THE NATIONAL COMPANY LAW TRIBUNAL
GUWAHATI BENCH

I.A No.73/2018

In

C.P. No.(IB) 02/GB/2018

Under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

In the Matter of :

Kitply Industries Ltd., a company Incorporated under the Companies Act, 1956 & having its registered office at Makum Pathar, A.T. Road, Margherita, Assam-786181 ... Corporate Debtor

And

Mr Bijoy Murmuria, ... Applicant/Resolution Professional

-Versus-

IDBI Bank Limited
A bank incorporated under the Banking Act, 1956 and having its Registered Office at IDBI Towers, WTC Complex, Cuffee Parade, Mumbai-400005, ... Non-applicant/ Financial Creditor

Coram:

Hon'ble Mr. Justice P.K. Saikia, Member (J)

For the applicant/Resolution Professional : Ms. M. Hazarika, Sr. Advocate
Ms. Kewizun, Advocate

For the non-applicant/Financial Creditor : Mr M. Dutta, Advocate

....

ORDER

Date of Order: 7th December 2018

Heard Ms. Millie Hazarika, learned counsel for the applicant/resolution professional. Also heard the Resolution Professional, Mr. Bijay Murmuria.

2. IDBI Bank Limited, one of the Financial Creditors of Kitply Industries Limited (the Corporate Debtor) filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in short "IBC 2016") for initiating Corporate Insolvency Resolution Process ("CIRP") against the Corporate Debtor. Vide Order dated 01.05.2018 in C.P. No.(IB) 02/GB/2018, this Adjudicating Authority admitted the application, declared moratorium in terms of Section 14 of the IBC 2016 and was pleased to appoint Mr. Bijay Murmuria as the Interim Resolution Professional (in short "IRP").

3. Further in the 1st Meeting of the Committee of Creditors (in short, CoC), held on 8th June, 2018, the CoC appointed the Interim Resolution Professional, Mr. Bijay Murmuria as the Resolution Professional (in short "RP") of the Corporate Debtor and since then the applicant has been discharging the functions of a Resolution Professional with respect to the corporate debtor.

4. The Resolution Professional Published Invitation for Expression of Interest (EoI) for Submission of Resolution Plan in Amar Asom (Regional language newspaper) at Tinsukia, where the registered office of the Corporate Debtor is situated and in Business Standard (English)- All Editions on 13.07.2018. The last date for submission of resolution plan was slated as 27.07.2018. However, Resolution Professional did not receive any Expression of Interest till 27.07.2018 and therefore, with the approved of Committee of Creditors publication for further extension of date of EoI in Financial Express- all editions on 27.07.2018 whereby time for submission of EOI was extended till 07.08.2018.

5. The Resolution Professional received Expression of Interest from the following entities (hereinafter referred to as "Entities/Prospective Resolution Applicants") till 07.08.2018, being the last date of submission of EoI:

(a) Greenply Industries Limited

(b) Ensemble Infrastructure India Limited (Lead Member) in consortium with ESS GEE Real Estate Developers Private Limited and ESS GEE Realty Private Limited

(c) SREI Multiple Asset Investment Trust (Vision India Fund).

6. The Resolution Professional provided Information Memorandum, Evaluation Matrix, RFRP & other relevant documents to each Resolution Applicant, on receiving undertakings from them that such members shall maintain confidentiality of the information furnished to them and shall not use such information to cause an undue gain or undue loss to itself or to any other person.

7. The Resolution Professional after taking concurrence from the members through email at the behest of Ensemble Infrastructure India Limited (Lead Member) in consortium with ESS GEE Real Estate Developers Private Limited and ESS GEE Realty Private Limited (Consortium Members) extended the last date for submission of resolution plan till 01.10.2018.

8. The Resolution Professional, however, received only One Resolution Plan from SREI Multiple Asset Investment Trust (Vision India Fund) till the last date of submission of Resolution Plan i.e., 01.10.2018. The Envelope containing the Resolution Plan was unsealed/opened in presence of the Financial Creditor in the Fourth Meeting of the CoC dated 04.10.2018. Once the resolution plan was unsealed, the representatives of the resolution applicant at the behest of the Financial Creditors gave a brief presentation on the intricacies of the resolution plan as submitted by them for the said corporate debtor.

9. In the Fifth Meeting of CoC held on 09.10.2018, it was proposed by the Resolution Applicant namely SREI Multiple Asset Investment Trust (Vision India Fund) that they shall submit a Revised Resolution Plan to the members of the CoC in the light of the amendment in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulation, 2016 dated 05.10.18. The members of the CoC discussed and deliberated on the said plan and thereby asked the Resolution Applicant to reconsider and revisit the entire plan and come up with their best possible offer for consideration after incorporating the amendments in the Resolution Plan.

10. The Resolution Applicant submitted the Revised Resolution Plan dated 10th October, 2018 and the same was circulated to all the members of CoC vide email dated 11th October, 2018 for perusal.

11. The Resolution Professional in the Sixth Meeting of CoC convened as on 20th October, 2018 tabled before the members the Final Resolution Plan for approval.

