



**NATIONAL COMPANY LAW TRIBUNAL
CHANDIGARH BE C.A. (IBC) No. 119/2019NCH (COURT-I),
CHANDIGARH
(Exercising powers of Adjudicating Authority under
the Insolvency and Bankruptcy Code, 2016)
(through web-based video conferencing platform)**

**C.A. (IB) No. 119/2019
in
CP (IB) No. 42/Chd/Hry/2017
(Admitted)**

**Under Section 7 of the Insolvency
and Bankruptcy Code, 2016**

IN THE MATTER OF:

Corporation Bank

..... Petitioner/Financial Creditor

Versus

Amtek Auto Limited

.....Respondent/Corporate Debtor

AND IN THE MATTER OF C.A. NO. 119/2019

**Under section 60 (5) read with
section 74(3) of the Insolvency
and Bankruptcy Code, 2016**

Mr. Dinkar T. Venkatasubramanian

Insolvency Professional and Member of
Monitoring Committee for Amtek Auto Ltd.
3, LSC, Pomposh Enclave, Greater Kailash-1
New Delhi – 110048

.....Applicant

Versus

1. LIBERTY HOUSE GROUP PTE LTD.

8, Marian View,
#40-06 Asia Square Tower 1,
Singapore, 018960

2. BARCLAYS BANK PLC.

1st Floor, Eros Corporate Tower,
Nehru Place, New Delhi-110019



.....Respondents

3. Corporation Bank

Corporate Banking Branch
MGF Automobiles Building
1, Faiz Road, Jhandewalan
New Delhi-110005

Order delivered on: 21.11.2024

Coram: HON'BLE MR. HARNAM SINGH THAKUR, MEMBER (JUDICIAL)
HON'BLE MR. UMESH KUMAR SHUKLA, MEMBER (TECHNICAL)

Present:

For the Erstwhile RP/Applicant : Ms. Munisha Gandhi, Senior Advocate,
Mr. Sanjay Bhatt, Advocate
For the Respondent No. 1 in : Mr. Arvind Kumar, Advocate
CA No. 119/2019
For the Respondent No. 2 in : Mr. Ashish Chopra, Senior Advocate
CA No. 119/2019 Ms. Nitika Sharma, Advocate,
Mr. Amitabh Tewari, Advocate,
Mr. Dilmrig Nayani, Advocate

Per: Sh. Harnam Singh Thakur, Member (Judicial)
Sh. Umesh Kumar Shukla, Member (Technical)

ORDER

The Present Company Application (hereinafter referred to as the "**CA**" or "**IA**") has been filed by Mr. Dinkar T. Venkatasubramanian (hereinafter referred to as the "**Applicant**"), Insolvency Professional appointed by this Tribunal and as member of the Monitoring Committee (hereinafter referred to as the "**MC**") of Amtek Auto Limited (hereinafter referred to as the "**Corporate Debtor**" or "**CD**" or "**Amtek**") against the Respondents namely Liberty House Group Pte Limited (hereinafter referred to as the "**Respondent No. 1**" or "**Liberty**"), Barclays Bank PLC, (hereinafter referred to as the



“Respondent No.2” or **“Barclays”**) and Corporation Bank (hereinafter referred to as the **“Respondent No.3”**) under the provisions of section 60 (5) read with section 74(3) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the **"Code"** or **“IBC”**), seeking an order for securing/ensuring deposit of Rs.50 crore from the Respondents, jointly and severally.

FACTS OF THE CASE

2. It is averred in the Application:

- (i) Respondent No.1, in concert with its Banker, Respondent No.2, acting with a malafide intent, committed a fraud against the Committee of Creditors (hereinafter referred to as the **“CoC”** and other stakeholders, while submitting the Bid Bond Guarantee (hereinafter referred to as the **"BBG"**) for submission of resolution plan for the Corporate Debtor. Respondent No.1 has perpetrated this fraud by eliminating specific negations word "Not" at two places to cause the forfeiture event into a conditional forfeiture, thereby denying the CoC any right with respect of the BBG in spite of blatant defaults by Respondent No.1.
- (ii) This Adjudicating Authority, vide order dated 24.07.2017 (copy annexed with the IA at Annexure-1), admitted the petition filed by the Corporation Bank under section 7 of the Code against the Corporate Debtor and vide order dated 27.07.2017 appointed Dinkar T. Venkatasubramanian as the Interim Resolution Professional, who later continued as the Resolution Professional



(hereinafter referred to as the "**RP**") with the approval of the CoC in their meeting held on 22.08.2017.

- (iii) The CoC on 07.12.2017 approved a Process Note for selection (copy annexed with the IA at Annexure-2) and evaluation of the resolution plans for the Corporate Debtor, which was duly circulated to all the prospective resolution applicants (hereafter referred to as the "**PRAs**"), including Respondent No.1, who duly accepted the terms of the Process Note and submitted its binding offer for submission of resolution plan to the RP.
- (iv) As a pre-condition for submission of binding offer, the PRAs were required to submit BBG of Rs.50 crore in favour of the Corporation Bank, the lead Financial Creditor of the Corporate Debtor. In pursuance to the above, a proforma in which BBG was required to be submitted was prepared by the Applicant's team and was circulated to all the PRAs, including the Respondent No. 1, with the Process Note. The format of BBG was provided by the RP to Respondent No.1, which in response suggested some variations in the BBG format, which were discussed at length on January 11, 2018 between Respondent No.1 and the Process Advisors in consultation with RP and the Legal counsels. Finally, a format was circulated by Mr Simon Nasta, Group General Counsel for Respondent No.1, along with its changes vide email dated January 11, 2018 (12:20 pm IST), which was found acceptable to the RP. Subsequently, the BBG number BBGXXXXXX was issued by



Respondent No.2 on January 27, 2018 in favour of the Corporation Bank. The email dated January 11, 2018 from Mr. Simon Nasta along with modified BBG format has been annexed as Annexure A-3 to the IA.

- (v) The Respondent No.1 sent the hardcopy of the BBG for Rs.50.00 crore dated 23.01.2018 duly executed in favour of Corporation Bank, directly to it. The Corporation Bank confirmed the receipt of the BBG to RP. The resolution plan of Respondent No.1 was accordingly considered by the RP and submitted to the COC, which approved the same by 94.20% majority. The RP filed the C.A. No. 114/2018 before this Adjudicating Authority for approval of the resolution plan, which was approved by this Adjudicating Authority vide order dated 25.07.2018. After approval of the resolution plan, the Respondent No.1 started making excuses to delay implementation of its terms, apparently on account of its inability to raise funds to honour its financial obligations, even though it had provided a firm commitment from Greensill Capital (UK) Limited (hereafter referred to as the "**Greensill**") about the sources of funds. The Respondent No.1 also raised frivolous excuses for not implementing the resolution plan e.g. information in the information memorandum had serious issues and was incomplete and questioned the valuation and other facts attempting to renegotiate the approved resolution plan. The failure of Respondent No.1 and Greensill, which provided letter of assurance for funds to the RP and CoC leads to a reasonable belief that the letter was



provided only to mislead the CoC into approving the resolution plan of Respondent No.1 and there was no honest and genuine intention to release funds on its approval.

