

Committee Of Creditors Of Metalyst ... vs Consortium Of Deccan Value Investors Lp ... on 7 February, 2020

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

NEW DELHI

Company Appeal (AT) (Insolvency) No. 1276 of 2019

[arising out of Order dated 27th September, 2019 by NCLT, Mumbai Bench, Mumbai in CP No. (IB) - 1555 (IB)/MB/2017]

IN THE MATTER OF:

Committee of Creditors of Metalyst Forging Ltd.,
Through State Bank of India,
State Bank of India, Stressed Asset Management Branch I,
12th Floor, Jawahar Vyapar Bhawan,
1, Tolstoy Marg,
New Delhi - 110 001

...Appellant

Versus

1. Deccan Value Investors LP,
850, New Burton Road, Suite 201,
Dover, Delaware 19904 USA.

2. DVI PE (Mauritius) Ltd.,
SGG, Mauritius,
33, Edith Cavel Street,
Port Louis - 11324.

3. Resolution Professional of Metalyst
Forgings Limited,
EY Restructuring LLP,
Golf View Corporate Tower B,
Sector - 42,
Gurugram (Haryana) 122002.

...Respondents

Present:

For Appellant: Mr. Arun Kathpalia, Senior Advocate with
Mr. Siddhant Kant, Ms. Misha, Mr. Nikhil Mathur,
Mr. Kauser Hussain, Advocates for Appellant -
'Committee of Creditors'

For Respondents: Dr. U.K. Choudhary, Senior Advocate with
Mr. Mahesh Agarwal, Mr. Rajeev Kumar,
Mr. Rohan Dakshini, Ms. Akansha Saxena and
Dhruv Gupta, Advocates for Respondent Nos.1
and 2.

Mr. Abhinav Vashisht, Senior Advocate with
Ms. Anannya Ghosha and Mr. Brian Moses,
Advocates for RP.

With

Company Appeal (AT) (Insolvency) No. 1281 of 2019

[arising out of Order dated 27th September, 2019 by NCLT, Mumbai Bench, Mumbai in M.A. No. 1272/2018 & M.A. No. 956/2018 in CP No. (IB) - 1555 (IB)/MB/2017]

IN THE MATTER OF:

1. Deccan Value Investors L.P.,
850, New Burton Road, Suite 201,
Dover,
Delaware 19904, USA

2. DVI PE (Mauritius) Ltd.,
SGG Mauritius,
33, Edith Cavell Street,
Port Louis 11324.

...Appellants

Versus

1. Mr. Dinkar Venkatasubramanian,
Resolution Profession of
Metalyst Forgings Ltd.,
Gate No. 614,
Village Kurulikhed,
Pune - 410 501.

2. State Bank of India,
State Bank Bhavan,
Madame Cama Road,
Nariman Point,
Mumbai - 400 021.

...Respondents

Present:

For Appellant:

Dr. U.K. Choudhary, Senior Advocate with
Mr. Mahesh Agarwal, Mr. Rajeev Kumar, Mr.
Rohan Dakshini, Ms. Akansha Saxena and Mr.
Dhruv Gupta, Advocates.

For Respondents:

Mr. Arun Kathpalia, Senior Advocate with Mr.
Siddhant Kant, Ms. Misha, Mr. Nikhil Mathur
Gupta, Advocates for 'Committee of Creditors'

Company Appeal (AT) (Insolvency) Nos. 1276 & 1281 of 2019

Mr. Abhinav Vashisht, Senior Advocate with
Ms. Anannya Ghosha and Mr. Brian Moses,
Advocates for RP.

JUDGMENT

SUDHANSU JYOTI MUKHOPADHAYA, J.

In the 'Corporate Insolvency Resolution Process' of Metalyst Forgings Ltd. (Corporate Debtor) the Resolution Plan submitted on 13th April, 2018 by 'Deccan Value Investors LLP' and 'DVI PE (Mauritius) Limited' was approved by the 'Committee of Creditors' on 28th August, 2018.

2. The Resolution Professional placed the 'Resolution Plan' before the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai for its approval under Section 31 of the 'Insolvency and Bankruptcy Code, 2016' ('I&B Code', for short).

