

**BEFORE THE ADJUDICATING AUTHORITY
(NATIONAL COMPANY LAW TRIBUNAL)
AHMEDABAD BENCH
AHMEDABAD**

**IA 236 of 2019 in
C.P. (I.B) No. 190/NCLT/AHM/2018**


Coram: **Hon'ble Mr. HARIHAR PRAKASH CHATURVEDI, MEMBER JUDICIAL**
Hon'ble Ms. MANORAMA KUMARI, MEMBER JUDICIAL

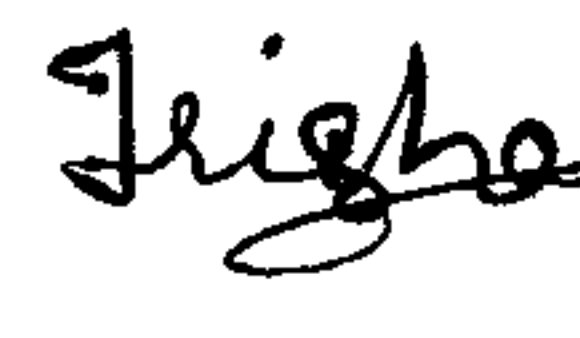
**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF AHMEDABAD BENCH
OF THE NATIONAL COMPANY LAW TRIBUNAL ON 24.06.2019**

Name of the Company: Abhijit Guhathakurta RP for Korba West Power Co. Ltd.

Section of the Companies Act: Section 30(6) r.w. 31(1) of the Insolvency and Bankruptcy Code r.w. Regulation 39(4) of IBBI Regulations 2016

<u>S.NO.</u>	<u>NAME (CAPITAL LETTERS)</u>	<u>DESIGNATION</u>	<u>REPRESENTATION</u>	<u>SIGNATURE</u>
--------------	-------------------------------	--------------------	-----------------------	------------------


1.	NACHIKET DAVE	ADVOCATE	PETITIONER	} 
2.	AIVAN RAJ	ADVOCATE	PETITIONER	


Sandeep Singhi Pavini Shah Trisha Baxi for Singhi & Co.	} Advocates	} Resolution Applicant	} 
--	-------------	------------------------	---

ORDER

The parties are represented through their respective learned counsels.

The Order is pronounced in the open court, vide separate sheet. The Resolution plan is approved.


MANORAMA KUMARI
MEMBER JUDICIAL
Dated this the 24th day of June, 2019


HARIHAR PRAKASH CHATURVEDI
MEMBER JUDICIAL

**BEFORE THE ADJUDICATING AUTHORITY
(NATIONAL COMPANY LAW TRIBUNAL)
AHMEDABAD BENCH
AHMEDABAD**

I.A. No. 236 of 2019
in
CP(IB) No. 190 of 2018

In the matter of:

Mr. Abhijit Guhathakurta,
Resolution Professional,
Korba West Power Company Limited ...Applicant

Versus

Korba West Power Company Limited ...Respondent

Order delivered on 24th June, 2019

**Coram: Hon'ble Mr. Harihar Prakash Chaturvedi, Member (Judicial)
Hon'ble Ms. Manorama Kumari, Member (Judicial)**

Appearance: Mr. Sandeep Singhi, Ms. Neha Anand and Ms. Parini Shah, Advocates for Singhi & Co. for Resolution Applicant. Mr. Siddhartha Samal and Ms. Vinita Hamdalkar, Advocates for the Corporation Bank. Sr. Advocate, Mr. Navin Pahwa, Mr. Nachiket Dave, Advocate. Mr. Abhinandan Banerjee, Advocate

ORDER

[Ms. Manorama Kumari, Member (Judicial)]

1. The instant application (IA) No. 236 of 2019 in CP(IB)No. 190/2018, is filed by the Applicant, the Resolution Professional of Corporate Debtor Korba West Power Company Limited, under Section 30(6) read with Section 31(1) of the Insolvency and Bankruptcy Code, 2016 read with Regulation 39(4) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 with the following prayers:

- (a) Pass an order approving the Resolution Plan submitted by the successful Resolution Applicant in respect of the Corporate Debtor

Manoran

W

under Section 31(1) and declare that the same shall be binding on the Corporate Debtor and its employees, members, all creditors (whether admitted or not including contingent or otherwise), guarantors and other stakeholders in the ICR Process of the Corporate Debtor.

- (b) Pass appropriate directions for grant of reliefs and waivers sought for by the successful Resolution Applicant under Section 6, Part V of the Resolution Plan.
- (c) Pass such other order/orders as it may deem fit and proper in the facts and circumstances of the case.