12. Further in terms of Section 30(4) of the IBC 2016, the CoC approved the said resolution plan by 92.74% votes in favour of the said resolution vide e-voting dated 22.10.2018 after considering its feasibility and viability and other requirements specified by the CIRP Regulations where SREI Infrastructure Finance Limited, State Bank of India, IFCI Limited and Standard Chartered Bank voted in favour of the Resolution Plan. Pertinent to mention here that State Bank of India could not cast its vote on the portal because of some technical glitch but confirmed their Assent over Email and Letter to the Resolution Professional.

13. Furthermore, 7.26% members of the CoC voted against the said Resolution Plan. The members who voted against the said Resolution Plan are IDBI Bank, Canara Bank and Bank of Baroda.

14. That as per the Resolution Plan submitted by SREI Multiple Asset Investment Trust (Vision India Fund) the Break-up of the total amount payable by the Resolution Applicant are as follows:

EXHIBIT G of Format VA- Resolution Plan

S.No	Particulars	Clause No. of Format VA-Resolution Plan	Amount (Rs. In Cr)
	Total Resolution Fund		175.00
	<u>Payments</u>		
1	On Cancellation of Equity Shares	Clause 1	3.3925
2	For settlement of CIRP Cost	Clause 3.1	0.2500
3	For settlement of Operational Creditors	Clause 3.2	0.0725
4	For settlement of Financial Creditors	Clause 3.3	167.2232
5	For settlement of Workmen/Employees	Clause 3.4	3.2400
6	For settlement of Statutory Dues	Clause 3.5	0.6700
7	For settlement of Litigations	Clause 3.6	0.0500
8	For settlement of Related Party	Clause 3.7	Rupee 1
9	For settlement of Other Creditors	Clause 3.8	0.1018
	Total Payment		175.00

Furthermore, the Resolution Fund is subject to change depending upon the following:

a. Increase in CIRP Cost (unpaid)

b. Updated List of Dues of Workmen/Employees

c. Updated List of Statutory Dues

15. The relevant provision for approval of Resolution Plan has been stipulated under Section 30 of the Insolvency & Bankruptcy Code, 2016 which reads as under:

Section 30. Submission of resolution plan. –

(1) A resolution applicant may submit a resolution plan along with an affidavit stating that he is eligible under section 29A to the resolution professional prepared on the basis of the information memorandum.

(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan -
(a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor;
(b) provides for the payment of the debts of operational creditors in such manner as may be specified by the Board which shall not be less than the amount to be paid to the operational creditors in the event of a liquidation of the corporate debtor under section 53;
(c) provides for the management of the affairs of the Corporate debtor after approval of the resolution plan;
(d) The implementation and supervision of the resolution plan;
(e) does not contravene any of the provisions of the law for the time being in force
(f) confirms to such other requirements as may be specified by the Board.
Explanation. – For the purposes of clause (e), if any approval of shareholders is required under the Companies Act, 2013(18 of 2013) or any other law for the time being in force for the implementation of actions under the resolution plan, such approval shall be deemed to have been given and it shall not be a contravention of that Act or law.

(3) The resolution professional shall present to the committee of creditors for its approval such resolution plans which confirm the conditions referred to in sub-section (2).

(4) The committee of creditors may approve a resolution plan by a vote of not less than sixty-six per cent. of voting share of the financial creditors, after considering its feasibility and viability, and such other requirements as may be specified by the Board:

Provided that the committee of creditors shall not approve a resolution plan, submitted before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 (Ord. 7 of 2017), where the resolution applicant is ineligible under section 29A and may require the resolution professional to invite a fresh resolution plan where no other resolution plan is available with it:

Provided further that where the resolution applicant referred to in the first proviso is ineligible under clause (c) of section 29A, the resolution applicant shall be allowed by the committee of creditors such period, not exceeding thirty days, to make payment of overdue amounts in accordance with the proviso to clause (c) of section 29A:

Provided also that nothing in the second proviso shall be construed as extension of period for the purposes of the proviso to sub-section (3) of section 12, and the corporate insolvency resolution process shall be completed within the period specified in that sub-section:

Provided also that the eligibility criteria in section 29A as amended by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 shall apply to the resolution applicant who has not submitted resolution plan as on the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018.

(5) The resolution applicant may attend the meeting of the committee of creditors in which the resolution plan of the applicant is considered:
Provided that the resolution applicant shall not have a right to vote at the meeting of the committee of creditors unless such resolution applicant is also a financial creditor.

(6) The resolution professional shall submit the resolution plan as approved by the committee of creditors to the Adjudicating Authority.

Section 31. Approval of resolution plan.

(1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan.

Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this sub-section, satisfy that the resolution plan has provisions for its effective implementation.

(2) Where the Adjudicating Authority is satisfied that the resolution plan does not confirm to the requirements referred to in sub-section (1), it may, by an order, reject the resolution plan.