(vi) All actions set out in the resolution plan were required to be consummated within a maximum period of ninety days from the date of the order of approval of this Adjudicating Authority on 25 July 2018 (subject to CCI approval), however, the Respondent No.1 perpetrated a malice in the documents in concert with its bank and has failed in fulfilling the following commitments:

- a. Failure to pay a sum of Rs.3,310 crore upfront along with the fresh infusion of Rs.350 crore within the stipulated closing period of ninety days, extendable by another 30 days, in case the CCI Approval is not received within a period of 60 days from the approval date of the Adjudicating Authority (CCI approval received on 6 November 2018) i.e. November 22, 2018.
- b. Failure to fulfil the commitments prescribed under the Process Note dated 7 December 2017 prepared under the mandate of Section 25(2)(h) of the Code and approved resolution plan including but not limited to (i) furnishing a performance guarantee of an amount of Rs.100 crore against the committed amounts of Rs.4404 crore (Rs.3525 crore upfront amount and Rs.879 crore as pass through against sale of investments) for financial creditors, Rs.50 crore for operational creditors, Rs.2.5 crore for equity stakeholders and Rs.500 crore fresh infusion



for stabilization & improving operations of the Corporate Debtor; and (ii) creation of the escrow equivalent to 15% of the upfront cash pay-out as an alternative to the provision of the performance bank guarantee in favour of the CoC (in the form acceptable to the CoC).

c. Furnishing the BBG in the desired format and perpetrated.

(vii) In terms of the Process Note, on approval of the resolution plan by the CoC, the RP on behalf of the CoC also sent the draft Letter of Intent (hereinafter referred to as “LoI”) to the Respondent No.1 for unconditional acceptance. However, under the garb of negotiations, the Respondent No.1, on one pretext or the other kept on delaying signing of the LoI. This Adjudicating Authority, while approving the resolution plan vide order dated 25.07.2018, in para 31 and 32 has recorded as under in respect of Letter of Intent:

“31. The entire committee of creditors has filed its own reply by diary No.1911 of 30.05.2018. The COC confirms and accepts the contents of the application filed by the resolution professional for approval of the resolution plan.

32. It is further stated that post approval of the resolution plan by the committee of creditors, a letter of intent was required to be signed between the resolution applicant and the resolution professional. The details of the conditions to be mentioned in the letter of intent as approved by the committee of creditors have been stated in this response and draft of the letter has been issued to the resolution applicant by the resolution professional.....”

(viii) Along with the said Application, the RP also annexed a copy of the forwarding letter dated 27.03.2018 issued by him in accordance with the requirement of section 30(3) of the Code read with



regulation 39(2) of the IBBI (Insolvency Resolution Process for Corporate Persons), 2016 (hereinafter referred to as the “**CIRP Regulations**”), as Annexure A-5 for presentation of the resolution plan of Respondent No.1 to the CoC. Along with the said forwarding letter, the RP had also annexed a copy of the draft LoI issued by the RP on instructions of the CoC setting out the conditions subject to which the CoC had approved the resolution plan and Respondent No.1 was required to sign unconditionally and return the same to the CoC.

- (ix) In view of the above, a decision was taken by the MC/joint lenders in its meeting held on 19.11.2018 to invoke the BBG submitted by Respondent No.1 and accordingly, the Corporation Bank vide Notice of Demand dated 20.11.2018 issued to the Respondent No.2, invoked the BBG. A copy of the Notice of Demand dated 20.11.2018 issued by Corporation Bank to the Respondent No.2 has been annexed with the IA as Annexure A-4.
- (x) Despite the fact that Respondent No.1 has itself failed to fulfil its obligations under the approved resolution plan, the Respondent No.1 in complete disregard to the provisions of the Code filed a civil suit being CS (Comm) 1245 of 2018 before the Hon’ble High Court of Delhi inter alia seeking a permanent injunction of the invocation of the BBG. In the meantime, the Respondent No.2 vide its letter dated 27.11.2018 declined to honour its commitment under the BBG on the alleged ground of the Notice of Demand issued by



Corporation Bank being not as per the format of Appendix of the BBG. A copy of the letter dated 27.11.2018 issued by the Respondent No.2 has been annexed with the IA as Annexure A-5.

- (xi) Upon learning the reasons of refusal by the Respondent No.2 to honour the BBG, the MC examined the contents of the BBG tendered by the Respondent No.1 to the Corporation Bank and found that instead of the negotiated agreed format of BBG, the Respondent No.1 had furnished the BBG in a totally different form than what was agreed by the RP and sent it directly to Corporation Bank. The contents of the BBG were unilaterally twisted to make the forfeiture event a condition for invocation and apparently deny the CoC their right to invoke the BBG even after default by Respondent No.1. The extract from the agreed format (as circulated by Simon Nasta from Respondent No.1 on January 11, 2018) and executed BBG (as received by the Corporation Bank) are as below:

	Agreed Format of BBG	Executed BBG
Second half of the first Para	In the event the Applicant has been declared the Successful Applicant (as defined in the Process Letter) by the Resolution Professional and the Applicant has not signed the letter of intent (based on the terms of the Resolution Plan (in form and substance satisfactory to the Successful Applicant) and as agreed in writing by the Successful Applicant) issued to it by the Committee of Creditors, within the time limit stated in the letter of intent, this amount is liable to be forfeited ('Event of Forfeiture') where: (a) the Successful Applicant fails to extend the validity of the Bid Bond Guarantee as may be required by the Resolution Professional and	In the event the Applicant has been declared the Successful Applicant (as defined in the Process Letter) by the Resolution Professional and the Applicant has signed the letter of intent (based on the terms of the Resolution Plan (in form and substance satisfactory to the Successful Applicant) and as agreed in writing by the Successful Applicant) issued to it by the Committee of Creditors, within the time limit stated in the letter of intent, this amount is liable to be forfeited ('Event of Forfeiture') where: (a) the Successful Applicant fails to extend the validity of the Bid Bond Guarantee as may be required by the Resolution Professional and



	Agreed Format of BBG	Executed BBG
	<p>agreed to by the Successful Applicant;</p> <p>(b) is found to have made a false or misleading declaration of eligibility under Section 29A of the IBC;</p> <p>(c) is found to have made false or misleading representation in respect of its credentials under Regulation 38 and 39 of the CIRP Regulations;</p> <p>(d) fails to submit the Performance Guarantee as may be required by the Resolution Professional and agreed to by the Successful Applicant; or</p> <p>(e) fails to implement the Resolution Plan sanctioned by the Adjudicating Authority (National Company Law Tribunal).</p>	<p>agreed to by the Successful Applicant;</p> <p>(b) is found to have made a false or misleading declaration of eligibility under Section 29A of the IBC;</p> <p>(c) is found to have made false or misleading representation in respect of its credentials under Regulation 38 and 39 of the CIRP Regulations;</p> <p>(d) fails to submit the Performance Guarantee as may be required by the Resolution Professional and agreed to by the Successful Applicant; or</p> <p>(e) fails to implement the Resolution Plan sanctioned by the Adjudicating Authority (National Company Law Tribunal).</p>
<u>Last para</u>	<p>For the avoidance of any doubt:</p> <p>(1) this Guarantee/BBG may only be invoked in case the Applicant becomes the Successful Applicant in accordance with the Process Note and the Applicant <u>has not signed</u> the letter of intent (based on the terms of the Resolution Plan (in form and substance satisfactory to the Successful Applicant) and agreed in writing by the Successful Applicant) issued to it by the Committee of Creditors, within the time limit stated in the letter of intent;</p> <p>(2) if an Event of Forfeiture has occurred and is continuing; and</p> <p>(3) no person shall be entitled to invoke this Guarantee/BBG if any non-compliance arises due to:</p> <p>a. non-receipt of the Letter of Intent from the Committee of Creditors; or</p> <p>b. the Successful Applicant not accepting additional terms stipulated by the Committee of Creditors in the Resolution Plan without consent of the Successful Applicant, pursuant to negotiations with the Successful Applicant.</p>	<p>For the avoidance of any doubt:</p> <p>(1) this Guarantee/BBG may only be invoked in case the Applicant becomes the Successful Applicant in accordance with the Process Note and the Applicant <u>has signed</u> the letter of intent (based on the terms of the Resolution Plan (in form and substance satisfactory to the Successful Applicant) and agreed in writing by the Successful Applicant) issued to it by the Committee of Creditors, within the time limit stated in the letter of intent;</p> <p>(2) if an Event of Forfeiture has occurred and is continuing; and</p> <p>(3) no person shall be entitled to invoke this Guarantee/BBG if any non-compliance arises due to:</p> <p>a. non-receipt of the Letter of Intent from the Committee of Creditors; or</p> <p>b. the Successful Applicant not accepting additional terms stipulated by the Committee of Creditors in the Resolution Plan without consent of the Successful Applicant, pursuant to negotiations with the Successful Applicant.”</p>

A copy of the executed BBG dated 23.01.2018 together with last amendatory extension has been annexed with the IA as Annexure A-6.



