paid by different resolution applicants to same class of creditors are also discriminative and mischievous. Such unhealthy and sharp practices ought to be discouraged by the Hon'ble Tribunal in public interest.

11. The applicant has submitted that the proposal of the applicant is superior to the proposal of Acme Chem Limited. The RP has grossly overlooked the fact that applicant has offered current assets amounting to Rs.1476.61 lakhs to secured lenders vide sub para 1 of the para No. III of Part D of Chapter IV on page 32 of Resolution Plan. The reason for not considering vis a vis valuation if these assets under Regulation 35 needs to be examined by the Adjudicating Authority.

12. The Applicant has submitted that the RP has grossly overlooked the fact that applicant has offered rationale amount to workmen and employees and other statutory and operational creditors as per information provided in information memorandum, however, RP has accepted lower

amount offered by Acme Chem Limited as evident from evaluation matrix available as annexure 1 on page 13 of minutes of meetings for the CoC held on 12.09.2018.

13. It is submitted that the CoC did not record its satisfaction with respect to the viability and feasibility of the resolution plan of Acme Chemical Ltd that was approved by it at the meeting held on 12.09.2018. The provisions of Section 30(4) of the Code make it the bounden duty of the CoC to approve a resolution plan after considering its feasibility and viability and such other requirements as may be specified by the Board. The applicant submits that such lack of reasoning on the viability and feasibility of a resolution plan approved by the CoC is itself unacceptable and the CoC's decision is liable to be declared as null and void by the Adjudicating Authority. It was totally silent that resolution plan submitted by Acme Chem limited may attract considerably Minimum Alternate Tax (MAT) liability under Section 115JB of the Income Tax Act 1961 and Self Assessment tax liability under Section 140A of the Income Tax Act, 1961.

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14. It is submitted that in terms of provisions of Section 31(1) of IBC, 2016, the Adjudicating Authority can accord its approval to the resolution plan approved by CoC u/s 30(4) of the Code only if Adjudicating Authority is satisfied that the resolution plan meets the requirements as referred to in Section 30(2) of the Code. It may be noted that the approval of CoC is conditional as the resolution passed at the CoC meeting held on 12.09.2018 categorically and candidly provides that the RP is authorised to approach Adjudicating Authority along with specific requests made by successful resolution applicant in respect of the resolution plan submitted by Acme, while making an application in respect of approval of the resolution plan by Adjudicating Authority as long as they are not against law of the land. It is further submitted that many of items mentioned under the said resolution are legally not tenable as they are beyond the scope and power of the Adjudicating Authority as well as the Code. A careful perusal of the concessions and reliefs sought shall reveal that the resolution applicant requires the Adjudicating Authority to go beyond the ambit



of law and approve certain items which are otherwise legally not permissible.

15. The Applicant has submitted that as per the Regulation 39(2) of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, resolution professional has to submit to the committee all the resolutions plans which comply with the requirements of the Code and regulations made thereunder. It is not evident from the minutes of the CoC meeting dated 12.09.2018, the RP complied with the requirement of the Regulation 39(2).

16. The Resolution Professional has filed a counter stating therein that the resolution plan submitted by the successful resolution applicant did not contravene the provisions of law and after following the due procedure set out under the Insolvency and Bankruptcy Code read with IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, approved the resolution plan of Acme Chem and the same was approved by the CoC by 100% of the CoC members and this Respondent has filed an application

being M.A No. 515 of 2018 before this Hon'ble Tribunal seeking approval of the resolution plan and the same is pending consideration by this Hon'ble Tribunal.

17. The Resolution Professional has submitted that ACME sent a reminder on 09.06.2018 bringing to the notice of this Respondent that there are only four players in the rubber chemical industry including this company and fixing a turnover of Rs. 200 crores could only help in NOCIL Limited or Lanxcess India Private Limited acquiring Merchem Ltd., (corporate debtor) resulting in getting a dominant position in the rubber chemical industry. The authorised officers of the Respondents 3, 4 and 5 who constituted more than 90% of the voting share confirmed their acceptance to reduce the turnover by 20% to Rs. 160 crores and ultimately the Resolution Professional revised the eligibility criteria reducing the average turnover to Rs. 160 crores only on receipt of confirmations from the members of CoC.

18. The Resolution Professional has submitted that the request made by the Applicant was forwarded to all the members of the CoC. As far as the postponement or

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continuation of the meeting is concerned, it is the responsibility of the RP, given the timeline mandated under the Code read with Regulations needs to complete the Corporate Insolvency Resolution Process in time.

19. The Resolution Professional has submitted that the applicant herein is not a party to the minutes of the meeting held on 12.09.2018 and he has not even attended the meeting. The RP has filed the application seeking approval of the resolution plan before this Hon'ble Tribunal and therefore, till such time, this Respondent, as a resolution professional, has to maintain confidentiality of the information especially with regard to the minutes of the CoC meeting.