(3) After the order of approval under sub-section (1), -

> *(a) the moratorium order passed by the Adjudicating Authority under section 14 shall cease to have effect; and*
>
> *(b) the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its database.*

(4) The resolution applicant shall, pursuant to the resolution plan approved under sub-section (1), obtain the necessary approval required under any law for the time being in force within a period of one year from the date of approval of the resolution plan by the Adjudicating Authority under sub-section (1) or within such period as provided for in such law, whichever is later:

Provided that where the resolution plan contains a provision for combination, as referred to in section 5 of the Competition Act, 2002, the resolution applicant shall obtain the approval of the Competition Commission of India under that Act prior to the approval of such resolution plan by the committee of creditors.

16. It may be stated here that after the submission of Resolution Plan before this Authority after being approved by RP and CoC, the IDBI Bank Limited come up with an application urging this authority not to approve the Resolution Plan alleging that the learned RP miserably failed to discharge his statutory duty in conducting CIRP. In that connection, following allegations have been levelled against the RP in conducting CIRP:

A) The mandate in proviso to Section 21 (2) of the Code of 2016 was not followed.

B) The mandate of Section 29 (A) (c) was also flouted.

C) Preferential treatment were granted to the SREI Infrastructure Finance Limited.

17. In regard to the contention that the learned RP had disregarded the mandate in proviso to section 21(2) of the Code, the applicant argued that the learned RP made no attempt whatsoever to see if any or some of the members of the COC are related party to the CD since a party, related to the CD, comes under some stringent restrictions as far as having any right of representation, participation or voting in a meeting of CoC are concerned. In that connection, the applicant herein has referred me to the proviso to section 21(2) of the Code of 2016. For ready reference, same is reproduced below: -

Section 21(2)

(2) The committee of creditors shall comprise all financial creditors of the corporate debtor:

Provided that a related party to whom a corporate debtor owes a financial debt shall not have any right of representation, participation or voting in a meeting of the committee of creditors.

18. In support of such contention, it has been pointed out that the applicant had genuinely doubted that one of the important members of the CoC was a related party to the CD. Therefore, the applicant had requested the learned RP to provide it with information relating to the family trees of the promoters of the CD. The learned RP, instead of making due diligence in that regard, simply requested the KMP of the CD to furnish such information. The KMP of the CD, on the other hand, gave only incomplete information as to the family tree of the CD and declined to give the rest of the information on the pretext that they were unable to collect such information.

19. The learned RP, however, chose to accept such very unsatisfactory explanation of the KMP of the CD although under the law the learned RP has an inescapable duty, cast on him, to make due diligence to get all the information as to family tree of the CD, more so, when such information is easily available in the public domain which would have shown that one of the important members of the CoC was a related party to the CD and in that event , such a party, in terms of law, laid down in proviso to section 21(2) of the code could not have any right of representation, participation or voting in a meeting of CoC and in such a scenario , perhaps the fate of various resolutions , adopted in CoC would have been different .

20. To support such a contention that RP has a mandatory duty of doing due diligence to ascertain the related party status of the members of the COC, my attention was drawn to the decision of Hon'ble Supreme Court in *Arcelormittal India Private Limited vs Satish Kumar Gupta &*

Ors in Civil Appeal No.9582/2018 and in Diary No.35253/2018 and Diary No.33971/2018. The relevant part thereof is also reproduced below: -

> *"Thus, the importance of the Resolution Professional is to ensure that a resolution is complete in all respects, and to conduct a due diligence in order to report to the Committee of Creditors whether or not it is in order. Even though it is not necessary for the Resolution Professional to give reasons while submitting a resolution plan to the Committee of Creditors, it would be in the fitness of things if he appends the due diligence report carried out by him with respect to each of the resolution plans under consideration, and to state briefly as to why it does or does not conform to the law."*

21. Since one of the important members of the CoC was a related party to the CD and since such a related party was allowed to have representation, participation or voting in a meeting of CoC, the entire CIRP get vitiated by such an illegality of extremely serious nature and on this count alone, the CoC ought to have rejected the resolution plan, submitted by the Resolution applicant, namely, the SREI Multiple Assets Investment Trust (SMAIT)

22. Such contention was, however, hotly disputed d by Mrs M. Hazarika, the learned Sr. counsel appearing for the RP alleging that such allegations are premised more on conjecture and surmise than on facts, law and logic. In support of such contention, it has been pointed out that the CoC was constituted as early as 29.05.2018 and same was duly communicated to the Adjudicating Authority (AA, in short) on 31.05.2018. But, at no point of time till 27-09-2018, any member of the CoC including the applicant herein raised any voice against any member of the CoC, being a related party to the CD.

23. Only on 27-09-2018, the applicant raised such suspicion. At first, the applicant had prayed for KYCS of Vinay Goenka , Usha Goenka, Sunita Goenka and Gaurav Goenka and the details of mortgagors, they being Vinay Goenka , Usha Goenka, Sunita Goenka and Gaurav Goenka. Such request was duly forwarded to the KMPs of the CD who while providing some information as to the mortgagors to the applicant, however, expressed their inability to arrange for the KYCS of the promoters of the CD. Such information was duly communicated to the applicant *vide email dated 29.09.2018.*

24. Subsequently, however, vide 10th October 2018, the family details of Lt. Shanty Goenka and Lt Pawan Kumar Goenka, stated to be the predecessors in interest of Vinay Goenka , Usha Goenka, Sunita Goenka and Gaurav Goenka were furnished to the applicant which , according to Mrs M. Hazarika, was substantial compliance of the request from the side of the applicant . The above revelations hardly support the allegation that one of the important members of the CoC was a related party to the CD which, in turn, serves to show that the applicant was fishing only in troubled water. The fact that the applicant kept on asking for liquidation value of the CD even at a stage when law prohibits sharing of such intimation with anyone makes such conclusion inevitable.