- (xii) The approved BBG provided that “where the Successful Applicant **has not signed** the LOI, then the BBG should be allowed to be invoked, if any forfeiture event occurs”, whereas the same was unilaterally changed by Respondent No.1 to read that “where the Successful Applicant **has signed** the LOI, then the BBG should be allowed to be invoked”. The effect of aforesaid non-inclusion of “not” in the executed BBG is that if LoI has not been executed by Successful Applicant, then there arises no obligation on the part of the Respondent No.2 to make the payment against BBG on invocation.
- (xiii) In view of the refusal on the part of the Respondent No.2 having been brought to the knowledge of the Hon’ble Delhi High Court, the Hon’ble High Court vide order dated 10.12.2018 disposed of the said suit filed by the Respondent No.1 with the liberty to sue, if the BBBG is invoked afresh or if the need for seeking return of the BBG arises. A copy of the order dated 10.12.2018 passed by Hon’ble Delhi High Court CS (Comm) 1245/2018 has been annexed with the IA as Annexure A-7.
- (xiv) In terms of the order dated 25.07.2018 read with the resolution plan, the MC was constituted to oversee the implementation of the Resolution Plan and also appointed the Applicant as Insolvency Professional, to supervise, manage and control all the business operations of the Corporate Debtor from the date of the approval of the resolution plan till the closing of date in term of resolution plan.



Accordingly, the Applicant is entitled to file this IA as Insolvency Professional and member of the MC.

- (xv) The MC, while reserving their right to initiate appropriate criminal proceedings against the Respondent No.1 and all the persons in charge of and responsible for it, Applicant filed the present IA seeking directions to protect/secure the amount involved under the BBG.

REPLY BY THE RESPONDENT NO. 1

3. The Respondent No. 1 filed its reply dated 29.08.2019, vide diary no. 4428, wherein it is submitted that:

- (i) The case of the Applicant is premised on the false allegation that the Respondent No.1 has committed a fraud against the CoC, while submitting a BBG under the Process Document.
- (ii) The BBG was submitted to the Corporation Bank in its capacity as the lead bank of the CoC of Amtek and as such the RP has no locus to maintain the present IA. It is an attempt of forum shopping by the RP/CoC/Corporation Bank to receive amounts under the BBG, after the CoC failed in its mala fide attempt to fraudulently invoke the BBG and its invocation was rejected by Respondent No.2 on the ground that the invocation was not in terms of the BBG and the IA is akin to a recovery suit or suit for damages that can be only claimed before a civil court after payment of appropriate court fee.



- (iii) Respondent No.1 has already raised issues of the gross misrepresentations/suppression/mistake of fact/irregularities in the information (in relation to the Corporate Debtor) supplied by the RP to the resolution applicants during the bidding process and fraud played by the RP on the resolution applicants and the process of law, which has resulted in the entire corporate insolvency resolution process (hereinafter referred to as the "**CIRP**") including the documents issued during the CIRP being vitiated. Accordingly, there is no non-compliance of the resolution plan on the part of Respondent No.1 as has been alleged in the IA.
- (iv) Respondent No.1 had moved an application being C.A. 601 of 2018 (hereinafter referred to as the "**LHG Application**") before this Adjudicating Authority raising these issues, which were not determined by this Adjudicating Authority and disposed of LHG Application vide order dated 13.02.2019 in CA No. 567 of 2018, whereby a direction was given to the CoC to file a complaint with the Insolvency and Bankruptcy Board of India for taking appropriate steps against Respondent No.1 for its alleged default in implementation of the resolution plan for Corporate Debtor and Respondent No.1 was granted liberty to take its grounds raised in the LHG Application in defence therein. Pertinently, the said order dated 13.02.2019 of this Adjudicating Authority was set aside by the Hon'ble National Company Law Appellate Tribunal (hereinafter referred to as the "**NCLAT**") vide its judgment dated 16.08.2019 in Company Appeal (AT) No. 219 of 2019, 442 of 2019 and 443 of



2019. The issues raised by Respondent No.1 are therefore still not adjudicated upon, thus, there is no deliberate default in implementation of the resolution plan by it. A copy of the judgment dated 16.08.2019 has been annexed with the reply as Annexure A.

- (v) There is no fraud at all on part of Respondent No.1 in the execution of the BBG, as the RP as well as the CoC agreed to the terms of the final BBG submitted to Corporation Bank. The BBG is issued by Respondent No. 2 in favour of Corporation Bank, and as such is an independent contract.
- (vi) The Respondent has submitted its own version of the factual narration leading to the submission of the BBG by Respondent No.1 in the resolution process of Amtek, which is reproduced in brief as under:
 - a. CIRP of the Corporate Debtor was put in motion by way of an application bearing No. CP(IB)42/Chd/Hry/2017 filed by Corporation Bank under Section 7 of the Code against the Corporate Debtor.
 - b. Vide order dated 24 July 2017 the said application was admitted by this Tribunal and Mr. Dinkar T. Venkatasubramanian was appointed as the interim resolution professional and subsequently confirmed by the CoC as the RP. On 29 July 2017, the RP invited claims from creditors of the Corporate Debtor.
 - c. On 31 August 2017, the RP invited expressions of interest from all interested resolution applicants to present resolution plans



for the revival of the Corporate Debtor. In the Expression of Interest, which was published as per Section 25(2)(h) of the Code, the eligibility conditions for PRAs were prescribed, the PRAs were also required to submit an additional bank guarantee of Rupees One Crore Only ("Eol BG") along with their expression of interests for submission of resolution plans. Accordingly, Respondent No.1 submitted its expression of interest along with the required Eol BG.

- d. On 7 December 2017, the RP issued a Process Note, which prescribed a requirement of submission of a bank guarantee/earnest money deposit of Rs.50 crore only in favour of Corporation Bank in addition to the Eol BG. The BBG was required to be valid for the plan validity period as defined under the Process Note (i.e. the period starting from the plan due date till the selection of the successful applicant).
- e. As admitted by the RP in its CA, RP agreed to negotiate the terms and format of the BBG, in addition to the correspondence referred to in the IA, Respondent No.1 and RP along with their respective legal counsel discussed the terms of the BBG over conference calls. There were discussions between the RP and Respondent No.1 on the format of the BBG on 10.01.2018 and multiple versions of the proposed BBG were exchanged. The negotiations culminated into the email dated 11.01.2018 by the RP, whereby it is clear that the BBG would become enforceable



only after signing of the LoI, as the RP stated that the process was to proceed in good faith. Pertinently, the RP also wrote that efforts would be made to agree on the LoI with the successful applicant before its resolution plan is put to vote. The RP has concealed these emails in the present CA.

- f. Pursuant thereto, Respondent No.1 followed up with Respondent No.2 on the execution of the BBG on the language of BBG. Accordingly, Respondent No.2 informed Respondent No.1 that they were reviewing the BBG and would expedite the issuance of the BBG, which was also informed to the RP.
- g. Upon receipt of the above email on 12.01.2018, the RP sought confirmation, if the language of the BBG would be changed by Respondent No. 2, to which Respondent No.1 confirmed that this was only procedural. Further on the request of the RP, Respondent No.1 also sent a letter to the RP that funds have been specifically allotted for the purpose of issuance of BBG. A copy of the complete email trail from 10.01.2018 till 12.01.2018 has been annexed with the reply as Annexure B.
- h. Finally, when the BBG was finalised and issued by Respondent No.2 (Barclays Bank), an executed copy of the SWIFT advice of the BBG was shared by Respondent No.1 with the RP and his process advisors vide an email dated 22.01.2018. The SWIFT advice contained the entire language of the BBG. A copy of the



email dated 22.01.2018 attaching the BBG has been annexed with the reply as Annexure C.