2. For the sake of brevity and convenience, it is mentioned herein that:

2.1 **CP(IB)No. 190/2018** was filed by Korba West Power Company Limited, the Corporate Debtor under Section 10 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "Code") read with Rule 7 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 seeking initiation of Corporate Insolvency Resolution Process of Korba West Power Company Limited (hereinafter referred to as "Corporate Debtor") having registered office at First Floor, E-122, Patel Nagar, City Centre, Site No. 2, Gwalior, Madhya Pradesh.

2.2 The said CP(IB) No. 190/2018 was admitted on 26.07.2018 by this Adjudicating Authority and appointed Shri Abhijit Guhathakurta, as the Interim Resolution Professional (hereinafter referred to as "IRP"). Subsequently, Shri Abhijit Guhathakurta was confirmed as the Resolution professional for the Corporate Debtor in accordance with Section 22 of the Code by the Committee of Creditors (hereinafter referred to as "CoC") of the Corporate Debtor in its first meeting held on 10.09.2018.

2.3 The Resolution Professional, so appointed, made public announcement on 07.08.2018 as per the provisions of section 15 of the Code read with Regulation 6 of the CIR Regulations inviting all stakeholders including financial creditors of the Corporate Debtor to submit their claims by 17.08.2018. Pursuant to the public announcement, the Resolution Professional received claims of Rs. 5034.79 crores from 19 financial

Handwritten signature

creditors out of which claims for Rs. 5032.16 crores from 19 financial creditors were admitted. Further, the Resolution Professional received claims for Rs. 291.33 crores from 197 operational creditors out of which claims for Rs. 111.45 crores were admitted.

- 2.4 It is stated that Resolution Professional convened the 2nd (second) meeting of the CoC on 09.10.2018, wherein the Resolution Professional apprised the members of the CoC that appointment of valuation agencies, transaction review auditor, security agencies and sharing of Information Memorandum had been carried out. It is further stated that the Resolution Professional also invited the members of the CoC to approve the eligibility criteria for prospective resolution applicant(s).
3. It is submitted that Resolution Professional issued a public invitation by way of an advertisement dated 15.10.2018 in terms of Section 25(2)(h) of the Code, whereby, the Resolution professional inter alia invited prospective resolution applicants, who met the qualification requirements as provided in the advertisement, to submit the expression of interest for submitting a resolution plan for the Corporate Debtor by 06.11.2018. Pursuant to the publication of the advertisement, the Resolution Professional received expression of interest from ten (10) potential resolution applicants as of the last date for submission of expression of interest i.e. 06.11.2018, who were keen to submit resolution plans for the Corporate Debtor.
- 3.1 It is stated that the Resolution Professional conducted the 3rd (third) meeting of the CoC on 13.11.2018, wherein, the evaluation criteria proposed for prospective resolution applicants was approved by the members of the CoC.
- 3.2 Thereafter, the Resolution Professional, acting in compliance of Regulation 36A (1) of the CIR Regulations by way of an email dated 16.11.2018, provided to the members of the CoC, the provisional list of prospective resolution applicants with his comments who met the Qualification Criteria. The Resolution Professional vide said email intimated the members of the CoC that out of the ten (10) prospective resolution applicants, seven (seven) were considered to be eligible as per the Qualification Criteria.

J. Kumar

- 3.3 Similarly, on 21.11.2018, the Resolution Professional provided the Information Memorandum in respect of the Corporate Debtor to all 7 (seven) prospective resolution applicants in the provisional list provided by the Resolution professional, in terms of Section 29 of the Code and Regulation 36B of the CIR Regulations.
- 3.4 Subsequently, in terms of Regulation 36(A)(12), the Resolution Professional vide his email dated 27.11.2018 provided a final list of resolution applicants, to the members of the CoC who successfully met the Qualification Criteria.
- 3.5 It is stated that Resolution Professional also appointed registered valuers, viz. CRRE South Asia Private Limited and RBSA Valuation Advisors LLP to determine the liquidation value and fair value of the Corporate Debtor in terms of Regulation 35 of the CIR regulations. The liquidation value as determined in accordance with Regulation 35 of the CIR Regulations stood at Rs. 1454.93 crores and the average fair value of the Corporate Debtor stood at Rs. 2496.36 crores.
4. In the meantime, this Adjudicating Authority, by way of its order dated 22.01.2019 allowed additional time of 90 days beyond 180 days for completion of the CIR process, on the application so made by the Resolution Professional on the basis of resolution passed by CoC.
5. It is stated that in the interregnum, the Resolution Professional received resolution plans from 3 resolution applicants viz. **(a) Adani Power Limited (b) Worlds Window Impex India Private Limited and (c) Lakshdeep Investments and Finance Private Limited**. Thereafter, in the 6th (sixth) meeting of the CoC, the Resolution Professional invited the resolution applicants one after another to present their plans in brief at the meeting of the CoC. The Plan submitted by Lakshdeep Investments and Finance Private Limited was considered non-responsive as Lakshdeep Investments and Finance Private Limited had not submitted earnest money deposit along with the resolution plan as is required under the RFRP.
- 5.1 It is stated that on 19.03.2019, the Process Advisor presented his final evaluation of the resolution plans to the CoC and on the basis of such evaluation, the resolution plan submitted by the successful Resolution