25. It has also been pointed out that the information relating KYCs of the promoters was sought for at a stage when the CIRP had almost entered into final phase which is certainly not in the tune of arrangements of things as envisages in the Code where time is the essence since the Code prescribes very specific period for completion of each and every stage of CIRP. In the face of such revelations, contention of the applicant that *since one of the members of the COC was the related party to the CD*

and *since such a member of the COC was allowed to have representation, participation or voting in a meeting of CoC, the entire CIRP becomes a nullity* is nothing more than a bundles of claims without any substance whatsoever.

26. Learned counsel appearing for the applicant had also drawn my attention to the provisions of Section 29A (c) of the Code of 2016 to contend that at the time of submission of resolution plan by the SMAIT, it was hit by the prohibition in aforesaid provisions of law. For ready reference, the provisions of Section 29A (c) is reproduced below: -

"Section 29 A

[29A. Persons not eligible to be resolution applicant. –

......

(c) [at the time of submission of the resolution plan has an account,] or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949) 3 [or the guidelines of a financial sector regulator issued under any other law for the time being in force,] and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor:

Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to nonperforming asset accounts before submission of resolution plan:

[Provided further that nothing in this clause shall apply to a resolution applicant where such applicant is a financial entity and is not a related party to the corporate debtor.

Explanation I.- *For the purposes of this proviso, the expression "related party" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date.*

Explanation II.— *For the purposes of this clause, where a resolution applicant has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset and such account was acquired pursuant to a prior resolution plan approved under this Code, then, the provisions of this clause shall not apply to such resolution applicant for a period of three years from the date of approval of such resolution plan by the Adjudicating Authority under this Code;]"*

(d) has been convicted for any offence punishable with imprisonment –
(i) for two years or more under any Act specified under the Twelfth Schedule; or
(ii) for seven years or more under any law for the time being in force:
Provided that this clause shall not apply to a person after the expiry of a period of two years from the date of his release from imprisonment:
Provided further that this clause shall not apply in relation to a connected person referred to in clause(iii) of Explanation I];

(e) is disqualified to act as a director under the Companies Act, 2013 (18 of 2013):
[Provided that this clause shall not apply in relation to a connected person referred to in clause (iii) of Explanation I;]"

(f) is prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets;

(g) has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the Adjudicating Authority under this Code:
[Provided that this clause shall not apply if a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place prior to the acquisition of the corporate debtor by the resolution applicant pursuant to a resolution plan approved under this Code or pursuant to a scheme or plan approved by a financial sector regulator or a court, and such resolution applicant has not otherwise contributed to the preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction;]

(h) has executed [a guarantee] in favour of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code [and such guarantee has been invoked by the creditor and remains unpaid in full or part];

(i) [is] subject to any disability, corresponding to clauses (a) to (h), under any law in a jurisdiction outside India; or

(j) has a connected person not eligible under clauses (a) to (i).
Explanation[I]. — For the purposes of this clause, the expression "connected person" means—

> *(i) any person who is the promoter or in the management or control of the resolution applicant; or*
> *(ii) any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan; or*
> *(iii) the holding company, subsidiary company, associate company or related party of a person referred to in clauses (i) and (ii):*

Provided that nothing in clause (iii) of Explanation I shall apply to a resolution applicantwhere such applicant is a financial entity and is not a related party of the corporate debtor:

Provided further that the expression "related party" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date;]

[Explanation II—For the purposes of this section, "financial entity" shall mean the following entities which meet such criteria or conditions as the Central Government may, in consultation with the financial sector regulator, notify in this behalf, namely: —
(a) ....
(b)......................
(c)......................
(d)........................

(e) an Alternate Investment Fund registered with Securities and Exchange Board of India;

(f) ....

27. In support of such contention, it has been submitted that one of the Resolution Applicant through one of its Fund, namely, India Growth Opportunity Fund had invested in the *Oddisha Slurry Pipeline Limited* (in short "OSPIL") and have around 69% shareholding and management control over the OSPIL. The OSPIL had defaulted in making payment to IDBI Bank Ltd. and the debt due from the OSPIL was declared NPA and the same was, therefore, referred to NCLT but such application was not admitted as yet as informed by the applicant. Such a fact was brought to the notice of the CoC in its 5th meeting by the applicant. Since the applicant has come under the prohibition enunciated in Section 29A (c) of the Code, on this count also, the Resolution Plan submitted by the SMAIT (RA) is required to be rejected.