- i. On 23.01.2018, the Respondent No.1 submitted BBG for Rs.50 crore (subsequently amended on 09.11.2018) as per clause 1.8.1 of the Process Note.
- j. Thus, the RP and his process advisors were sent the acknowledged copy of the BBG on 23.01.2018. The Corporation Bank also received a physical copy of the BBG, which was confirmed by the process advisors. A copy of emails dated 23.01.2018 has been annexed with the reply as Annexure D.
- k. Pertinently the Process Note under clause 1.9.3 read with clause 1.8.1 also provided that the CoC had the power to declare the resolution plan of Respondent No.1 as non-responsive in the event, it was not satisfied with the BBG submitted by Respondent No.1. The clause 1.9.3 of the Process Note is extracted below for reference:

1.9.3 Non submission of the Performance Guarantee by the Successful Applicant, as per the provisions of the Clause 1.8.1 and 1.9.1, will lead to rendering of Resolution Plan by such Applicant as non-responsive, and the Resolution Professional/ Committee of Creditors shall have the right to reject the Resolution Plan.

- l. Since the CoC was satisfied with the BBG submitted by Respondent No.1, on 06.03.2018, the CoC, shortlisted Respondent No.1 as the preferred bidder. Pursuant to discussions held between Respondent No.1 and the CoC, a



revised resolution plan was submitted on 26.03.2018 (as further revised on 03.04.2018 as per discussions with CoC).

- m. The Resolution Plan was placed before the CoC at its meeting on 02.04.2018 for consideration in terms of Section 30(3) of the Code and was further put to vote between 04.04.2018 and 05.04.2018. The Resolution Plan was approved by an overwhelming majority of 94.20% of the CoC. It is relevant to note that contrary to the RP's email dated 11.01.2018, the LoI was not agreed to or finalized before the resolution plan was put to vote. Even at this time, no issue was ever raised by the CoC.
- n. Thereafter, the RP made an application before this Tribunal for approval of the Resolution Plan under Section 31 of the Code. Pertinently, at this time (and even thereafter as is evident from the sequence of events set out hereunder), the terms of the LOI and escrow arrangement (as required to be executed under the Resolution Plan on terms and conditions mutually acceptable to both RP and Respondent No.1 and prior to submission of the Resolution Plan to this Tribunal) were under negotiation and not finalised between the Respondent No.1 and RP. From the subsequent conduct of the RP/CoC (as detailed hereunder), it became apparent that the RP/CoC intended to push for plan approval before the Adjudicating Authority and thereafter arm twist Respondent No.1 into accepting their one sided terms and conditions for escrow arrangement and LoI in breach of the



Resolution Plan (which required the terms to be mutually acceptable) and under the threat of unwarranted legal proceedings. Clause 5.6 of the Resolution Plan, which provided for execution of LoI and creation of escrow on mutually acceptable terms and conditions prior to submission of the Resolution Plan to the Adjudicating Authority for approval, is set out hereunder:

"5.6 Escrow Undertaking Upon execution of the Letter of Intent by the Resolution Applicant and prior to the submission of the Plan to the NCLT by the Resolution Professional in accordance with Section 30(6) of the Code, the Resolution Applicant shall create an escrow or any equivalent arrangement for an aggregate amount of 15% (fifteen percent) of the Upfront Amount, in favour of a member of the Committee of Creditors nominated by the Committee of Creditors, on terms and conditions mutually acceptable to the Resolution Professional and the Resolution Applicant."

- o. In the meantime, the eligibility of Respondent No.1 to submit a Resolution Plan was also challenged before this Tribunal.
- p. While LoI and escrow arrangement were still not finalized, the Resolution Plan was approved by the Adjudicating Authority vide order dated 25 July 2018 in CA 114 of 2018 in CP No. (IB) 42 (Chd-Hry) of 2017 ("25 July Order").
- q. Pursuant thereto, the draft of the LoI continued to be extensively negotiated between the RP/CoC and Respondent No.1, inter-alia including the issue of nature, terms and conditions of escrow to be created by Respondent No.1. As the non-execution of LoI is sought to be wrongfully attributed to the Respondent No.1 by the RP, the sequence of events leading to an impasse between Respondent No.1 and RP over the execution of LoI and creation



of escrow, which shows that it was RP, who sought to deviate from the agreed terms between the parties, is briefly set out hereunder:

- i. The Process Note provided for submission of a performance guarantee under clause 1.9 within 10 days of issuance of LoI.
- ii. However, on 26.02.2018, Respondent No.1 received an email from the RP, removing the requirement for submission of a performance guarantee as per the Process Note, and Respondent No.1 had to instead undertake to create an escrow equivalent to 15% of the upfront cash payout, in favour of the CoC, in the event the CoC approved the resolution plan of Respondent No.1. It is relevant to point out that the obligation of performance guarantee of Rs.100 crore was increased to an obligation of setting up Rs.500 crore escrow account by the said e-mail dated 26.02.2018. The relevant extract of the email dated 26.02.2018 is as under:

"3) RA should undertake to create an escrow equivalent to 15% of the Upfront Cash Pay-out in the event CoC approves your resolution Plan. Such escrow should be created in favour of the CoC before the filing of the CoC- approved Resolution Plan with the Hon'ble NCLT (this subsumes the PBG of Rs. 100 cr as requested as per the Process Note issued on December 6, 2017."

- iii. In line with the requirement set out in e-mail dated 26.02.2018, clause 5.6 of the Resolution Plan was provided for under the Resolution Plan of Respondent No.1 and approved by the CoC.



- iv. Thereafter, the RP placed the Resolution Plan of Respondent No.1 before the Adjudicating Authority for approval. At this stage, the CoC filed a reply to the said application for approval of the Resolution Plan, requesting the Adjudicating Authority to take into consideration certain unilateral considerations in the LoI inserted by the CoC before approving the Resolution Plan (in clear contravention of clause 5.6 of the Resolution Plan).
- v. However, it is reflected from the 25 July Order that the Adjudicating Authority did not consider the relief prayed by the CoC in its reply as stated above and recorded in paras 16 and 32 that the draft of the LoI is under negotiation between the RP and Respondent No.1. Relevant extracts are as follows:

16.....It is also stated that the letter of intent and escrow agreement between the CoC and the resolution applicant was under negotiation and as soon as the same is provided to the applicant by the CoC, the resolution professional shall issue the same to the resolution applicant. 32. It is further stated that post approval of the resolution plan by the committee of creditors, a letter of intent was required to be signed between the resolution applicant and the resolution professional. The details of the conditions to be mentioned in the letter of intent as approved by the committee of creditors have been stated in this response and draft of the letter has been issued to the resolution applicant by the resolution professional..."