Applicant i.e. Adani Power Limited was identified as the best Resolution Plan in terms of Regulation 38(3) of the CIR Regulations. Accordingly, 10th (tenth) meeting of CoC was convened on 01.04.2019, wherein, the Resolution Plan of the successful Resolution Applicant i.e. Adani Power Limited, was placed before the CoC for its consideration and approval. The said Resolution Plan of the Adani Power Limited, was approved by the members having 69.08% voting share in the CoC.

- 5.2 It is stated that subsequent to the approval of the Resolution Plan by the CoC, the Resolution Professional issued the letter of Intent dated 06.04.2019 to the successful Resolution Applicant i.e. Adani Power Limited in accordance with the RFRP which was accepted by the successful Resolution Applicant, Adani Power Limited on 09.04.2019 and submitted a bank guarantee/demand draft for Rs. 20 crores on 09.04.2019 as performance security in accordance with the provisions of the RFRP.
- 5.3 In view of the aforesaid facts and circumstances, the Resolution Professional submits Resolution Plan under section 30(6) seeking its approval in terms of Section 31(1) of the Code.
6. The applicant/the Resolution Professional, deliberating the sequence of events right from calling EoI up to approval of the Resolution Plan by the CoC in its tenth meeting held on 01.04.2019 submitted the Resolution Plan duly approved by the CoC and affirming that he has verified the contents of the Resolution Plan and confirmed that it complies with the requirements envisaged under Regulation 38 of the CIR Regulations as well as Section 30 of the Code, and sought for approval of the Resolution Plan by this Adjudicating Authority. The Resolution Professional has submitted a detailed Table showing the compliances of the Resolution Plan with the mandatory requirements under the Code and CIR Regulations to support his contention, which said Plan has also been approved by the CoC having 69.08 per cent of voting in favor of the Resolution Plan. The Table showing the compliances is given hereunder:

The compliance of the Resolution Plan is as under:

Manna

Section of the Code Regulation No.	Requirement with respect to Resolution Plan	Section of Resolution Plan	Compliance (Yes/No)
25(2)(h)	Whether the Resolution Applicant meets the criteria approved by the CoC having regard to the complexity and scale of operations of business of the CD?	Brief background of the Qualified Resolution Applicant	Yes
Section 29A	Whether the Resolution Applicant is eligible to submit Resolution Plan as per final list of Resolution Professional or Order, if any, of the Adjudicating Authority?	Annexure 10 of Resolution Plan	Yes
Section 30(1)	Whether the Resolution Applicant has submitted an affidavit stating that it is eligible?	Annexure 10 of the Resolution Plan	Yes
Section 30(2)	Whether the Resolution Plan: (a) Provides for the payment of insolvency resolution process costs? (b) Provides for the payment of the debts of Operational Creditors? (c) Provides for the management of the affairs of the Corporate Debtor? (d) Provides for the implementation and supervision of the Resolution Plan? (e) Contravenes any of the provisions of the law for the time being in force?	Section 3.1	Yes
		Section 3.2	Yes
		Section 7	Yes
		Section 8	Yes
		Section 1.5	No
Section 30(4)	Whether the Resolution Plan (a) Is feasible and	NA	Yes

Adnan

[Signature]

	<p>viable, according to the CoC?</p> <p>(b) Has been approved by the CoC with 66% voting share?</p> <p>(c)</p>	NA	Yes
Section 31(1)	Whether the Resolution Plan has provisions for its effective implementation plan, according to the CoC?	NA	Nil
Regulation 35A	Where the Resolution Professional made a determination if the Corporate Debtor has been subjected to any transaction of the nature covered under section 43, 45, 50 or 66, before the one hundred and fifteen day of the insolvency commencement date, under intimation to the Board?	NA	Nil
Resolution 38(1)	Whether the Resolution Plan gives priority to the amount due to the operational creditors in payment over financial creditors	Section 1.2	Yes
Regulation 38(1A)	Whether the Resolution Plan includes a statement as to how it has dealt with the interests of all stakeholders?	Section 1.2	Yes
Regulation 38(1B)	<p>(i) Whether the Resolution Applicant or any of its related parties has failed to implement or contributed to the failure of the implementation of any resolution plan approved under the Code.</p> <p>(ii) If so, whether the Resolution Applicant has</p>	<p>Section 1.7</p> <p>Section 1.7</p>	<p>No</p> <p>No</p>