28. The learned Sr. Counsel, Ms. M. Hazarika, however, submits that the aforesaid contention has no basis at all. It is an admitted position that the RA is an alternative investment fund registered with the Securities & Exchange Board of India. Sub-clause (e) to second Explanation to clause (j) of Section 29A clearly declares that an Alternative Investment Fund, registered with the SEBI, is exempted from the purview of Section 29A (c).

29. In regard to alleged preferential treatment provided to SREI Infrastructure Finance Ltd. it has been submitted by the learned counsel appearing for the applicant that the Code does not provide any classification or priority or differential treatment amongst the secured creditors at the CIRP stage. In other words, the Code of 2016 does not make any provision for differential treatment to different secured creditors.

30. Such contention is also opposed to by the learned Sr. counsel appearing for the RA stating that it is not true to say that preferential treatment cannot be meted out to the secured creditors at the CIRP stage under any circumstances. In that connection, the decision of NCLT, Kolkata Bench in *SreeMetaliks Ltd. vs. SREI Equipment Finance Ltd. (07.11.2017, NCLT Kolkata: MANU/NC/1686/2017* as well as the decision of same NCLT in *State Bank of India vs Orissa Manganese & Minerals Ltd. 22.06.2018: NCLT. Kolkata)* were referred to contend that in the aforesaid cases, preferential treatment was meted out to different secured creditors. Being so, according to Ms. M. Hazarika, last allegation too is found to be without any substance.

31. I have considered the rival submissions having regard to the materials on record. Coming to the allegation that the RP fails to perform his statutory duties to collect information as to whether any or more members of the CoC is/are party /parties related to the CD, I have found that the Code has certainly cast an obligation on the RP to ascertain if any member(s) of the CoC is/are related to the CD. He is also expected to do necessary investigation in this regard. However, such a duty cannot be stretched to such absurd limits requiring the learned RP to make investigation against each and every suspicion which may crop up while constituting the CoC regardless of whether or not such suspicion has any basis.

32. It is worth noting here that none of the members of the CoC raised any query as to the constitution of CoC since the constitution of CoC on 29.05.2018 till the fag end of September, 2018. Only on 27-09-2018, after a gap of almost five months from the date of initiation of CIRP, the

applicant (IDBI Bank) raised such contention. I have found that the applicant at first wanted information as to the KYCs of the promoters of the CD as well as information about the mortgagors. I have found that some of the information so sought for was furnished while inability was expressed in regard to furnishing of other information vide email dated 29-09-2018 from RP addressed to the applicant. For ready reference, same is reproduced below

> *"Dear Yogesh,*
> *With reference to the trial mail, we pursued for KYCs of the promoters namely Vinay Goenka, Usha Goenka, Usha Goenka, Sunita Goneka and Gaurav Goenka with KMPs of the Corporate Debtor. However they have shown their inability to arrange for the KYCs of the promoters as requested by your good office.*
>
> *Moreover the KMPs have stated that the given assets are not owned by the corporate debtor but are third party assets of Vinay Goenka, Usha Goenka, Sunita Goenka and Gaurav Goenka and the Guarantee Deeds have been executed solely in favour of SRIE Infrastructure Finance Limited and to no other Financial Creditor. Moreover the Guarantee is limited to the value of respective holding of Agricultural Land. They have further requested that one should refer Point No.1 in each respective deed of guarantee which reads as under:*
>
> > *"To be liable for the secured obligations under the IDM debentures and Arcil debentures respectively provided that the guarantors liability to pay any amount under this deed shall be discharged from and the recourse of IDM or Arcil or the debenture trustee shall be limited only to the agricultural land."*
>
> *At the behest of the KMPs, undersigned attaches relevant documents for your kind perusal. Request you to revert with your understanding on the matter.*
>
> *Thanks & Regards*
> *Bijay Murmuria"*

33. The information, so furnished by the learned RP, is found to be incomplete. But then, I have also found, in course of time, the family details of Lt. Shanti Prakash Goenka and Lt. Pawan Kumar Goenka, who appear to be the predecessors –in- interest of the Goenkas , named above, were also furnished to the applicant vide email dated 10-10-2018. Furnishing of such information to the applicant coupled with the fact that no member of the CoC even raised any query with regard to formation of the COC till the end of Sept, only serves to show that the allegation that one of the members of the CoC is a related party to the CD cannot be accepted as a reliable claim. The fact that the applicant too could not bring on record any unfailing material to justify such allegation makes such a conclusion inevitable.

34. I have also noticed that the conduct of the applicant during the course of CIRP is also found far from satisfactory. There are indisputable materials on record to show that the applicant had also kept on asking the learned RP to furnish it with some information viz. liquidation value of the CD, *and that too, at a stage,* when law forbids the RP from sharing such information with anyone. Such conduct on the part of the applicant again shows that some considerations, other than valid one, might have driven the applicant to keep on hurling queries after queries on the RP in regard to allegation that one of the members of the CoC is a related party to the CD. Being so, in my considered opinion, the RP cannot be adjudged guilty of non-performing of his statutory duty quo constitution of CoC only because of the non-furnishing of the KYCs of the promoters of the CD.