3. In the meantime, the 'Resolution Professional' vide its letter dated 15th October, 2018, called upon the 'Deccan Value Investors LLP' ('Deccan', for short) to submit the performance guarantee. In reply to such demand of Performance Guarantee, Deccan, vide its letter dated 17th October, 2018 conveyed its decision to withdraw the Resolution Plan and filed for approval by the Adjudicating Authority.

4. Miscellaneous Application No. 956 of 2018 was filed by the Resolution Professional for approval of the 'Resolution Plan' of Deccan. In the said case, the Deccan also moved an application under Section 60(5) of the 'I&B Code' in MA No. 1272/2018 for withdrawal of the plan.

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5. The Adjudicating Authority taking into consideration the fact and circumstances of the case by impugned order dated 27th September, 2019 refused to approve the resolution plan of Deccan and directed the Resolution Professional/Committee of Creditors for inviting the fresh bid (Plans) within a period of 21 days.

6. The Adjudicating Authority while passing such order observed that the 'Resolution Applicant' - Deccan will not be entitled to refund of the amount of the bid bond guarantee in case fresh bid of Resolution Applicant (Deccan) is not accepted. The Resolution Applicant did not participate in the 1st Bid process.

7. The Committee of Creditors have challenged the order dated 27th September, 2019, as the approval of the 'Resolution Plan' of the Deccan has been rejected.

8. The Resolution Applicant (Deccan) has also challenged the order dated 27th September, 2019 so far it relates to clarification that the 'Resolution Applicant (Deccan) will not be entitled to get refund of forfeiture of 'Bid Bond Guarantee' in a case of fresh bid of Resolution Applicant is not accepted or Resolution Applicant did not participate in fresh bidding process.

9. During the hearing of the Appeal, this Appellate Tribunal by order dated 18th November, 2019 observed that it will be open to the 'Committee of Creditors' to go through the other 'Resolution Plan(s) and approve the same as observed by the Adjudicating Authority. On 6th December, 2019 opportunity was given to the 'Deccan Value Investor LP' and 'DVI PE Company Appeal (AT) (Insolvency) Nos. 1276 & 1281 of 2019 (Mauritius) Ltd.' (Appellants) to settle the matter and bring the same to the notice of this Appellate Tribunal.

10. The Assistant General Manager of the State Bank of India, Member of the 'Committee of Creditors' in its affidavit has informed that the Appellant (Deccan) sought meeting to discuss the settlement by way of e-mail dated 10th December, 2019. The Appellant (Deccan) by another e mail dated 11th December, 2019 provided an offer to the Respondent. It was tabled before the 'Committee of Creditors' in its 26th Meeting held on 12th December, 2019 and after a detailed deliberation of the same, the 'Committee of Creditors' deemed the offer placed by the Deccan as not viable and feasible. Accordingly the offer was rejected.

11. Learned counsel for the 'Committee of Creditors' submitted that the impugned order dated 27th September, 2019 passed by the Adjudicating Authority is an erroneous exercise of such powers vested under the 'I&B Code'.

STAND OF THE COMMITTEE OF CREDITORS

12. Learned counsel for the 'Committee of Creditors' submitted that the Adjudicating Authority's powers with respect to an application filed under Section 31 of the 'I&B Code' are circumscribed by Section 30(2) of the 'I&B Code' and, therefore, besides the jurisdiction to either approve a 'resolution plan' which passes the muster of the limited prescriptions prescribed under Section 30(2) or reject a resolution plan on any of the grounds elucidated in sub-section (a) to (e) of Section 30(2) of the 'I&B Code', the Adjudicating Authority has no jurisdiction for entertaining / allowing an application for the Company Appeal (AT) (Insolvency) Nos. 1276 & 1281 of 2019 withdrawal of a resolution plan subsequent to approval of the resolution plan by the 'Committee of Creditors'.

13. He further submits that the impugned order is also erroneous insofar as it treads on exclusive domain of the 'Committee of Creditors' to examine and decide on the feasibility and viability of the 'approved resolution plan'.