	submitted the statement giving details of such non-implementation?		
Regulation 38(2)	Whether the Resolution Plan provides: (a) The term of the plan and its implementation schedule? (b) For the management and control of the business of the Corporate Debtor during its term? (c) Adequate means for supervising its implementation?	Section 9 Section 7 and 8 Section 8	Yes Yes Yes
38(3)	Whether the resolution plan demonstrates that- (a) It addresses the cause of default? (b) It is feasible and viable? (c) It has provisions for its effective implementation? (d) It has provisions for approvals required and the timeline for the same? (e) The resolution applicant has the capability to implement the resolution plan?	Schedule 2 Schedule 2 Section 8 Section 9 Schedule 2	Yes Yes Yes Yes Yes
39(2)	Whether the RP has filed applications in respect of transactions observed, found or determined by him?	NA	Nil
Regulation 39(4)	Provide details of performance security received, as referred to in sub-regulation (4A) of Regulation 36B.	NA	Yes. Provided separately.

Handwritten signature

7. The details of financial claims submitted to Resolution Professional as on March 07, 2019 are mentioned herein below:

(Amount in Rs. Crores)

Sr. No.	Name of the Bank	Amount Claimed	Amount Admitted	Voting share
1.	Adani Power Limited	1,878.52	1,878.52	37.33%
2.	Axis Bank	351.11	351.11	6.98%
3.	Union Bank of India	327.20	324.58	6.45%
4.	UCO Bank	284.75	284.75	5.66%
5.	Bank of India	254.16	254.16	5.05%
6.	Central Bank of India	187.62	187.62	3.73%
7.	LIC of India	172.18	172.18	3.42%
8.	Allahabad Bank	160.24	160.24	3.18%
9.	Bank of Maharashtra	159.25	159.25	3.16%
10.	Corporation Bank	157.25	157.25	3.12%
11.	Phoenix ARC (SBH)	154.72	154.72	3.07%
12.	State Bank of India(SBP)	147.01	147.01	2.92%
13.	Syndicate Bank	131.94	131.94	2.62%
14.	Edelweiss ARC(SBT)	123.10	123.10	2.45%
15.	United Bank of India	118.88	118.88	2.36%
16.	Dena Bank	114.03	114.03	2.27%
17.	Andhra Bank	110.69	110.69	2.20%
18.	SREI Infrastructure Finance Limited	107.17	107.17	2.13%
19.	Aditya Birla Finance Limited	94.98	94.98	1.89%
Total		5,034.80	5,032.18	99.99%

8. The summary of operational creditors' claims received and reviewed till March 07, 2019 is mentioned below:

(Amount INR Crore)

Claimant Type	Claims Received		Claims Status		
	No. of Claims	Amount	Amount Admitted	Amount Under Verification	Amount Rejected
Workmen	-	-	-	-	-
Employees	1	0.002	-	0.002	-
Statutory Bodies	2	1.27	0.68	-	0.58
Vendors	193	279.41	100.12	0.43	178.86
Related Parties	1	10.65	10.65	-	-
Total	197	291.33	111.45	0.43	179.44

9. On perusal of the records, it is found that amounts provided for the stakeholders under the Resolution Plan as given by the Resolution

Handwritten signature

Professional in its Compliance Certificate, in the form of Form H, are as under:

(Amount in Rs. Crores)

Sl. No	Category of Stakeholder	Amount Claimed	Amount Admitted	Amount Provided under the Plan	Amount Provided to the Amount Claimed (%)
1.	Secured Financial Creditors	3,349.45	3,346.83	1100	32.84%
2.	Unsecured Financial Creditors	1,685.35	1,685.35	1,685.35	100.00%
3.	Operational Creditors	291.32	111.45	104.28	35.79%
	Government	Included with Operational Creditors above.			
	Workmen	Included with Employees below			
	Employees	0.002253	0.002253	0.002253	100.00%
4.	Other Debts and Dues	Nil	Nil	Nil	Nil

10. The Resolution Applicant has undertaken insolvency resolution of the Company/Corporate Debtor in the manner as stated in Section 3 at Page No. 82 of the Resolution Plan under the head - "Treatment of Stakeholders" which is the part and parcel of the Resolution Plan as well as the application. The said Resolution Plan also includes the distribution of financial outlay as certified by the Resolution Professional in the preceding para in his Compliance Certificate.