35. Here, it needs to be stated that the RP had published invitation for Expression of Interest (EOI) on 13.07.2018 stating 27.07.2018 as the last date for submission of EOI. However, none had submitted EOI within the date so fixed, for which the date for submission of EOI was extended till 07.08.2018. Pursuant thereto, three Prospective Resolution Applicants had submitted their EOI. In due course, RP has provided Information Memorandum, Evaluation Matrix, RFFP and other relevant documents to those Prospective Resolution Applicants (PRAs in short) and also obtained from them Confidentiality Undertaking/Non-Disclosure Agreement and the last date for submission of Resolution Plan was fixed on 01.10.2018.

36. However, the RP had received only one resolution plan from SMAIT within the stipulated period meaning thereby that in the event of failure of RA herein too to submit the resolution plan under consideration, there would have been no other option but to allow the CD to go into liquidation. The Hon'ble Supreme Court/Hon'ble NCLAT have held that revival of a sick corporate debtor is a rule, whereas liquidation is an exception. In the face of such observations from the Hon'ble Supreme Court/Hon'ble NCLAT and also in view of the facts, which I have recorded hereinbefore, I am of the opinion that allegation that the constitution of CoC being bad for violation of mandate in Proviso to Section 21 (2) of the Code of 2016, sounds pretty unconvincing.

37. As far as the contention that the Resolution Plan, submitted by the SMAIT, cannot be accepted for the RP's violating the mandate of law in the form of Section 29 (A) (c) of the Code of 2016 is concerned, I have found that such contention too is without any basis since the Resolution applicant is a AIF, registered with SEBI, which is exempted from the prohibition in Section 29 (A) (c) of the Code of 2016 in view of law laid down in explanation (e) to sub clause (f) section 29A(c) of the Code .

38. Coming to the last allegation, I have found that such a contention was also examined by Shri Saumendra Kabiraj, learned Advocate. It may be stated here that before submitting the Resolution Plan to the CoC, learned RP also requested Shri Kabiraj to render his opinion whether resolution plan, submitted by the SMAIT, meets the parameters, specified in Section 30 (2) of the Code of 2016. Mr Kabiraj, on examining the Resolution Plan, found it to be in tune with the requirements of law and accordingly gave his opinion on all the relevant factors including preferential treatment meted out to *SREI Infrastructure Finance Ltd*. For ready reference, his opinion is also reproduced below:

"6.1.5. ***Opinion:***

6.1.6. It appears that the Resolution Plan of SMAIT-VIF has sought to classify Creditors/ Secured creditors in two classes. SREI Infrastructure Finance Ltd, a secured creditor has been classified as Category A Secured Creditor and has been made eligible for more favourable treatment. Such financial creditors <u>admittedly have exclusive charge on the brand value of the corporate debtor</u> and first charge on all the fixed assets/current assets of the Corporate Debtor. Another set of Creditors/Secured creditors have been classified as Category B, on the ground that such creditors <u>do not have a first charge</u> on the fixed assets/current assets. Based on this classification, the Plan proposes particular manner of distribution of proceeds amongst the Class A Creditor and Class B Creditors.

6.1.7. *In our view, there appears to be a strong rationale for such classification, which is discussed as under:*

6.1.8. *The category "A" secured creditor represent the sole Financial Creditor who are the single largest creditor of the Corporate Debtor and is having exclusive charge on the brand value of the corporate debtor and first charge on the fixed assets/current assets of the company, being the Corporate Debtor.*

6.1.9. *Category "B" Creditors represent those secured creditors who have minuscule exposure as compared to the Class A Secured Creditor, and who are not having first charge on the fixed assets/current assets of the company.*

6.1.10. *In the event of liquidation, the Secured Creditor having exclusive charge on the brand value of the corporate debtor and first charge on the fixed asset/current asset block of the corporate debtor if exercises the SARFAESI rights available to them, therein that event, no other creditors either financial or operational, would get any amount through the waterfall arrangement, as provided in Section 53 of the Code.*

6.1.11. *On this logic, the treatment proposed to be accorded to the different class of secured creditors cannot be seen as arbitrary, illegal or contrary to the provisions of the I&B Code, 2016 and/or the CIRP Regulations.*

6.1.12. *In **SreeMetaliks Litd. vs. SREI Equipment Finance Ltd. (07.11.2017-NCLT-Kolkata): MANU/NC/1686/2017** the Hon'ble National Company Law Tribunal, Kolkata Bench while dwelling upon similar facts while rejecting the argument of creation of 'a class within a class' has upheld the procedure adopted in the proposed Resolution Plan and had rejected the contention that 'the events that may unfold later at liquidation stage (Chapter III of Part II of Code) cannot be taken into account at an earlier resolution stage ('CIRP' stage') (Chapter II of Part II of Code)'. The Adjudicating Authority held that though code does not provide for any classification or priority or differential treatment amongst the secured creditors at the CIRP stage it could not be ignored that if the Corporate Debtor were to go into liquidation, it would be logical to assume that the Class A secured creditors would opt for exercising their SARFAESI rights and take all the existing assets of the Corporate Debtor, leaving almost nothing for the Class B Creditors or the unsecured Operational Creditors.*