- vi. In view thereof, after passing of the 25 July Order, Respondent No.1 suggested an escrow arrangement in line with the escrow undertaking above, with no requirement of furnishing a performance guarantee, which to Respondent No.1 surprise was not acceptable to the CoC and the RP.



vii. In complete departure from the condition mentioned in the Resolution Plan, which provided for an escrow on mutually acceptable terms and conditions between Respondent No.1 and the RP, the RP vehemently insisted that the escrow should be in such form as was acceptable to the CoC and their counsel. Vide email dated 13 September 2018, the RP further threatened Respondent No.1 that the non-acceptance of escrow in the manner suggested by the CoC would result in severe consequences including inter-alia forfeiture of existing securities. This condition was contrary to the terms of the Resolution Plan, which was submitted by the Respondent No.1 and approved by the CoC.

viii. While negotiations were ongoing between Respondent No.1 and the RP on the manner and nature of such escrow arrangement, vide email dated 14.09.2018, Respondent No.1 wrote to the RP stating therein that Respondent No.1 was willing to show its bona fides by agreeing to the conversion of the BBG into a performance guarantee by amending its terms and conditions. This was in addition to the requirement of the escrow arrangement under the Resolution Plan. Respondent No.1 even shared a draft of the escrow agreement with RP/CoC to proceed with the matter.

ix. However, vide its letter dated 21.09.2018, the RP rejected the request of Respondent No.1 to convert the BBG into a



performance guarantee. The RP in its letter dated 21.09.2018 imposed a condition of provision of a performance guarantee from a scheduled commercial bank in India immediately thereof, in addition to the escrow arrangement. Such a condition was completely contrary to the terms under the Resolution Plan and Process Note (as read with the email received by Respondent No. 1 from the RP on 26.02.2018). Thus, the terms of the LoI could not be finalised with the RP/CoC. Copy of the correspondence exchanged for finalisation of the LoI has been annexed with the reply as Annexure E.

- r. Simultaneously, in the interests of the resolution of the Corporate Debtor, pending negotiations on the LoI, Respondent No.1 started working towards its obligations under the Resolution Plan by holding various advisory meetings for legal, tax and accounting purposes. Respondent No. 1 also filed resolution plan for the approval of CCI on 11.09.2018. These actions were taken by Respondent No.1 without being aware that the RP had supplied incorrect and inflated information to the resolution applicants during the bidding process.
- s. Parallely, pursuant to passing of the 25 July order, as per Paragraph 5.1.1 of Part II of the Resolution Plan, the RP assumed the role of "Insolvency Professional" of the Corporate Debtor in order to supervise, manage and control all the business and



operations of the Corporate Debtor. As per Paragraph 5.1.3 of Part II of the Resolution Plan, the Insolvency Professional is mandated to act on the instructions of a committee comprising of (a) a representative or an advisor of the CoC; (b) a representative of the Resolution Applicant (to be appointed on receipt of approval from Competition Commission of India for performance of the Resolution Plan); and (c) the Insolvency Professional. Further, the Resolution Applicant has the right to appoint an observer in the MC.

- t. Thus, pursuant to Paragraph 5.1.3 of Part II of the Resolution Plan, Respondent No.1 appointed an observer on the MC. Being an observer on the MC, Respondent No. 1's authorised representative, started attending meetings of the MC as well as various operational review meetings conducted by the RP. For instance, Respondent No.1's authorised representative attended the first MC meeting on 13.09.2018 and participated in operational reviews on 06.08.2018 and 29.08.2018, 18.09.2018 including site visits, conducted by Insolvency Professional/RP, when to the shock and surprise of Respondent No.1, it discovered blatant discrepancies in the condition of machineries, valuations and representations made in the Information Memorandum and Valuation Reports. Accordingly, it became evident to Respondent No.1 that the information contained in the Information Memorandum was incorrect, false, and reflecting inflated values and information.



- u. The Information Memorandum and Valuation Reports formed the basis on which the Resolution Plan was formulated by Respondent No.1 (as per the provisions of the Code), and consequently any serious and material inaccuracies in this data would have a direct and material bearing on the performance of the Respondent No.1's obligations under the Resolution Plan. Therefore, Respondent No.1 immediately held meetings with the CoC on 24.10.2018 and 31.10.2018 to discuss these issues and strive to arrive at a solution and wrote the letters dated 06.11.2018, 14.11.2018 and 21.11.2018 requesting the RP to arrange a meeting between Respondent No.1 and CoC to discuss the discrepancies discovered by Respondent No.1. However there was no positive response from the RP. A copy of the letters sent by Respondent No.1 on 06.11.2018, 14.11.2018 and 21.11.2018 have been annexed with the reply as Annexure F.
- v. Also, Respondent No.1 discovered that RP and CoC were aware that Corporate Debtor's assets were inflated, in the Transaction Audit Report (TAR) submitted by Ernst Young (EY) to RP/CoC on 13.02.2018 and this information was suppressed from the bidders and neither was the IM updated with this material financial observation.
- w. In view of these circumstances, Respondent No.1 was constrained to file an application being C.A. No. 601 of 2018 before this Adjudicating Authority demonstrating that the entire



CIRP of Corporate Debtor was vitiated by misrepresentations and fraud.

- x. In the meantime, in the evening of 22.11.2018 to Respondent No.1's shock and surprise, it received a notice of invocation dated 22.11.2018 enclosing Notice of Demand dated 20.11.2018 addressed by Corporation Bank/CoC to Respondent No.2 (Barclays Bank PLC) seeking payment under the BBG on the basis of ex facie false/misleading confirmations, as follows:

"We confirm that:

a) The Applicant has been declared the successful applicant by the Committee of Creditors through voting on April 4, 2018 and LOI/Resolution Plan was approved by the Hon'ble NCLT Chandigarh vide order dated July 25, 2018; and

b) There is an event of forfeiture continuing and outstanding."

- y. Respondent No.1 thus immediately filed a suit for permanent injunction being C.S. (COMM) No. 1245 of 2018 on 26.11.2018 before the Hon'ble High Court of Delhi seeking an order injuncting Respondent No.2 to make payment under the BBG. Vide the order dated 26.11.2018, the Hon'ble High Court granted ad-interim stay on the encashment of the BBG with the condition that Respondent No.1 would keep the BBG alive in the meantime. A copy of the order dated 26.11.2018 passed by the Hon'ble High Court of Delhi in CS (COMM) No. 1245 of 2018 has been annexed with the reply as Annexure G. Pertinently, the wordings of the Notice of Demand clearly demonstrate that the CoC and RP were aware of the conditions of invocation under the BBG, which inter-alia included the signing of Lol by Respondent



No.1. Thus, admittedly when the negotiations between the CoC and Respondent No.1 on the execution of Lol were still going on, the CoC sought to fraudulently invoke the BBG by modifying the language of the Notice of Demand as required under the BBG.

z. Further, Corporation Bank filed a reply in CS (COMM) 1245 of 2018, even where no plea of fraud being played by Respondent No.1 was raised by them. A copy of the reply filed by Corporation Bank in CS (COMM) 1245 of 2018 has been annexed with the reply as Annexure H.

aa. Since the Notice of Demand was contrary to the terms of the BBG as no Lol had been signed between Respondent No.1 and CoC after approval of Respondent No.1's resolution plan, the same was rejected by Respondent No. 2. Accordingly, CS (COMM) No. 1245 of 2018 has been disposed of by the Hon'ble High Court vide order dated 10.12.2018. A copy of the order dated 10.12.2018 in CS (Comm) No. 1245 of 2018 has been annexed with the reply as Annexure I.

bb. Pertinently, in the meantime, Respondent No.1 had also renewed the BBG on 09.11.2018 pending discussions with the CoC and RP on the issues raised by Respondent No.1. A copy of the amended BBG has been annexed with the reply as Annexure J. Pertinently, no objections were raised with regard to the contents of the BBG by the RP/CoC even at this stage.



cc. The RP agreed to the format of the BBG as finally executed and was always aware of the conditions of the BBG submitted by Respondent No.1 and never once raised an objection on the same, as the terms were as agreed between Respondent No.1 and the RP. It is clear that the RP and CoC were aware of the terms of the BBG for more than 12 months and never once raised any objection in relation thereto. In fact, till date no communication of any kind has been addressed to Respondent No.1 by the RP or the CoC alleging such a fraud, or holding the resolution plan non responsive, or requesting for a re-negotiation of the BBG.