10.1 It is stated in the Resolution Plan, that in accordance with the Code, the unpaid CIRP Costs will be paid in priority over payments to any other creditors on Effective Date.

10.2 It is stated in the Resolution Plan that Operational Creditors claim(s) aggregating to approximately INR 291.32 crores have been verified and admitted for the purposes of the CIRP by the Resolution Professional as on December 10, 2018. It is further stated that in the Resolution Applicant's assessment, the Liquidation Value of the Corporate Debtor which stands at Rs. 1454.93 crores, is insufficient to satisfy even the claims of the Secured Financial Creditors in full and therefore, the Liquidation Value accruing to the Operational Creditors (except workmen of the Corporate Debtor to extent payments are required to be made under the Code) would be NIL. Accordingly, the Resolution Applicant

Handwritten signature

undertakes to pay Liquidation Value to all Operational Creditors (including any Governmental Authorities) (if any) in respect of their Admitted Operational Creditors Debt, in priority to payment to any Financial Creditors. In view of the above, post the payment of Liquidation Value, all dues of the Operational Creditors (excluding any Workmen and Employee) shall be written off in full and shall be, and be deemed to be, permanently extinguished as on the NCLT Approval Date. However, in the interest of keeping the Project operational and for running the Corporate Debtor as a going concern, the Resolution Applicant proposes to provide ex-gratia amount of INR 104.28 crores to the Operational Creditors (excluding employees and Workmen) within 6 (six) months from the Effective Date, or such other date(s) as may be mutually agreed with the relevant Operational Creditor.

- 10.3 It is also submitted that the Resolution Applicant will make upfront cash payment of Rs. 100 crores to the Secured Financial Creditors on pro rata basis. It is also submitted that the Resolution Applicant estimates (a) fund infusion of up to INR 594 crores to meet capital expenditure requirements of the Corporate Debtor and (b) additional capital expenditure of up to INR 480 crores as requirement towards compliance with environmental and other norms.
11. Before proceeding further, it is pertinent to go through the mode of settlement of claims of the different claimants/stakeholders etc. etc. which is reflected in Section 53 and the priorities listed therein, required to be followed in the Resolution Plan. **Section 53(1)** notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period and in such manner as may be specified, namely: -
- (a) The insolvency resolution process costs and the liquidation costs paid in full;
 - (b) The following debts which shall rank equally between and among the following: -
 - (i) Workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and

Chandra

- (ii) Debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;
- (c) Wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;
- (d) Financial debts owed to unsecured creditors;
- (e) The following dues shall rank equally between and among the following: -
 - (i) Any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;
 - (ii) Debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;
- (f) Any remaining debts and dues;
- (g) Preference shareholders, if any; and
- (h) Equity shareholders or partners, as the case may be.

(2) Any contractual arrangement between recipients under sub-section (1) with equal ranking, if disrupting the order of priority under that sub-section shall be disregarded by the liquidator.

(3) The fees payable to the liquidator shall be deducted proportionately from the proceeds payable to each class of recipients under sub-section (1), and the proceeds to the relevant recipients shall be distributed after such deduction.

Explanation – For the purpose of this section –

(a) It is hereby clarified that at each stage of the distribution of proceeds in respect of a class of recipients that rank equally, each of the debts will either be paid in full, or will be paid in equal proportion within the same class of recipients, if the proceeds are insufficient to meet the debts in full; and

(b) the term “workmen’s dues” shall have the same meaning as assigned to it in section 326 of the Companies Act, 2013 (18 of 2013).

12. Thus, Section 53 of the Code lists the priorities to be given to the beneficiaries, of liquidation value of the assets of the Corporate Debtor. The provisions of Section 53 make it amply clear that Operational

Abhishek

Creditors are at the end of the list of beneficiaries as the Secured Financial Creditors have edge over the others.

13. It would also be pertinent to mention here that Operational Creditors have no locus standi as far as approval of the Resolution Plan by the CoC is concerned. As per Section 24(3)(C), they are not eligible to attend and vote at the meetings of CoC if they are holding less than 10% of the total debt.

Section 24(3) of the Code reads as under:

Section 24:

- (3) The Resolution Professional shall give notice of each meeting of the committee of creditors to –
- (a) members of [Committee of Creditors, including the authorized representatives referred to in sub-sections (6) and (6A) of section 21 and sub-section (5)];
 - (b) members of the suspended Board of Directors or the partners of the corporate persons, as the case may be;
 - (c) operational creditors or their representatives if the amount of their aggregate dues is not less than ten per cent of the debt.
14. To decide the issue, it will be pertinent to notice the very object of the 'IB Code', 'Resolution' and Role of CoC.