14. He also submits that it is a settled position of law that the Adjudicating Authority being a creature of a statute (such as under the 'I&B Code') is bound within the four corners of the said statute and cannot exercise its jurisdiction beyond/outside the scope prescribed under the statute. Accordingly, it was impermissible for the Adjudicating Authority to allow the withdrawal of the resolution plan beyond its jurisdiction prescribed under the 'I&B Code' or return a finding on

feasibility or viability of a resolution plan. He also relied upon the judgment of the Hon'ble Supreme Court in the case of 'Committee of Creditors of Essar Steel Limited v. Satish Kumar Gupta & Ors.' wherein the argument of a right being available under Section 60(5) of the 'I&B Code' to challenge the decision of the 'Committee of Creditors' to approve a resolution plan was rejected on account of Section 60(5)(a) which only refers to an application by or against the 'Corporate Debtor' and not by the Successful Resolution Applicant; Section 60(5) is non-obstante only with respect to "any other law" and not the 'I&B Code' itself and Section 60(5)(c) is a residuary jurisdiction vested in the Adjudicating Authority to decide on the question of law or fact with respect to the 'corporate insolvency resolution process' and the said residual jurisdiction does not in any manner impact the Company Appeal (AT) (Insolvency) Nos. 1276 & 1281 of 2019 jurisdiction of the Adjudicating Authority under section 30(2) of the 'I&B Code'.

STAND OF THE RESOLUTION APPLICANT - 'Deccan Value Investors LP'

15. On 'Deccan Value Investors LP' efforts to renegotiate with the 'Committee of Creditors' having failed, Deccan filed M.A. No. 1272 of 2018 seeking inter alia to withdraw its resolution plan. The Deccan also filed its reply opposing C.A. No. 956 of 2018 filed by the 3rd Respondent, setting out its case for withdrawal and raising the following issues of facts :

- (i) The report furnished by the Resolution Professional in the 'Virtual Data Room' (VDR) showed the realistic capacity to be 2.10 lac MTPA. Consequently, the plan assumed 1.10 lac MTPA production in the first year and increases thereafter. Admittedly the production capacity of Metalyst is only approximately 45,000 MTPA;
- (ii) The 2016 MM Report showing figures of production capacity was made available in the VDR in response to Deccan's request for any information on production capacity - Deccan was unaware that the said Report even existed;
- (iii) It was informed subsequently that the 12,500 ton press which was a critical component of the resolution plan could not be installed on Metalyst's land and needed to be installed on the land of sister concern (undergoing CIRP);
- (iv) Metalyst's historical financials were inaccurate and presented a false picture of its operations and turnover;

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(v) Reports of a transaction audit and a forensic audit revealed that practically 39% of the sales in the review period had been made to related parties and huge write-offs had been done during the three year period of January 2014 to December 2016;

(vi) The Resolution Professional asserts that he only provided the information available with him and could not be expected to verify it. He also asserts that Deccan should have done its own due diligence. The said submission is misplaced as the information available with Deccan was only that

on the VDR, which the resolution applicants were entitled to rely upon. There was no public source of information that would enable Deccan to ascertain production capacity.

16. He further submits that under Section 60(5) of the 'I&B Code', the Adjudicating Authority is required to consider the questions of fact raised i.e. whether Deccan has been misled in the course of the 'Corporate Insolvency Resolution Process', and whether the 'Corporate Insolvency Resolution Process' had been vitiated by misrepresentation and / or mutual mistake. The M.A. No. 1272 of 2018 filed by the Deccan was maintainable.

17. The data and material on record and the foregoing submissions clearly show that the production capacity of the 'Corporate Debtor' and the feasibility of the resolution plan was not accurately represented on record at the time of 'Committee of Creditors' accorded its approval to the plan; further, a critical part of the resolution plan viz. the 12,500 ton Press was subsequently revealed to be unavailable.

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18. On the merits, Deccan successfully established that the 'Resolution Plan' was not capable of implementation, and thus, justified their withdrawal of the same. It is submitted that the Hon'ble Supreme Court also in the 'Corporate Insolvency Resolution Process' of 'Amtek Auto Ltd.' and by order dated 24th September, 2019 has allowed the 'successful resolution applicant' to withdraw its plan prior to its approval.