REPLY BY THE RESPONDENT NO. 2

4. The Respondent No. 2 filed its reply through its authorized signatory Ms. Sneha Korde, dated 22.04.2019, vide diary no. 2015 wherein it submitted that this Tribunal has no jurisdiction to pass the orders against the Respondent No. 2, and its contentions are reproduced hereinafter in brief:

- (i) The Respondent No.2 is not a party to the proceedings pending before this Tribunal in the matter of the insolvency of Corporate Debtor. The orders prayed for against the Respondent No.2 are in the nature of a money claim, which can be brought only before the appropriate civil court on payment of requisite court fee. It is submitted that on this ground alone, the IA as against the Respondent No.2 is liable to be dismissed.
- (ii) The IA as against the Respondent No. 2 Bank is not maintainable both on facts and in law and is liable to be dismissed with



exemplary costs and the Applicant has unnecessarily implicated the Respondent No.2 without any basis, solely in order to divert attention from the failure on his own part as well as the failure of the CoC to conduct the necessary and appropriate due diligence while accepting the BBG from the Respondent No. 1.

(iii) The Respondent No.2 has, as a bank in India, acted only as the issuer of the BBG further to an application made to the Respondent No.2. The BBG was issued by the Respondent No.2 on the basis of the substantive format of the BBG, as to its terms that was presented to the Respondent No.2 with the request that the BBG be issued and it was accordingly issued by the Respondent No.2 pursuant to discussions in the ordinary and usual course with the Respondent No.1. The Respondent No.2 had nothing whatsoever to do with the final draft terms of the BBG as were negotiated and agreed between the Respondent No.1 and the beneficiary of the BBG.

(iv) The standard and usual process followed for issuance of bank guarantees is given as under:

a. The applicant for the issuance of a bank guarantee ("BG Applicant") will have a credit limit:

(i) with the guarantee issuing bank for issuance of bank guarantees at the request of the BG Applicant, or

(ii) with another bank at whose request and based on whose counter guarantee, the guarantee issuing bank will issue the



guarantees required by the BG Applicant, because the BG Applicant is a client of that other bank.

- b. The format of the bank guarantee, which has been agreed by the BG Applicant with the beneficiary of the bank guarantee, is submitted by the BG Applicant to the guarantee issuing bank. The guarantee issuing bank does not have anything to do with the underlying arrangement/transaction between the BG Applicant and the beneficiary of the bank guarantee. The guarantee issuing bank is under no obligation, and as a matter of banking practice, is not aware of the prior negotiations that will have been undertaken between the BG Applicant and the beneficiary with respect to the text of the bank guarantee that is submitted by the BG Applicant to the guarantee issuing bank.
- c. Upon the bank guarantee being issued by the guarantee issuing bank, the guarantee document is sent to the guarantee beneficiary and the guarantee beneficiary would check and confirm for itself that the text of the bank guarantee as issued meets the requirements the beneficiary has negotiated with the BG Applicant.
- (v) The Respondent No.1, being a client of Barclays Bank PLC in London and having a credit limit with Barclays Bank PLC in London, requested that Barclays Bank PLC in London request the Respondent No.2 Bank in India to issue the BBG on behalf of the Respondent No.1 to the beneficiary Corporation Bank, for which



Barclays Bank PLC in London would issue a counter guarantee to the Respondent No.2 utilizing the credit limit available from it to the Respondent No.1 for this purpose.

- (vi) On the basis of a counter guarantee provided by Barclays Bank PLC in London, the Respondent No.2 issued the BBG in favour of Corporation Bank, who was the beneficiary of the BBG.
- (vii) The Corporation Bank, as beneficiary of the BBG after having received the BBG document as issued by the Respondent No.2, did not reject it or raise any objection, whatsoever with respect to the contents thereof.
- (viii) The Respondent No.2 Bank never interacted with the beneficiary with respect to the text and content of the BBG, and that it was impossible for the Respondent No.2 to know that the BBG text, as now alleged by the Applicant, was at variance with what had been agreed between the beneficiary and the Respondent No.1. The Respondent No.2 was not required to conduct any checks in this regard as in accordance with banking practice, the BBG was issued as per the format provided by and agreed with the Respondent No.1, who was the BG Applicant pursuant to discussions between the Respondent No.1 and the Respondent No.2.
- (ix) After a period of more than one year since the BBG was issued and sent to the beneficiary, the Applicant has at this belated stage made an allegation that text in the BBG was twisted by the Respondent No.2 in collusion with the Respondent No.1, which allegation is



hereby denied as without any basis whatsoever. The Applicant has nowhere explained why no objection was raised regarding the text of the BBG as was issued, for a period of more than one year and how the Respondent No. 2 was expected to know the text that was desired by the beneficiary.

- (x) When the Respondent No.2 had initially rejected the invocation of the BBG on 27.11.2018, that rejection was rightfully made by the Respondent No.2 as the said invocation was admittedly not in accordance with the terms of the invocation notice that was required to be lodged for the BBG.
- (xi) The Respondent No.2 would never have contested its obligations under the BBG, if the beneficiary had validly invoked it in accordance with the terms thereof.
- (xii) The Respondent No.2 was not privy to the negotiations between the CoC and the Respondent No.1 with respect to the text of the BBG. The Respondent No.2 Bank in its role as the issuing bank issued the BBG on the basis of the format it received from and agreed with the Respondent No.1 and based on the latter's request that the BBG be issued. Pursuant to the draft of the BBG agreed with the Respondent No.1, Barclays Bank PLC, in the United Kingdom instructed the Respondent No.2 to issue the BBG. A copy of the SWIFT message containing the draft of the BBG as received by the Respondent No.2 from Barclays Bank PLC, in the United Kingdom on 22.01.2018 has been annexed with the reply as Annexure R2.



The Respondent No. 2 issued the BBG in form that is identical to the draft in Annexure R3, that was agreed between Barclays Bank PLC, United Kingdom and the Respondent No.1, and it is further submitted that the CoC duly accepted the said BBG as issued by the Respondent No.2 and never raised any objection with respect to the contents thereof until the filing of the present CA.

- (xiii) The draft of the BBG as annexed to the email dated 11.01.2018 from the Respondent No.1 to Corporation Bank and annexed as Annexure A-3 to the CA, also contains an appendix being the format of the demand letter (set out at page 93 of the CA). Clause (b) of the format of the said demand letter reads as under:

"(b) the Applicant has signed the letter of intent issued to it by the Committee of Creditors, within the time limit stated in the letter of intent"

- (xiv) The said clause (b) of the draft of demand letter does not contain the word "not" which was allegedly agreed to be incorporated as per the case of the Applicant herein. It is submitted that a perusal of the draft of the BBG, and the draft of the demand letter appended thereto, shows that there is an inconsistency between the main body of the draft of the BBG (at page 89 of the CA) and the text of (b) of the appendix.
- (xv) Such drafts, as were exchanged between the relevant parties during the negotiations between them, have no bearing on the rights and obligations of the parties as finally governed by the BBG issued by the Respondent No.2 at the request made to it in the ordinary course by the Respondent No.1 and duly accepted by the CoC.



- (xvi) The Respondent No.2 is not aware of the MC/Joint Lenders Meeting however, it is correct that a notice of demand dated 20.11.2018 was issued by Corporation Bank to the Respondent No. 2 Bank and received by the Respondent No.2 on 22.11.2018.
- (xvii) The Respondent No.2 rejected the invocation of the BBG as of 27.11.2018, because the notice of demand was admittedly not as per the format in the appendix of the BBG.
- (xviii) The role of the BBG issuing bank is limited to issuing the BBG as per the format submitted to it and acceptable to it. The only obligation of the Respondent No.2 is to make payment upon a valid invocation of the BBG, if the invocation is compliant with the terms stipulated in the BBG. The Respondent No.2 being the BBG issuing bank never disputed its obligations under the BBG on the terms of the BBG.
- (xix) The Applicant has no locus standi to make this CA as against the Respondent No.2, since the Respondent No.2 is not party to the insolvency proceedings of Corporate Debtor pending before this Tribunal.