The objective of the 'I&B Code'

"The objective of the Insolvency and Bankruptcy Code, 2016 is to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in time bound manner for maximization of the value of assets of such persons, to promote entrepreneurship, availability of credit, and balance the interests of all stakeholders including alteration in the priority of the payments of the government dues, to establish an Insolvency and Bankruptcy Fund and matters connected therewith or incidental thereto.

Thus, the preamble of the I&B Code aims to promote resolution over liquidation.

Chandra

[Handwritten mark]

The purpose of resolution is for maximization of value of assets of the 'Corporate Debtor' and thereby for all creditors. It is not maximization of value for a 'stakeholder' or 'assets of a stakeholder' such as creditors and to promote entrepreneurship, availability of credit and balance the interests. The first objective is 'resolution'. The second objective is 'maximization of the value of assets of the 'Corporate Debtor' and third objective is 'promoting entrepreneurship, availability of credit and balancing the interests'. This objective of the I&B Code is sacrosanct.

The said objective of the I&B Code is also affirmed by Hon'ble Supreme Court in Arcelor Mittal India Pvt. Ltd. Vs. Satish Kumar Gupta and Ors wherein the Hon'ble Supreme Court observed that "the Corporate Debtor consists of several employees and workmen whose daily bread is dependent on the outcome of the CIRP. If there is resolution applicant who can continue to run the corporate debtor as a going concern, every effort must be made to try and see that this is made possible.

Resolution Plan

The 'Insolvency & Bankruptcy Code' defines 'Resolution Plan' as a plan for insolvency resolution of the 'Corporate Debtor' as a going concern. It does not spell out the shape, color and texture of 'Resolution Plan', which is left to imagination of stakeholders. Read with long title of the 'I&B Code', functionally, the 'Resolution Plan' must resolve insolvency (rescue a failing, but viable business); should maximize the value of assets of the 'Corporate Debtor', and should promote entrepreneurship, availability of credit and balance the interests of all the stakeholders.

In the backdrop of the object of the Code, it is amply clear that the **"Resolution is Rule and the Liquidation is an Exception"**. Liquidation brings the life of a corporate to an end. It destroys organizational capital and renders resources idle till reallocation to alternate uses. Further, it is inequitable as it considers the claims of a set of stakeholders only if there is any surplus after satisfying the claims of a prior set of stakeholders fully. 'The Insolvency and Bankruptcy Code', therefore, does not allow liquidation of a Corporate Debtor' directly. It allows liquidation only on failure of corporate insolvency resolution process'. It rather facilitates and encourages resolution in several ways.

Chatur

The said objective of the Resolution Plan is affirmed in the decision in the matter of **K. Sashidhar Vs. Indian Overseas Bank & Ors** The Hon'ble Supreme Court has observed that National Company Law Tribunal has no jurisdiction and authority to analyze or evaluate the commercial decision of the Committee of Creditors (CoC) to enquire into the justness of the rejection of the resolution plan by the dissenting financial creditors.

Keeping in view such object behind the enactment of the Code, intention of the Legislature is, that priority is to be given to the resolution than liquidation in the larger interests of the public, workmen, stakeholders and the other employees of the Corporate Debtor in the interest of justice and in order to achieve the object of the Code, liquidation of a company can only be as a last resort, wherein, all efforts for bringing Resolution Plan failed or it cannot be found workable in the larger public interest. Hence, now the approval of Resolution Plan by this Adjudicating Authority is rule as per the apex court's decision in the matter of K. Sashidhar Vs. Indian Overseas Bank & Ors as discussed above.

The Hon'ble Supreme Court in its recent judgment in Civil Appeal No. 10673 of 2018 in K. Sashidhar Vs. Indian Overseas Bank & Ors. Comprising of Hon'ble Justice A.M. Khanwilkar and Hon'ble Justice Ajay Rastogi observed that:

“33. As aforesaid, upon receipt of a “rejected” resolution plan the adjudicating authority (NCLT) is not expected to do anything more; but is obligated to initiate liquidation process under section 33(1) of the I&B Code. The Legislature has not endowed the adjudicating authority (NCLT) with the jurisdiction or authority to analyze or evaluate the commercial decision of the CoC much less to enquire into the justness of the rejection of the resolution plan by the dissenting financial creditors. From the legislative history and the background in which the I&B Code has been enacted, it is noticed that a completely new approach has been adopted for speeding up the recovery of the debt due from the defaulting companies.”