RELEVANT FACTS & LAW

19. The 'Resolution Professional' allowed the Deccan and other resolution applicants to access the bid containing (i) Audited Financial Statements of the 'Corporate Debtor' for the Financial Years 2015-16 and 2016-17; and (ii) Projections, as per the 'Corporate Debtor's' Head Office Model V.24-vdr. However, there was no break up between the trading revenue and the manufacturing revenue in the HO Model as uploaded in the VDR.

20. The Resolution Professional thereafter uploaded the report dated 30th September, 2016 prepared by technical experts Mott MacDonald India ("2016 MM Report"), which represented the net realistic production capacity of the Corporate Debtor's Plant as 210,747 Metric Tonnes Per Annum (MTPA), on the basis of their technical due diligence, of the different plants based on their 'Plate Capacity' and 'Net Realistic Capacity'.

21. '2016 MM Report' was the single most important, direct and relevant source of information regarding the Corporate Debtor's production capacity, prepared by the technical experts on the basis of the Corporate Debtor's proprietary and confidential data provided to these experts. The Resolution Applicant was not given access to the data underlying the 2016 MM Report. Company Appeal (AT) (Insolvency) Nos. 1276 & 1281 of 2019

22. Representatives of Deccan conducted various meeting with the Resolution Professional and visited various plant sites of the Corporate Debtor. It is alleged that Deccan came to know material and contradictory information regarding production capabilities of the Corporate Debtor which has the material impact on the viability of the resolution plan.

23. In the aforesaid background, the 'Resolution Professional' vide letter dated 15th October, 2018 called upon Deccan to submit the guarantee and in reply, the Deccan intimated vide letter dated 17th October, 2018 conveyed its decision to withdraw the Resolution Plan and filed for approval by the Adjudicating Authority.

24. As per Section 30(6), the 'Resolution Professional' is required to submit the plan as approved by the 'Committee of Creditors' to the Adjudicating Authority.

25. Section 31 relates to approval of the 'resolution plan' as under:

"31. Approval of resolution plan.

(1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, Company Appeal (AT) (Insolvency) Nos. 1276 & 1281 of 2019 creditors, guarantors and other stakeholders involved in the resolution plan.

[Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this sub-section, satisfy that the resolution plan has provisions for its effective implementation.] (2) Where the Adjudicating Authority is satisfied that the resolution plan does not confirm to the requirements referred to in sub-section (1), it may, by an order, reject the resolution plan.

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

(a) the moratorium order passed by the Adjudicating Authority under section 14 shall cease to have effect; and

(b) the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its database.

[(4) The resolution applicant shall, pursuant to the resolution plan approved under sub-section (1), obtain the necessary approval required Company Appeal (AT) (Insolvency) Nos. 1276 & 1281 of 2019 under any law for the time being in force within a period of one year from the date of approval of the resolution plan by the Adjudicating Authority under sub-section (1) or within such period as provided for in such law, whichever is later.] Provided that where the resolution plan contains a provision for combination, as referred to in Section 5 of the Competition Act, 2002 (12 of 2013), the

resolution applicant shall obtain the approval of the Competition Commission of India under that Act prior to the approval of such resolution plan by the committee of creditors]

26. The aforesaid provision makes it clear that the Adjudicating Authority, if it is satisfied that the resolution plan as approved by the 'Committee of Creditors' meets the requirements as referred to in sub-section (2) of Section 30, then only will approve the resolution plan. Where the Adjudicating Authority is satisfied that the resolution plan does not confirm the requirements of Section 30(2), by an order reject the 'resolution plan'.

27. Section 60(5) empowers the Adjudicating Authority (National Company Law Tribunal) to dispose of all the matters as under :

Company Appeal (AT) (Insolvency) Nos. 1276 & 1281 of 2019 "60. (1) The Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of the corporate person is located.

(2) Without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in this Code, where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or bankruptcy of a personal guarantor of such corporate debtor shall be filed before such National Company Law Tribunal.

(3) An insolvency resolution process or bankruptcy proceeding of a personal guarantor of the corporate debtor pending in any court or tribunal shall stand transferred to the Adjudicating Authority dealing with insolvency resolution process or liquidation proceeding of such corporate debtor.