REJOINDER BY THE APPLICANT

5. The Applicant file the Rejoinder vide Diary No. 4841 dated 17.09.2019, stating that the Respondent No.1 was provided sufficient opportunities to carry out due diligence and if despite that if Respondent No.1 was not confident enough about background check about the Corporate Debtor, none forced it to submit the resolution plan. An order initiating the liquidation



proceeding against the Corporate Debtor was passed by the Hon'ble Appellate Tribunal vide its order dated 16.08.2019. Pursuant thereto, an appeal was moved against the said order by the CoC, pursuant to which the Hon'ble Supreme Court was pleased to stay the liquidation for the Corporate Debtor. A copy of the order dated 06.09.2019 passed by the Hon'ble Supreme Court is annexed as Annexure A-1. The points raised through the paragraph wise rejoinder is reproduced hereunder in brief:

- (i) The Resolution Professional denies that as a member of the MC, it has no locus to file the present CA. It is stated that the fraud has been committed not only against the CoC, but has also been committed against the Applicant, by submitting the BBG by unilaterally twisting the language of the agreed BBG format. It is submitted that the requirement of BBG was stipulated for the purpose of safeguarding the entire CIRP against defaulting resolution applicants, which under the present case due to the fraud on the part of the Respondent No.1, has been made unavailable to the RP and the CoC.
- (ii) It is denied that the present CA before the Adjudicating Authority is not maintainable rather it is stated that it is only this Adjudicating Authority that has jurisdiction under the IBC, as in terms of the IBC, it is established that all questions arising out of or in relation to the CIRP of the Corporate Debtor will have to be dealt by this Adjudicating Authority.



- (iii) The Applicant specifically refutes the argument made by Respondent No.1 with respect to BBG becoming enforceable only after signing the LoI, as such arguments have been raised by Respondent No.1 only with the intent to overcome the fraud committed by it by tinkering with the approved terms. The discussions, as relied upon by the Respondent No.1, nowhere mention that LoI has to be signed prior to BBG becoming enforceable. Not once has the Applicant made the mention as stated by Respondent No.1. In fact, the discussion had taken place to remove the proposed insertion made by the Respondent No.1 in the terms of BBG by proposing insertion "in the form and substance satisfactory to the Successful Applicant" from the last version of BBG circulated by Mr. Simon Nasta. Rather, the email communication notes that LoI is a document which has to be issued by the CoC and RA should accept it unconditionally.
- (iv) It is submitted that communication dated 12.01.2018 by Respondent 2, as forwarded by Respondent No.1, specifically stated in the second para of their email dated 12.01.2018 that they will release the BBG only upon approval of the wording of the guarantee and perfection of the facility (security).
- (v) It is stated that the Applicant was rather given to believe that the final draft of the BBG circulated by Simon Nasta, vide his mail dated 11.01.2018 had already been finalized and agreed to with Respondent No.2. However, the RP was surprised with the email



and hence sought to clarify the situation and that the version agreed to by the Applicant was the one mentioned in the email dated 11.01.2018 and Respondent No.1 has wrongly tried to portray that the Applicant was confirming changes to the draft. The reference is made to the communication dated 11.01.2018, wherein the Applicant clearly mentions that "push for the BG to be issued by end of day today". Further, this request for a letter from the RA was only made after the mail from Respondent No.2 raised this query that the facility has not been perfected, which specifically points out a case of lack of security for the facility, accordingly a letter was sought from the Resolution Applicant in good faith that they have made the necessary arrangements to secure the guarantee. A copy of the said email communications have been annexed with the reply as Annexure B.

- (vi) The eligibility of Respondent No.1 had been in question after the approval of the Resolution Plan by CoC, as Respondent No.1 had failed in disclosing the names of its connected parties and concealed the names of entities, which had already defaulted to Exim Bank and IDBI Bank both. While the default with EXIM Bank had caused the ineligibility in terms of Section 29A, but the default with IDBI was for a lesser period than 12 months to cause ineligibility.
- (vii) The requirement of escrow in favour of CoC while subsuming the PBG was cast upon Respondent No.1 with an intention of



enhancing the security required for the commitment under the resolution plan. Respondent No.1 had repeatedly stated that the cost for setting escrow in India is very high. For the purpose of arriving at consensus, the CoC members in a meeting held on 03.09.2018, post approval of the Resolution Plan on 25.07.2018 proposed that Respondent No.1 shall provide at least Rs.100 crore escrow/PBG in the format as per the requirement of the CoC and the remaining Rs.400 crore escrow can be created by Respondent No.1 as per its proposed format. This proposal was made by the members of CoC on the specific representation by Respondent No.1 that the costs for setting up the Escrow in India is very high. Despite the said proposal, no response was received from Respondent No.1. From the above stated conduct on the part of Respondent No.1, it is easily decipherable that Respondent No.1 never had any intention to create an escrow account.

- (viii) The entire claim of Respondent No.1 that they have offered the creation of an escrow through one of their banks i.e. Greensill does not hold ground on the fact that despite being aware of the underlying reason for the creation of the escrow (as contemplated vide email dated 26.02.2018), it was for the resolution applicant to demonstrate seriousness towards the resolution process, however, by suggesting an escrow arrangement to be maintained by a foreign bank, Respondent No.1 under the garb of demonstrating bonafide, is actually evading from its responsibilities, being fully aware of the fact that an escrow created with a foreign bank would not be



amenable to the CoC, as the banks and financial institutions in India would not be in a position to access the said amounts under the escrow on account of restrictions imposed by the Reserve Bank of India.

- (ix) It is denied that it had supplied incorrect and inflated Information to the resolution applicants during the bidding process or any discrepancies in the information memorandum and the valuation reports that formed the basis on which the resolution plan was submitted.
- (x) The RP had also provided Respondent No.1 access to a Virtual Data Room, which contained Investor On-boarding deck, list of plant and machinery available at each facility, detailed P&L of Corporate Debtor with relevant plant level annual performance schedules for historic period including FY16, FY17 and also monthly performance results for YTD18 (performance during the CIRP period). Further information with respect to debt profile, working capital related items etc. was made available.
- (xi) The process document clearly stipulated that the resolution applicants are required to conduct their due diligence before submitting the resolution plan and Respondent No.1, as part of its Resolution Plan, submitted a detailed Business plan based on its own diligence and estimates. A sufficient time was given to the resolution applicants for carrying on their due diligence.



(xii) The meeting of 24.10.2018, as mentioned by the Respondent No.1 was called based on an email from Respondent No.1 dated 22.10.2018, requesting for extension of the closing period from the CoC. During the meeting, Respondent No.1 expressed inability of securing the necessary finance to meet the Resolution Plan proceeds and thus requested extension for a period more than 90 days till February 2019, which was contrary to the Resolution Plan and even beyond the powers of the CoC/ MC as approved by this Adjudicating Authority. During the meeting, Respondent No.1 accepted that they could not prepare and file the CCI application in time, and for the first time raised a contention about deterioration and loss of customer base in Corporate Debtor due to efflux of time, as reason for inability to raise finance even though these were not unknown to Respondent No.1 at the time of submission of the resolution plan. A copy of the minutes of the meeting dated 24.10.2018 has been annexed as Annexure A-2.

(xiii) The meeting on 31.10.2018 was concluded with a repeat message to organize a meeting of senior officers of lenders with Mr. Sanjeev Gupta, the promoter of Respondent No.1 and at least give 7 day notice along with the agenda and proposal that Respondent No.1. However, Respondent No.1 did not organize any meeting with Mr Sanjeev Gupta of Respondent No.1 even after repeated requests by the RP/IP. A copy of the minutes of the meeting dated 31.10.2018 has been annexed as Annexure A-3.