6.1.13. *Reference can also be held to the case of **State Bank of India Vs. Orissa Manganese & Minerals Ltd. 22.06.2018- NCLT – KOLKATA)** the Hon'ble National Company Law Tribunal, Kolkata Bench has, in similar facts, has upheld that classification of the Financial Creditors in two sets cannot be said to be contrary to the provisions of the I&B Code, 2016.*

6.1.14. *From the above, it is clear that the said Resolution Plan does not suffer from arbitrariness, whimsicality and unreasonableness. It cannot be contended that the Plan tends to create a class within the class which is not permissible under the law. In our considered view, the plan is not arbitrarily, creating a class within a category nor* *violates the right to equality. Therefore, the Resolution Plan does not violate any of the provisions of the I&B Code, 2016."*

39. I have considered such opinion in the light of materials available on record and found reason to concur with the same. Resultantly, last allegation too, pressed into action to disqualify the resolution plan, is again found to be much without any substance.

40. It is not out of place to state here that a Resolution Plan was approved by a vote of 92.74% of voting share of the financial creditors whereas the applicant, who opposes it, holds only 6.74% of voting share of the FCs. In my considered opinion, in the facts and circumstances of the case, under consideration, it would be wholly preposterous to allow such a minuscule section of the financial creditors to hold the resolution plan to hostage, *and that too*, for no apparent valid reason

41. Resultantly, none of the allegations above stands to reason and accordingly all allegations are rejected.

42. But a perusal of Section 31 of the Code of 2016 also show that a heavy duty is cast on this Authority to satisfy itself before giving a seal of approval to the Resolution Plan, already approved by CoC under Section 30 (4) of the Code of 2016 that the Resolution Plan, so approved, meets the requirement of law as specified in Section 30 (2).Pursuant to the jurisdiction conferred upon this Adjudicating Authority by Section 31 of the IBC 2016, as set out above, I have examined the Final Resolution Plan and I find that the mandatory requirements have been dealt with in the Final Resolution Plan as follows:

(a) Clause 8 and Clause 2 & 3 of Format-VA of the Resolution Plan comprehensively provides for dealing with the interest of all the stakeholders of the corporate debtor including financial creditors and operational creditors of the corporate debtor.

(b) The terms and implementation schedule of the Final Resolution Plan are provided under Clause 4 of Format-VA of the Resolution Plan.

(c) The Final Resolution Plan provides for the payment of insolvency resolution process costs in priority over other payments under Clause 3.1 of Format-VA of the Resolution Plan.

(d) As per the Final Resolution Plan, since as per the successful Resolution Applicant, the liquidation value of the corporate debtor is significantly lower than the total admitted debt of financial creditors of the corporate debtor, the liquidation value is not sufficient to cover the debt of the financial creditors in full. Therefore, the liquidation value that is due to the operational creditors (including workmen, employees, government dues, taxes, other creditors) is NIL and therefore they are not entitled to any payment. However the Resolution Applicant has proposed to make certain payments to operational creditors, employees, statutory dues, other litigations, other liabilities and same has been comprehensively provided for in Clause 3 of Format-VA of the Resolution Plan.

(e) The management and control of the business of the corporate debtor post the approval of the Final Resolution Plan by this Hon'ble Tribunal is specified to be conducted in terms of Clause 5 of Format-VA of the Resolution Plan.

(f) Clause1, 2 and 6 of Format-VA of the Resolution Plan provides for the implementation and supervision of the resolution plan.

(g) The Final Resolution Plan provides for payment of the total Resolution Fund of INR 175 Crores as per Exhibit G of Format-VA of the Resolution Plan on or before 90 days of the approval of the Resolution Plan by this Adjudicating Authority. Out of the same, INR 170.51 Crores would be paid to the financial creditors within 90 days of the approval of the Resolution Plan by this Adjudicating Authority as per Exhibit E of Format-VA of the Resolution Plan.

(h) The Final Resolution Plan has provisions related to re-starting of the manufacturing operations of the Assam unit of the corporate debtor which will bring about necessary employment.

(i) The closure date for the purposes of the Final Resolution Plan would be the date when the Resolution Applicant acquires the management and control of the corporate debtor in accordance with the applicable laws subject to approval of the same by this Hon'ble Tribunal.

(j) Clause 5 of Format-VA of the Resolution Plan provides that from the date of approval of the Final Resolution Plan by this Authority until the closure date, a Supervisory Committee shall be constituted which will supervise the implementation of the Final Resolution Plan and manage and control the operations of the Corporate debtor.

(k) Clause no xxxi of Glossary of terms in Format-VA of the Resolution Plan provides for the composition of the Supervisory Committee

43. The Resolution Professional has submitted the required Compliance Certificate in Form H of the Schedule certifying that the Final Resolution Plan is in conformity with the provisions of IBC 2016 and the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016 including Section 30(2) of the IBC 2016 and Regulations 37(1), 38(1), 38(1A), 38(2), 38(3) and 39(4) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016 and does not contravene any of the provisions of the law for the time being in force.