Company Appeal (AT) (Insolvency) Nos. 1276 & 1281 of 2019 (4) The National Company Law Tribunal shall be vested with all the powers of the Debt Recovery Tribunal as contemplated under Part III of this Code for the purpose of sub-section (2).

(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of-- (a) any application or proceeding by or against the corporate debtor or corporate person; (b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and (c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code."

28. It is evident that the application under Section 60(5) of the 'I&B Code' can be entertained by the Adjudicating Authority (National Company Law Tribunal) both on the question of facts and law or in relation to the insolvency resolution or liquidation proceedings of the 'Corporate Debtor'.

29. In the present case, they cannot raise the question of fact mixed with question of law relating to resolution process. During the 'Corporate Company Appeal (AT) (Insolvency) Nos. 1276 & 1281 of 2019 Insolvency Resolution Process' period, the question of law involved is that in the facts and circumstances, the approval of the 'resolution plan' will be futile or not. If the allegation as raised by Deccan relating to net realistic capacity of the 'Corporate Debtor' has been wrongly shown in the 'Information- Memorandum'.

30. In 'Tata Steel Limited vs. Liberty House Group Pte. Ltd. & Ors.' - 'Company Appeal (AT) (Insolvency) No. 198 of 2018', this Appellate Tribunal held :

"30. Further, according to him, a 'Resolution Applicant' cannot challenge a decision of the 'Committee of Creditors' at any stage, till the Adjudicating Authority approves the 'Resolution Plan' under Section 31

40. In this background, while we hold that this appeal preferred by 'Tata Steel Limited' is premature, uncalled for, in absence of any final decision taken by the Adjudicating Authority under Section 31, this appeal is not maintainable."

In 'Arcelor Mittal India Private Limited v. Satish Kumar Gupta & Ors. (Civil Appeal Nos. 9402 - 9405 of 2018 etc.), the Hon'ble Supreme Court has held:

Company Appeal (AT) (Insolvency) Nos. 1276 & 1281 of 2019 "75. What has now to be determined is whether any challenge can be made at various stages of the corporate insolvency resolution process. Suppose a resolution plan is turned down at the threshold by a Resolution Professional under Section 30(2). At this stage is it open to the concerned resolution applicant to challenge the Resolution Professional's rejection? It is settled law that a statute is designed to be workable, and the interpretation thereof should be designed to make it so workable....."

76. Given the timeline referred to above, and given the fact that a resolution applicant has no vested right that his resolution plan be considered, it is clear that no challenge can be preferred to the Adjudicating Authority at this stage. A writ petition under Article 226 filed before a High Court would also be turned down on the ground that no right, much less a fundamental right, is affected at this stage. This is also made clear by the first proviso to Section 30(4), whereby a Resolution Professional may only invite fresh resolution plans if no other resolution plan has passed muster.

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79. Take the next stage under Section 30. A Resolution Professional has presented a resolution plan to the Committee of Creditors for its approval, but the Committee of Creditors does not approve such plan after considering its feasibility and viability, as the requisite vote of not less than 66% of the voting share of the financial creditors is not obtained. As has been mentioned hereinabove, the first proviso to Section 30(4)

furnishes the answer, which is that all that can happen at this stage is to require the Resolution Professional to invite a fresh resolution plan within the time limits specified where no other resolution plan is available with him. It is clear that at this stage again no application before the Adjudicating Authority could be entertained as there is no vested right or fundamental right in the resolution applicant to have its resolution plan approved, and as no adjudication has yet taken place.

81. If, on the other hand, a resolution plan has been approved by the Committee of Creditors, and has passed muster before the Adjudicating Authority, this determination can be challenged before the Appellate Authority under Section 61, and may further be challenged before the Supreme Court under Section 62, if there is a question of law arising out of such order, within the time specified in Section 62. Section 64 also Company Appeal (AT) (Insolvency) Nos. 1276 & 1281 of 2019 makes it clear that the timelines that are to be adhered to by the NCLT and NCLAT are of great importance, and that reasons must be recorded by either the NCLT or NCLAT if the matter is not disposed of within the time limit specified. Section 60(5), when it speaks of the NCLT having jurisdiction to entertain or dispose of any application or proceeding by or against the corporate debtor or corporate person, does not invest the NCLT with the jurisdiction to interfere at an applicant's behest at a stage before the quasi-judicial determination made by the Adjudicating Authority. The non-obstante clause in Section 60(5) is designed for a different purpose: to ensure that the NCLT alone has jurisdiction when it comes to applications and proceedings by or against a corporate debtor covered by the Code, making it clear that no other forum has jurisdiction to entertain or dispose of such applications or proceedings."