(xiv) Alternatively, Respondent No.1 started sending these letters first of which was received on 06.11.2018, which though was dated 06.11.2018, but sent to the RP/IP only on 08.11.2018 vide email of even date. Respondent No.1, despite being aware of its obligations to fulfil the conditions by 22.11.2018, at this stage sought to negotiate and revise its offer under the already approved resolution plan. The next letters came through on 14.11.2018 and 21.11.2018, but all without any concrete proposal.

(xv) Thereafter, due to serious objections of the CoC, on the conduct of Respondent No.1 in several meetings over last 5 months and considering there was no response from Mr. Sanjeev Gupta for the proposed meeting and its agenda, a lenders meeting on 19.11.2018 was called to decide with respect to these letters as sent by Respondent No.1 and the continuing non-compliance of the Resolution Plan. A copy of the minutes of the meeting dated November 19, 2018 has been annexed as Annexure A4.

6. The Applicant filed written submissions dated 18.05.2022, vide Diary No. 01291/01 and the Respondent No. 1 filed written submissions dated 20.02.2023 vide Diary No. 01291/6 and Additional written submissions dated 09.11.2023 vide Diary No. 01291/7.

ANALYSIS

7. We have heard the Ld. Counsels for the parties and gone through the records carefully.



8. The cardinal point for consideration before us is **“Whether the Applicant has locus standi to file the Application.”**

- (i) The dispute has emerged from the BBG issued as a condition of the Process Note for the submission of the resolution plan. The relevant clause of the Process Note regarding submission of BBG is as below:

1.8 Submission Bond Guarantee

1.8.1 All Applicants shall provide a bank guarantee/Earnest Money Deposit of INR 50,00,00,000/- (Indian Rupees Fifty Crore only) in favour of “Corporation Bank CIR Amtek” in addition to bank guarantee/EMD of INR 1,00,00,000 (Indian Rupees One Crore only) provided at the time of submission of Non-binding offer in favor of Amtek Auto Ltd., as part of their Resolution Plan (“Bid Bond Guarantee” or “BBG”). The Bid Bond Guarantee shall be valid for the Plan Validity Period (the period starting from the Plan Due Date, as defined later, till the Successful Applicant, as defined later, is selected) and shall be renewed / extended by the Applicant for a period as may be required by the Resolution Professional / Committee of Creditors (“Bid Bond Guarantee Validity Period”). The BBG shall have an initial claim period of 6 (six) months from the Plan Due Date. (Format to be attached as Annexure). The Corporation Bank will hold the BBG in trust on behalf of the Committee of Creditors.

- (ii) The Process Note also provides for right of the CoC for invocation of BBG and forfeiture of the BBG of successful applicant as below:

1.8.4 Forfeiture of Bid Bond Guarantee

- i. Committee of Creditors shall be entitled to invoke the Bid Bond Guarantee where
 - (a) the Successful Applicant fails to extend the validity of the Bid Bond Guarantee as may be required by the Resolution Professional, or (b) Successful Applicant fails to submit the Performance Guarantee within the stipulated time; or (c) Applicant is found to have made a false or misleading declaration of eligibility under Section 29A of the IBC; (d) Applicant is found to have made false or misleading representation in respect of its credentials under Regulation 39 and 39 of the CIRP Regulations; (e) in case of any other non-compliance with the Resolution Plan Process or the Resolution Plan submitted by the Applicant.
- ii. Provided, that Committee of Creditors shall not be entitled to invoke the Bid Bond Guarantee of the Successful Applicant in accordance with Clause 1.8.1 above, if any non-compliance with the requirements set out above arises due to:
 - a. non-receipt of the Letter of Intent from the Committee of Creditors; or
 - b. the Successful Applicant not accepting additional terms stipulated by the Committee of Creditors in the Resolution Plan without consent of the Successful Applicant, pursuant to negotiations with the Successful Applicant.

- (iii) It is noted that the present application has been filed vide Diary No.001295 dated 20.12.2019 and during the pendency of the present application, the resolution plan was submitted by Deccan



Value Investor LP (hereinafter referred to as the Deccan), which has been approved by the CoC in its meeting held on 11.03.2020 with 70.07% voting, which has also been approved by this Tribunal vide order dated 09.07.2020 in CA No. 225/2020. The above resolution plan is silent regarding the above dispute between CoC of the Corporate Debtor and Liberty.

(iv) After approval of the resolution plan, once the Corporate Debtor has been handed over to the new management, the RP and CoC does not exist and they become functus officio and Applications cannot be pursued by the erstwhile RP. In this regard, the reliance is also placed on the following judgements:

(a) The Hon'ble Supreme Court of India in the matter of **Gujarat UrjaVikas Nigam Limited Vs. Amit Gupta &. (2021) 7 SCC 209** has held that NCLT cannot exercise its jurisdiction over matters dehors the insolvency proceedings since such matters would fall outside the realm of IBC.

(b) The Hon'ble Supreme Court in the matter of **Tata Consultancy Services ltd. vs SK Wheels (P) ltd. (2022) 2 SCC 583** has held as below:

"29. Thus, we are of the view that NCLT does not have any residuary jurisdiction to entertain the present contractual dispute which has arisen dehors the insolvency of corporate debtor..."

(c) The Hon'ble High Court of Bombay while adjudicating I.A. No. 1161 of 2020 in the matter of **Reliance Communication**



Limited vs. Rajendra P. Bansal, referred to **Embassy Property Developments (P) Ltd. vs. State of Karnataka (2020) 13 SCC 308** and **Urja Vikas Nigam Limited vs. Amit Gupta and Ors., (2021) 7 SCC 209**, observed the following:

“(g) Therefore, the position of law which emerges from the decisions in Embassy Property (Supra) and Gujarat Urja (Supra) is that:

(i) The NCLT cannot exercise jurisdiction over every issue concerning the corporate debtor simply because the corporate debtor is in insolvency. It is only those issues which arise solely out of the insolvency of the corporate debtor that can be adjudicated upon by the NCLT under Section 60(5)(c) of the IBC.

(ii) The Interim Resolution Professional/Resolution Professional cannot short-circuit its obligation under Section 25(2)(b) of the IBC of representing the corporate debtor in judicial/quasi-judicial proceedings by bringing all matters before the NCLT. Wherever the matter in question falls outside the purview of the IBC, it is the forum, which is otherwise vested with jurisdiction in law that is the right forum to adjudicate upon the said matter.”

(v) In view of the above provision, the present dispute has now attained the character of a contractual dispute between the CoC and an unsuccessful resolution applicant, Liberty.

9. Further, if at all, there was any manipulation or interpolation in BBG by Respondent No.1 in connivance with Respondent No.2 Bank as alleged by Applicant, then it was bounden duty of the COC/RP to scrutinise and compare or tally the draft BBG with proposed Performa of BBG agreed between COC/RP and Respondent No.1 before finalising the same. However, it is noted that when the BBG was finalised and issued by Respondent No.2, an executed copy of the SWIFT advice of the BBG was shared by Respondent No.1 with the RP and his process advisors vide an email dated 22.01.2018,



which contained the entire language of the BBG. Subsequently, the RP and his process advisors were sent the acknowledged copy of the BBG on 23.01.2018 and the Corporation Bank also received a physical copy of the BBG. Subsequently, the Respondent No.1 also renewed the BBG on 09.11.2018 and no objections were raised with regard to the contents of the BBG by the RP/CoC even at this stage. In view of the above facts, the RP/CoC cannot take the plea regarding contents of BBG, as now estoppel would be operative against RP/ CoC for taking such plea against the Applicant.

10. As a sequel to the discussion above, the present application bearing no. C.A. (IB) No. 119/2019 is dismissed and disposed of accordingly, however, without any order as to costs, with liberty to the Applicant, if advised so, to seek appropriate civil remedies as per the law.

Sd/-
(Umesh Kumar Shukla)
Member (Technical)

Sd/-
(Harnam Singh Thakur)
Member (Judicial)

November 21, 2024

Vishesh