“39. In our view, neither the adjudicating authority (NCLT) nor the appellate authority (NCLAT) has been endowed with the jurisdiction to reverse the commercial wisdom of the dissenting financial

Khanwilkar

creditors and that too on the specious ground that is only an opinion of the minority financial creditors. The fact that substantial or majority percent of financial creditors have accorded approval to the resolution plan would be of no avail, unless the approval is by a vote of not less than 75% (after amendment of 2018 w.e.f. 06.06.2018, 66%) of voting share of the financial creditors. To put it differently, the action of liquidation process postulated in Chapter-III of the I&B Code, is avoidable, only if approval of the resolution plan is by a vote of not less than 75% (as in October, 2017) of voting share of the financial creditors. Conversely, the legislative intent is to uphold the opinion or hypothesis of the minority dissenting financial creditors. That must prevail, if it is not less than the specified percent (25% in October, 2017; and now after the amendment w.e.f. 06.06.2018, 44%). The inevitable outcome of voting by not less than requisite percent of voting share of financial creditors to disapprove the proposed resolution plan, de jure, entails in its deemed rejection.

“35. Whereas, the discretion of the adjudicating authority (NCLT) is circumscribed by Section 31 limited to scrutiny of the resolution plan “as approved” by the requisite percent of voting share of financial creditors. Even in that enquiry, the grounds on which the adjudicating authority can reject the resolution plan is in reference to matters specified in Section 30(2), when the resolution plan does not confirm to the stated requirements. Reverting to Section 30(2), the enquiry to be done is in respect of whether the resolution plan provides: (i) the payment of Insolvency resolution process costs in a specified manner in priority to the repayment of other debts of the corporate debtor, (ii) the repayment of the debts of operational creditors in prescribed manner, (iii) the management of the affairs of the corporate debtor, (iv) the implementation and supervision of the resolution plan, (v) does not contravene any of the provisions of the law for the time being in force, (vi) conforms to such other requirements as may be specified by the Board. The Board referred to is established under section 188 of the I&B Code. The powers and functions of the Board, directly or indirectly, pertain to regulating the manner in which the financial creditors ought to or ought not to exercise their commercial wisdom during the voting on the resolution plan under section 30(4) of the I&B Code. The

Abhinav

subjective satisfaction of the financial creditors at the time of voting is bound to be a mixed baggage of variety of factors. To wit, the feasibility and viability of the proposed resolution plan and including their perceptions about the general capability of the resolution applicant to translate the projected plan into a reality. The resolution applicant may have given projections backed by normative data but still in the opinion of the dissenting financial creditors, it would not be free from being speculative. These aspects are completely within the domain of the financial creditors who are called upon to vote on the resolution plan under section 30(4) of the I&B Code.

15. **Objections of the Corporation Bank – the dissenting Financial Creditor**

During the course of arguments, the Corporation Bank filed their objections through engaged lawyer being dissenting Financial Creditor, objecting the approval of the Resolution Plan by this Adjudicating Authority. It is submitted by the Ld. lawyer of the Corporation Bank that Resolution Plan approved by the CoC does not meet and is not in conformity of the requirements of Section 30(2) of the IBC; suit the vested interest of the Resolution Applicant some of the members of the CoC; the purchase price is undervalued and depressed and fails to achieve the Fair Market Value and the Resolution Plan has failed to maximize the value of the assets of the Corporate Debtor, the Forensic Audit Report has not been circulated/provided amongst the Lenders despite the lenders being informed that the copy would be provide and the Resolution Plan is attempting to foist mandatory obligation on the Lenders without considering that for any approval, restructuring of debts , the Lenders have to comply with the directions and Guidelines laid down by the Reserve Bank of India and also the Lender Banks Internal Circular.

On perusal of the records, it is found that Corporation Bank is holding 3.12% of the voting share. Further, the CoC in its meeting held on 01.04.2019 has approved the Resolution Plan by 69.08% of voting in favor of the Resolution Applicant. That at the time of approval of the Resolution Plan, the Corporation Bank was very much present in the meeting, being one of the Financial Creditors. Admittedly, the Corporation Bank is the dissenting member of the CoC and if being

Aburani

aggrieved by the decision of the CoC, could have approached this Adjudicating Authority, long before the date of hearing i.e. 14.06.2019, when the Resolution Plan is placed before this Adjudicating Authority, for approval. Therefore, the dissenting Financial Creditor, has approached this Adjudicating Authority at the belated stage. Time is of essence in the bankruptcy proceedings. One of the key purposes of the Code is to encourage resolution of the issues in time bound manner so that the time value of money is preserved for maximization of assets by providing a time bound process for insolvency resolution.