31. On the realistic and actual basis of technical production of the capacity of the 'Corporate Debtor', the 'Deccan' brought to the notice of the Adjudicating Authority that the present plan was unviable or unfeasible or unimplementable.

32. 'Deccan' has pointed out the discrepancy between the representations made by the Resolution Professional on which Deccan formulated its Resolution Plan and the actual undisputed production capacity of the Corporate Debtor as under :

Company Appeal (AT) (Insolvency) Nos. 1276 & 1281 of 2019 Corporate Debtor's Production Capacity [in MTPA] Represented by the Projected by the Actual position Resolution Professional Applicants in Deccan in the 2016 MM Report Resolution Plan 210,747 110,000 Approx. Maximum 66,000

33. It was shown by Deccan that the financial and technical documents and data in relation to the Corporate Debtor was discrepant and false, as the Financial Statements for the Financial Years 2015-16 and 2016-17 and the Provisional Financial Statements for the period April 2017 to December 2017 were provided in the VDR for the Resolution Applicants for undertaking their due diligence. But these statements, as per the Resolution Professional and the 'Committee of Creditors', are discrepant, unreliable and contain false information since they are being subjected to the

transaction and forensic audit. Therefore, any reliance upon these statements is said to have vitiated Deccan's Resolution Plan.

34. The Adjudicating Authority noticed that the income tax returns of the company for the Financial Year 2015-16 and Financial Year 2016-17 do not indicate trading operations. The audited financial statements of the Corporate Debtor also, do not indicate any trading operations at all. The Corporate Debtor was represented as a primarily manufacturing company to the Bidders. However, as per the claims made by the Resolution Professional, based upon the document purporting to be the "relevant excerpt of the details of historical revenues provided to the Resolution Applicant in the "Metalyst Company Appeal (AT) (Insolvency) Nos. 1276 & 1281 of 2019 HO Model" under the tab Historical Financial", the obvious implications would be that almost 70% of the revenue of the Corporate Debtor would come from trading, and not from manufacturing, which would mean that the Corporate Debtor's business has been misrepresented to bidder as a primarily manufacturing company, and the size and scale of the purported revenues from manufacturing were also misrepresented.

35. It was further noticed by the Adjudicating Authority that the meeting held on 5th September, 2018, and, thereafter, by way of the resolution Professional's letter dated 23rd October, 2018 it was informed that the 12.500 ton Press that was proposed to be installed as part of Deccan's Resolution Plan, would only be installed on-premises owned by a third-party, Clover Forgings and Machining Pvt. Ltd. ("Clover") and that is not possible to install the 12.5k ton Press at the Aurangabad plant of the Corporate Debtor. It was also pointed out that insolvency resolution proceedings had been admitted in respect of Clover, by way of an Order dated 4th December, 2018 of the National Company Law Tribunal, New Delhi Bench.

36. The Adjudicating Authority noticed the Report of the Bankruptcy Law Reforms Committee, November 2015 which envisaged the role of the Resolution Professionals an agent of the Adjudicating Authority. The relevant clauses of the said report are:

"58. Clause 4.4 set out certain mandates for the Resolution Professional, including that the Insolvency Professional will treat the assets of the debtor with honesty and transparency. The BLRC Report Company Appeal (AT) (Insolvency) Nos. 1276 & 1281 of 2019 recommends that the Resolution Professional must provide the Information Memorandum to the entity (based on which solution can be offered to resolve insolvency). Further, the Information Memorandum put out by the Resolution Professional must be with a "degree of completeness" of the information that the Resolution Professional is willing to certify (Clause 5.3.2).