20. The Resolution Professional has submitted that as per the dictum of the Supreme Court of India, the Applicant has no vested right to claim that his resolution plan be considered. The RP has further submitted that there was no violation of principle of natural justice more so when a) the Applicant was given sufficient opportunity to make himself available for the CoC meeting on 12.09.2018; b) the

Applicant having chosen not to be present either himself or through its authorised representative; c) the presence or absence of the Applicant would not have changed its position in as much as the entire documentation was available before the CoC and it was for the CoC to decide on the basis of evaluation matrix and the other parameters as to who is the successful Applicant. Accordingly, the CoC in its 7<sup>th</sup> meeting after going through the evaluation matrix had considered both the resolution plans and unanimously decided to approve the resolution plan submitted by Acme.

21. The Resolution Professional has submitted that there cannot be any qualms about the legal position set out by the NCLAT in "Rajputana Industries". The ratio in Rajputana industries deals about a case where a person was not allowed to participate in the CoC meeting for some reason and therefore it was contended that there was a violation of Section 24 of the Code. However, in the instant case the Applicant chose not to remain present and did not even bother to send its representative for the CoC meeting. The Applicant being a company cannot say that the promoter alone can attend the meeting and he was always

at liberty to send any authorised representative for the CoC meeting. Therefore, there is no violation of principle of natural justice and as held by the Supreme Court, any resolution applicant cannot have a vested right that his resolution plan should be considered.

22. The Resolution Professional has submitted that the present application under Section 60 is not maintainable and the Supreme Court has deprecated the practice of filing such application under Section 60(5) of the Code making it very clear that the jurisdiction of this Hon'ble tribunal under Section 60(5) is designated for different purpose to ensure that the NCLT alone has jurisdiction when it comes to application and proceedings by or against the corporate debtor covered by the code making it clear that no other forum has jurisdiction to entertain or dispose of such applications or proceedings.

23. The Resolution Professional has submitted that the Applicant is attempting to mislead this Hon'ble Tribunal by stating that the average annual turnover for the past 3 years is Rs. 159.55 crores. In this connection, the Applicant



is taking into account only the average net turnover and has not considered the turnover for 2017-18. The Average turnover of the successful Resolution Applicant for the past 3 years is Rs. 175 crores.

24. The Resolution Professional has submitted that the resolution plan of the Applicant with all the disclosures were forwarded to the members of CoC and with regard to the Current assets valuing Rs. 1476.61 lakhs, there was a discussion which is evident in the 6<sup>th</sup> meeting of the CoC. As far as the insurance premium of Rs, 198 lakhs is concerned, the Applicant has misdirected himself and is attempting to mislead this Hon'ble Tribunal. This was only an estimated loss on reinstatement basis of the damaged machinery/plant due to vandalism. The Applicant herein is presuming that an insurance claim has been lodged that the same is receivable which is fundamentally incorrect. The RP has submitted that with regard to the increase in CIRP costs, it has followed the same yardstick for the Applicant herein as well as the successful resolution applicant.

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25. The Resolution Professional has submitted that the wages to workers needs to be considered at Rs. 559.17 lakhs and the total liability to be considered is Rs. 18.9 crores and not Rs. 5.59 cores as alleged by the Applicant. The Applicant has chosen to prefer the payment of Rs. 5.59 crores and the successful resolution applicant had decided to follow Section 53 of the IBC and gave an option to CoC in this regard. The successful resolution applicant had proposed payment of Rs. 115 crores which is inclusive of provision for a) Resolution Professional Cost; b) liquidation value to the dissenting secured financial creditors.

26. The Resolution Professional has submitted that the resolution plans submitted by both the parties viz the Applicant herein and the successful resolution applicant were considered in proper perspective as per the criteria fixed by the CoC and the evaluation matrix. Based on the detailed discussion regarding scoring as per the approved evaluation matrix, CoC unanimously came to a conclusion that Acme Chem is the H1 and their resolution plan could be considered as accepted and RP stated that relevant

resolutions would be passed in the presence of Sri. Thomas, the promoter Director.

27. The Resolution Professional has submitted that there is no basis for the Applicant herein to arrive at the revised consideration at Rs. 133 crores for the following reasons:

- a. Sale value of current assets Rs. 1476.61 lakhs-reiterate the contentions set out in the preceding paragraphs.
- b. The insurance claim Rs. 198 lakhs-reiterates the contentions set out in the preceding paragraph.

28. The Resolution Professional has submitted that the Acme Chem limited has chosen to pay the workmen employee as per the eligibility under Section 53 of the Code, the Applicant herein had chosen to pay a fixed amount, it is futile on the part of the Applicant now to contend that RP had accepted lower amount in the case of Acme Chem. There is no basis for the Applicant to contend that the consideration of payment to secured creditors by the Applicant would be Rs. 137.65 crores as against the payment of Acme Chem limited amounting to Rs. 109.80 cores which is 16.23% higher.