Further, in view of the fact that the Resolution Plan has been approved by a majority of 68.47% of the Financial Creditors, this Adjudicating Authority has no reason to question the commercial wisdom of the CoC as upheld by the Hon'ble Supreme Court in **K. Sashidhar Vs. Indian Overseas Bank & Ors.**

In view of the above explanations, the objections of the dissenting Financial Creditor, the Corporation Bank are not maintainable.

16. Before proceeding further, it is expedient to discuss Section 30 of the Code, to ascertain whether the Resolution Plan meets the requirements of Section 30 of the Code.

Section 30: Submission of resolution plan:

"30. (1) A resolution applicant may submit a resolution plan 1[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 2[payment] of other debts of the corporate debtor;
- (b) provides for the 3[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) conforms to such other requirements as may be specified by the Board.

Handwritten signature

4[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).

5["(4) The committee of creditors may approve a resolution plan by a vote of not less than 6[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, 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.”.]

7[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.]span>

(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.”

17. On perusal of the records, it is found that the Resolution Plan confirms to the criteria as provided under clauses (a) to (f) in section 30(2) of the Code and the CoC approved the Resolution Plan by 69.08 per cent majority of

Johnson

voting share. The Resolution Plan also confirms to such other requirements as may be specified by the Board.


On perusal of the Resolution Plan, it is found that it meets the requirement of Section 31 r/w Section 30(2) of the Code as well as Section 29A of the Code. Therefore, the present application IA 236 of 2019 is allowed with following observations.


18. The Resolution Applicant has sought certain reliefs and waivers. However, the Resolution Applicant under Section 6, Part V of the Resolution Plan has stated that any relief(s) requested to be granted by the NCLT to the Resolution Applicant shall not be construed as condition for the implementation of this Resolution Plan.
- 18.1 This Adjudicating Authority has carefully gone through the reliefs and waivers sought by the Resolution Applicant. As far as reliefs and waivers sought in Clauses 6.1 (i), (vii), (xi), (xii), (xiv), (xv), (xvi) and (xvii) are concerned, the said clauses are clarificatory in nature and the Resolution applicant would not be liable to discharge any financial obligation or any financial liabilities prior to the Effective Date.
- 18.2 For the other reliefs and waivers mentioned in Clause 6, this Adjudicating Authority is of the considered view that these are the matters related with the concerned competent authorities, hence the Resolution Applicant may approach those competent authorities for relief(s) and waivers sought by them, for their consideration. However, looking to the very pious objective of the IBC, it is expected from those competent authorities to extend their support and cooperation to the Resolution Applicant for the effective implementation of the Resolution Plan by allowing reasonable time in the form of any relief(s) and/or concession(s) as the case may be and/or agreed between the parties to run the Company/Corporate Debtor as a going concern.
- 18.3 It may further be observed that approval of the Resolution Plan, does not mean automatic waiver or abatement of any fees/remuneration and legal proceedings etc etc applicable or pending by or against the Company/Corporate Debtor, as they are the subject matter of the concerned competent authorities having their proper/own jurisdiction to

J. Kumar

pass any appropriate order as the case may be. Hence on approval of the Resolution Plan, the Resolution Applicant may approach those competent authorities/Courts/Legal Forums/Offices – Govt. or Semi Govt. / State or Central Govt. for appropriate relief(s) for appropriate relief(s).

19. The Resolution Applicant has liberty to approach this Adjudicating Authority for appropriate directions/clarifications, as the case may be, in case there is any hindrance in the effective implementation of the Resolution Plan, in accordance with law.
20. It is further directed that:
- i. The approved Resolution Plan shall come into force with immediate effect.
 - ii. The Resolution Plan shall be subject to the various existing laws in force and shall also confirms to such other requirements as specified by the Board and other Statutory/Competent Authorities as the case may be.
 - iii. The Resolution Applicant shall pursuant to the Resolution Plan approved under section 31(1) of the Code, obtain the necessary approvals required under any laws for the time being in force within a period of one year from the date of approval of the Resolution Plan by this Adjudicating Authority under section 31(1) or within such period as provided for in such law, whichever is later or as the case may be.
 - iv. The Resolution Professional shall forward all records relating to the conduct of the corporate insolvency resolution process and Resolution Plan to the Insolvency and Bankruptcy Board of India to be recorded on its database.
20. We, the Adjudicating Authority, are of the considered opinion and also being satisfied that the Resolution Plan as approved by the Committee of Creditors (CoC) meets the requirements as referred to under section 30(2) of the Code, accordingly IA 236 of 2019 is allowed with the above said observations and directions.


Ms. Manorama Kumari,
Adjudicating Authority
Member (Judicial)


Harihar Prakash Chaturvedi,
Adjudicating Authority
Member (Judicial)