59. The Clause 5.3.2 regarding the role of the Resolution Professional provides that :

"The first phase of the IRP is completed when the creditor's committee is formed, and the window to submit claims is closed. The creditor's committee can apply to the Adjudicator to appoint a new RP to replace the interim RP. The RP must be chosen by a majority vote in the creditor's committee for the Adjudicator to accept the

application. The RP becomes the manager of the negotiation between the debtor and the creditors in assessing the viability of the entity. In this role, she has the responsibility of managing all information so that debtors and creditors are equally informed about the business in the Company Appeal (AT) (Insolvency) Nos. 1276 & 1281 of 2019 negotiations. Finally, she is responsible for inviting and collecting proposals of solutions to keep the entity going. In this role, she is responsible for managing the process through which to invite proposals from the overall financial market, rather than just the creditors and debtor. The Committee discussed that this could include other potential market participants, such as other financial institutions, asset reconstruction companies, foreign financiers, strategic investors, other firms and minority shareholders in the entity. Part of the task of the RP is to ensure as much equality of information about the entity to all participants in the negotiations as is possible.

Thus, the RP needs to ensure several features in the IRP, giving priority to the need to preserve time value and equality in negotiations in the process:

1. The RP must provide the most updated information about the entity as accurately as is reasonably possible to this range of solution providers. In order to do this, the RP has to be able to verify claims to liabilities as well as the assets disclosed by the entity. The RP has the Company Appeal (AT) (Insolvency) Nos. 1276 & 1281 of 2019 power to appoint whatever outside resources that she may require in order to carry out this task, including accounting and consulting services.
2. The information collected on the entity is used to compile an information memorandum, which is signed off by the debtor and the creditor's committee, based on which solutions can be offered to resolve the insolvency. In order for the market to provide solutions to keep the entity as a going concern, the information memorandum must be made available to potential financiers within a reasonable period of time from her appointment to the IPR. If the information is not comprehensive, the RP must put out the information memorandum with a degree of completeness of the information that she is willing to certify. For example, as part of the information memorandum, the RP must clearly state the expected shortfall in the coverage of the liabilities and assets of the entity presented in the information memorandum. Here, the asset and liabilities include those that the RP can ascertain and Company Appeal (AT) (Insolvency) Nos. 1276 & 1281 of 2019 verify from the accounts of the entity, the records in the information system, the liabilities submitted at the start of the IPR, or any other source as may be specified by the Regulator
3. Once the information memorandum is created, the RP must make sure that it is readily available to whoever is interest to bid a solution for the IPR. She has to inform the market (a) that she is the RP in charge of this case, (b) about a transparent mechanism through which interested third parties can access the information memorandum, (c) about the time frame within which possible solutions must be

presented and (d) with a channel through which solutions can be submitted for evaluation. The Code does not specify details of the manner or the mechanism in which this should be done, but rather emphasises that it must be done in a time-bound manner and that it is accessible to all possible interested parties. Finally, the RP is responsible for calling the creditors committee to evaluate the submitted proposals. She has a role to play in discussing and Company Appeal (AT) (Insolvency) Nos. 1276 & 1281 of 2019 ranking the proposals in terms of how to maximise enterprise value. As a first stage filter, she must ensure that all the proposals have clarity on how the IRP costs and the liabilities of the operational creditors will be treated and that all parts of the proposed solutions are consistent with the relevant laws and regulations. But she must leave the choice of final solution to selection by the majority vote from the creditors Committee".

37. In the aforesaid background, the Adjudicating Authority held that the 'Resolution Professional' was duty bound to provide the list updated information about the entity as accurately as is reasonably feasible and possible to the range of solution providers. In 'MobiloX Innovations (P) Ltd. vs. Kirusa Software (P) Ltd.' - (2018) 1 SCC 353' while tracing the background of the I&B Code, referred to the "Legislative Guide on Insolvency Law of the United Nations Commission on International Trade Law" and the following pertinent provisions/clauses thereof:

"11. An insolvency law should be transparent and predictable. This will enable potential lenders and creditors to understand how insolvency proceedings operate and to assess the risk associated with their position as a creditor in the event of insolvency. This will promote stability in commercial relations and foster lending and investment at lower risk Company Appeal (AT) (Insolvency) Nos. 1276 & 1281 of 2019 premiums. Transparency and predictability will also enable creditors to clarify priorities, prevent disputes by providing a backdrop against which relative rights and risks can be assessed and help define the limits of any discretion. Unpredictable application of the insolvency law has the potential to undermine not only the confidence of all participants in insolvency proceedings, but also their willingness to make credit and other investment decisions prior to insolvency. As far as possible, an insolvency law should clearly indicate all provisions of other laws that may affect the conduct of the insolvency proceedings (e.g. labour law; commercial and contract law; tax law; laws affecting foreign exchange, netting and set-off and debt for equity swaps; and even family and matrimonial law).