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29. The RP has submitted that the Applicant herein has no vested interest to question the approval of the resolution plan. Resolution Professional has examined and prime facie come to the conclusion that it satisfies the requirement of the Code as well as the regulations and filed application before this authority seeking approval of the resolution plan. It is always open to this Hon'ble Tribunal to accept or reject the same. It has further been submitted that the application under Section 60(5) is not maintainable and if at all the Applicant is aggrieved the approval of the resolution plan he is always at liberty to approach NCLAT under Section 60(1) of the Code. Even Supreme Court has set out the circumstances under which Section 60 (5) can be applied.

30. Counsel for the CoC has submitted in his counter that Committee of Creditors has approved the plan of Acme Chem Limited by 100% voting share as it has scored 73 marks as against the score of 52/54 marks scored by the Applicant based on the criteria set out in the evaluation matrix and the Resolution Professional has submitted the Plan for adjudication before this Tribunal under Section 31 of the Code and the same is pending before this Tribunal.

31. The counsel for the CoC has submitted that there are substantial differences between the offer made by Acme Chem as against the offer made by Nitrex, the applicant herein, and COC is bound to accept the bid which is highest based on the evaluation matrix and which meets the requirements as specified by the Code. It is further submitted that the resolution plan is also approved by 100% voting share by the financial creditors and satisfy the requirement of Section 30(4) of the Code.

32. It is further submitted by the counsel for the CoC that Applicant themselves have prepared a table which is reflected in their Resolution Plan (Page No. 67 of their Resolution Plan and Page 319 of the Paper Book) with the title "present value of inflow towards Resolution Debt Amount. This table reflects and is self explanatory that the total inflow towards Resolution Debt in absolute terms at Rs. 100 Crores and the Net Present Value at Rs. 87.21 Crores.

33. Counsel for the CoC has contended that plan submitted by the applicant only scored 52/54 marks as

against the 73 marks scored by the successful resolution Applicant. The total consideration of Acme Chem limited as per the resolution plan is Rs.115.252 Crores, which is payable upfront on the other hand the total consideration of Nitrex is 80.89 Crore, in the event of upfront payment and 109.56 Crore with a repayment schedule of 60 months. Hence, CoC has acted in accordance with the code to maximize the value of assets by rejecting the plan of the Applicant.

34. The Applicant also filed a rejoinder wherein he contended that as per the judgement of the Hon'ble Supreme Court in the matter of ***Arcelor Mittal Vs. Satish Kumar***, the aggrieved resolution applicant can approach NCLT.

35. Heard the Learned Counsel for the Applicant, the Learned Counsel for the CoCs, the Counsel for Resolution Professional and perused the Application and the Resolution passed by the CoCs in its 7<sup>th</sup> meeting which is placed at pages 464 to 476 to the typed set filed with application.



36. From the facts and circumstances of the present case, it is worth to be noted that the Resolution Applicant had expressed his inability to attend the CoC's meeting scheduled on 12.09.2018 due to religious constrains and requested the RP to fix any other date after 14.09.2018 for meeting of the CoC. However, the Resolution Professional refused to re-schedule the meeting. Therefore, a reasonable opportunity of being heard is not given to the applicant and the same is in violation of the principle of natural justice. As per Section 30 (5) of the I&B Code, 2016, the resolution applicant is entitled to attend the meeting of the CoC in which the resolution plan of the applicant is to be considered. In this regard reliance is placed on the Judgement passed by the Hon'ble NCLAT in **ANG Industries Ltd vs Shah Brothers Ispat Pvt. Ltd.** in Company Appeal (AT) (Insolvency) No. 109 of 2018, wherein the Hon'ble Appellate Tribunal while deciding the matter, relied upon the findings of Joint Parliamentary Committee and its earlier ruling in the matter of '**Rajputana Properties Pvt. Ltd. V/s. Ultra Tech Cement Ltd. & Ors.**

in I.A. No. 594 of 2018 in Company Appeal (AT) (Insolvency) No. 188 of 2018 and observed as under:

*“.....the Committee of Creditors while approving or rejecting one or other resolution plan should follow such procedure which is transparent. Those who will (be) watching the proceeding such as (suspended) Board of Directors or its Partners; Operational Creditors or its representatives and Resolution Applicant(s) are not mere spectator but may express their views to the Committee of Creditors for coming to conclusion in one or other way.”*

Thus, it is clear that though the resolution applicant has no voting right in the CoC; and it is the CoC to approve or reject the resolution plan, an opportunity ought to have been provided to the resolution applicant to attend the meeting of the CoC in which the Resolution Plan is to be considered, to make his representation and to express his view point on the Resolution Plan submitted to the CoC. Therefore, the application of the Resolution Applicant is allowed and the CoC is directed to consider the plan afresh submitted by the Applicant by providing it reasonable



opportunity of being heard within two weeks from the date of passing this order and RP is directed to file status report within two working days thereafter. Accordingly the application stands disposed of.

37. The order is pronounced in the open court in the presence of both the parties/counsels.

  
**(CH. MOHD SHARIEF TARIQ)**  
MEMBER (JUDICIAL)