44. In Para No.7 of the compliance certificate in Form H, the amounts provided for the stakeholders under the Resolution Plan is as under:

(Amount in Rs. lakh)

Sl. No.	Category of Stakeholder*	Amount Claimed	Amount Admitted	Amount Provided under the Plan#	Amount Provided to the Amount Claimed (%)
1.	Dissenting Secured Financial Creditors*	NA*	NA*	NA*	NA*
2.	Other Secured Financial Creditors	979,33.38	823,64.31	170,51.00	17.41%
3.	Dissenting Unsecured Financial Creditors*	NA*	NA*	NA*	NA*
4.	Other Unsecured Financial Creditors	Nil	Nil	Nil	NA
5.	Operational Creditors	1152.55	725.17	7.25	0.63%
	Government	Nil	Nil	67.00	NA
	Workmen	Nil	Nil	324.00	NA
	Employees	Nil	Nil		
	.....				
6	Other Debts and Dues				
	-on cancellation of Equity Shares to Public	Nil	Nil	11.25	NA
	-payment towards CIRP cost	Nil	Nil	25.00	NA
	-for settlement towards Litigations	Nil	Nil	5.00	NA
	-payment to related parties	Nil	Nil	0.00001	NA
	-for settlement of other Creditors	Nil	Nil	10.18	NA
Total		990,85.93	830,89.48	17500.68	18.04%

Amount provided over time under the Resolution Plan and includes estimated value of non-cash components. It is not NPV.

*Omitted vide Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Fourth Amendment Regulations, 2018 dated 05.10.2018

45. The fair value and liquidation value of the assets as on the insolvency commencement date i.e. 01.05.2018 as given in para 2 of Form H is INR 203.95 Crores and INR154.43 Crores respectively. However, as noted above, the total amount provided for the

stakeholders under the resolution plan is INR 175 Crores which is significantly higher than the liquidation value.

46. Para 9 of Form H states that in terms of the Report from S.K. Agrawal & Co, Chartered Accountants (appointed for conducting due diligence of the financials of the corporate debtor), there were no transactions u/s 43, 45, 50 & 66 of the Insolvency & Bankruptcy Code, 2016.

47. The Resolution Applicant SREI Multiple Asset Investment Trust (Vision India Fund) has submitted an affidavit pursuant to section 30(1) of the Code confirming its eligibility under section 29A of the Code to submit resolution plan.

48. Upon examination of the Final Resolution Plan, I note that the terms of the Final Resolution Plan appear to be in line with the objects and purpose of the IBC 2016 and provides for insolvency resolution in a time bound manner for maximization of value of assets and promotes entrepreneurship, availability of credit and balance interests of all the stakeholders.

49. Therefore, this Adjudicating Authority records its satisfaction for granting approval to the Final Resolution Plan. Further in the light of the benefits listed above apart from others as provided in the Final Resolution Plan it would be in the best interest of the company, its employees in particular, public in general and also in the interests of financial creditors and operational creditors to accept the Final Resolution Plan in question.

50. In light of the above, I hold that the Final Resolution Plan is in conformity with the provisions of Section 30 (2) of the IBC, 2016 and I approve the same plan by the following orders:

(a) The Final Resolution Plan as submitted by SREI Multiple Asset Investment Trust (Vision India Fund) which is approved by the CoC in its Sixth meeting dated 20.10.2018 vide e-voting held on 22.10.2018 with 92.74% votes in terms of Section 31(1) of the IBC is hereby approved.

(b) The Approved Final Resolution Plan shall come into force with immediate effect.

(c) The moratorium Order passed under Section 14 shall cease to have effect.

(d) All relevant parties in relation to the Final Resolution Plan are bound by the terms and conditions mentioned therein in accordance with Section 31(1) of the IBC 2016.

(e) All relevant parties are directed to extend full cooperation to SREI Multiple Asset Investment Trust (Vision India Fund) to carry out the terms and conditions of the Final Resolution Plan, the concerned parties/entities will be liable for punishment as per Chapter 7 (Offences and Penalties) of the IBC, 2016.

(f) The Resolution Professional shall forward all records relating to the conduct of the Corporate Insolvency Resolution Process and the Final Resolution Plan to the Insolvency and Bankruptcy Board of India to be recorded on its database.

(g) Accordingly, this proceeding same being C.P. No.(IB) 02/GB/2018 along with connected IAs filed and/or pending, if any, in this context is disposed of in terms of the approval as indicated above.

(h) None of the directions or observations, made above, shall be treated as exempting the RA/CD from paying any fee etc. that may lawfully be charged/levied/realizable from the RA/CD.

(j) All the concerned parties are hereby directed to strictly comply with the resolution plan approved by the Adjudicating Authority. If any deviation in implementing the resolution plan the concerned parties/entity will be liable for punishment as per Chapter 7 (Offences and Penalties) of IBC."

51. Both I.A No.73/2018 as well as C.P. No.02/2018 are disposed of.

52. A copy of this order be filed with the Registrar of Companies, Shillong.

Sd/-

Adjudicating Authority
National Company Law Tribunal,
Guwahati Bench, Guwahati.

nkm/