12. An insolvency law should ensure that adequate information is available in respect of the debtor's situation, providing incentives to encourage the debtor to reveal its positions and, where appropriate, sanctions for failure to do so. The availability of this information will enable those responsible for administering and supervising insolvency proceedings (courts or administrative agencies, the insolvency representative) and creditors to assess Company Appeal (AT) (Insolvency) Nos. 1276 & 1281 of 2019 the financial situation of the debtor and determine the most appropriate solution."

38. The Adjudicating Authority observed that the Resolution Professional's disassociation with the '2016 MM Report', in fact, constitutes an acceptance of the position that the '2016 MM Report' and the contents thereof are misleading and unreliable. Having made it available on VDR is contrary to the Resolution Professional's obligations under the I&B Code and the Regulations thereunder. The Adjudicating Authority further observed that :

"The Applicants were entitled to rely on the data provided in the VDR and to proceed on the basis that the said data was accurate in its representation of the Corporate Debtor, especially since the Applicants were only afforded a 2-2.5 hour walk-through site visit at the plants of the Corporate Debtor prior to submission of the resolution plan. The said site visit in no manner would enable the Applicants to assess the technical capacity of the Corporate Debtor correctly, and this visit does not give/afford any basis to the Resolution Professional and the CoC to assert that there was either full knowledge or awareness on the part of the Applicants, considering that the Resolution Professional himself states that even a six month period was insufficient to conduct due diligence."

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39. In the aforesaid background, the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench rightly observed that the 'Insolvency and Bankruptcy Code' do not confer any power and jurisdiction on the Adjudicating Authority to compel specific performance of a plan by an unwilling resolution applicant.

40. In absence of fact that there was any procedural infirmity and having not proceeded in the manner as was required, we hold that the plan approved was violative of Section 30(2)(e) of the 'I&B Code', having contravened the provisions of the 'I&B Code'.

41. For the said reasons, the plan approved by the 'Committee of Creditors' under sub-section (4) of Section 30 of the 'I&B Code' and rejected by the Adjudicating Authority in terms of Section 31(2), no interference is called for.

42. Insofar as refund of forfeiture of the Bid Bond Guarantee is concerned, this Appellate Tribunal is not inclined to grant any relief to the 'Deccan'. On 18th November, 2019, the 'Committee of Creditors' was allowed to go through the other resolution plans and approve the same. As observed by the Adjudicating Authority subsequently on 6th December, 2019, the 'Deccan' was also allowed to settle the claim. After having received all the information including '2016 MM Report' relating to net realistic volume production from the existing facility of the 'Corporate Debtor', having submitted the plan, which is not viable and feasible.

43. Non-availability of 12,500 ton press which is a critical component of the resolution plan could not be installed on Metalyst's land and needed to be Company Appeal (AT) (Insolvency) Nos. 1276 & 1281 of 2019 installed at the land of the sister concern, which is an undergoing 'corporate insolvency resolution process'.

44. Further, during the pendency, 'Committee of Creditors' is allowed to go through the other 'resolution plans'. No further time is allowed if it has approved one or other plan, which may be brought to the notice of the Adjudicating Authority for appropriate orders.

45. For the aforesaid reasons we are not inclined to interfere with the impugned order dated 27th September, 2019 passed by the Adjudicating Authority.

Both the appeals are dismissed. No costs.

[Justice S.J. Mukhopadhaya] Chairperson [Justice Bansi Lal Bhat] Member (Judicial) [Justice Venugopal M.] Member (Judicial) New Delhi 7th February, 2020 /ns/ Company Appeal (AT) (Insolvency) Nos. 1276 & 1281 of 2019