(2020) 02 NCLT CK 0163

In the National Company Law Appellate Tribunal

Case No : Company Application No. 2655 (PB) Of 2019 In Company Petition No. (IB)-974 (PB) Of 2018

Alok Kailash Saksena APPELLANT

Vs

Aditya Estates Private Limited RESPONDENT

Date of Decision : 14-02-2020

Acts Referred:

Competition Act, 2002 — Section 5

Insolvency And Bankruptcy Code, 2016 — Section 7, 12(2), 14, 18(1)(c), 29A, 30, 30(2), 30(2)(a), 30(2)(b), 30(2)(c), 30(2)(e), 30(2)(f), 30(4), 30(6), 31, 31(1), 31(3), 31(3)(b), 31(4), 32(2)(d), 53, 53(1), 61, 62

Insolvency And Bankruptcy Board Of India (Insolvency Resolution Process For Corporate Persons) Regulations, 2016 — Regulation 6(1), 27, 35, 36B(4A), 38, 39, 39(3), 39(4)

Citation : (2020) 02 NCLT CK 0163

Hon'ble Judges : B.S.V. Prakash Kumar, J;Santanu Kumar Mohapatra, Member (Technical)

Bench : Division Bench

Advocate : Misha, Shantan Chaturvedi, Yalini Ravi, Kunal Vajani, Varuna Ahuja

Final Decision : Disposed Of

Judgement

Santanu Kumar Mohapatra, Member (T)

1. This is an application filed by the Resolution Professional under Section 30(6) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as the "Code") seeking approval of the Resolution Plan under Section 31 of the Code read with regulation 39 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 in respect of the corporate debtor M/s. Aditya Estates Private Limited.

2. The facts in brief necessary for disposal of the present application are that one of the Financial Creditors, ICICI Bank UK PLC, had preferred an application under Section 7 of the Code for initiation of Corporate Insolvency Resolution Process against M/s. Aditya Estates Private Limited ("Corporate Debtor"). The said

Company Petition (IB)-974 (PB) / 2018 was admitted on 26.02.2019 imposing moratorium under Section 14 of the Code and the applicant Mr. Alok Kailash Saksena was appointed as an Interim Resolution Professional in respect of the Corporate Debtor M/s. Aditya Estates Private Limited.

3. Thereafter, in terms of Regulation 6(1) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016 ("CIRP Regulations"), the Interim Resolution Professional made a public announcement in FORM-A on 01.03.2019 inter alia calling for the submission of claims of the creditors.

4. In terms of the provisions of Section 18(1) (c) of the Code, the Interim Resolution Professional constituted the Committee of Creditors and a report along with list of creditors was filed before this Tribunal on 29.03.2019.

5. The first meeting of the Committee of Creditors ("CoC") was convened on 26.03.2019, wherein the IRP (applicant) was unanimously appointed to act as the Resolution Professional for the Corporate Debtor with 100% voting shares.

6. In terms of the Regulation 27 of the CIRP Regulations, 2016, the applicant appointed registered valuers namely, Mr. Sachin Garg and Mr. Tanuj Kumar Bhatnagar for valuation of land and building and Mr. Vishu Upadhyay and Mr. Tarun Jain were appointed for valuation of the securities/financial assets of the corporate debtor and for determination of the Fair Value and Liquidation Value of the Corporate Debtor in accordance with Regulation 35 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons), Regulations, 2016 ("CIRP Regulations, 2016").

7. With the approval of Committee of Creditors the Applicant had issued Form G on 29.04.2019 and revised Form G on 20.05.2019 seeking Resolution Plan for the Corporate Debtor. The last date for submission of Expression of Interest ["EOF] was 15.06.2019 and the Applicant had issued a Provisional List of Resolution Applicants on 18.06.2019. The Information Memorandum, Evaluation Matrix and Request for Resolution Plan was issued to the Resolution Applicants on 24.06.2019. The Final List of Resolution Applicants was issued on 27.06.2019 which is given below:

1

Adani Properties Private Limited.

2

Mr. Anil Rai Gupta.

3

Dalmia Cement (Bharat) Limited.

4

Mr. Malvinder Singh.

5

Mr. Narayana Murthy.

6

Panch Tatva Promoters Private Limited

7

Mr. Paras Pramod Agarwal.

8

Veena Investments Private Limited

9

Welspun Logistics Limited.

8. It is submitted that from the final list of Resolution Applicants, only Two Resolution Applicants namely Adani Properties Private Limited (APPL) and Veena Investments Private Limited (VIPL) submitted their Resolution Plans on 07.08.2019.

9. It is submitted in the application that the Committee of Creditors in its third meeting dated 26.04.2019 approved eligibility criteria applicable for the resolution applicants. In the fourth meeting of Committee of Creditors held on 20.06.2019 Evaluation Matrix was approved. The Committee of Creditors also ratified the appointment of the process advisors namely M/s. Knight Frank India Private Limited and transaction auditor namely Saxena & Saxena, Chartered Accountants ["S & S").

10. The Committee of Creditors in its fifth meeting held on 22.07.2019 resolved to extend the last date of submission of the Resolution Plan till 7th August, 2019. In the same meeting, the Committee of Creditors further resolved to extend the CIRP Period by 90 days. Subsequently, the applicant had filed an Application for extension of CIRP period under Section 12(2) of the Code which was allowed by this Tribunal vide Order dated 23.08.2019 and the Corporate Insolvency Resolution Process period was extended by 90 days till 22.11.2019.

11. In the Sixth and Seventh Committee of Creditor's Meetings held on 09.08.2019 and 28.08.2019 respectively, the CoC members discussed and ratified the appointment of Resolution Plan Evaluation Manager and Professional agency for evaluation of eligibility criteria of Resolution Applicants. Accordingly, BDO India LLP was appointed to evaluate the Resolution Plan and Mazars India LLP was appointed to evaluate the eligibility of the Resolution Applicants.

12. It is submitted in the application that during the Eighth, Ninth and Tenth CoC Meetings held on 11.10.2019, 21.10.2019 and 01.11.2019 respectively, the CoC

members had discussed the Resolution Plans and Compliances thoroughly and shared their queries with the Resolution Applicants which were adequately replied by the Resolution Applicants.

13. In the Eleventh, Twelfth and Thirteenth CoC Meetings held on 04.11.2019, 11.11.2019 and 15.11.2019 respectively, the CoC members had invited both the Resolution Applicants and discussed the various aspects of the Resolution Plan with both the Resolution Applicants and negotiated with them.

14. It is further stated that in the fourteenth CoC Meeting held on 18.11.2019, the CoC Members had again discussed the Resolution plans with the Resolution Applicants. Resolution Plan of VIPL was discussed by the CoC members where they observed that their Resolution Plan did not comply with various provisions of the Code and the applicable Regulations. The CoC members listed the non-compliances relating to the conditionality of the Resolution Plan, appointment of Nodal Officer etc. The CoC members observed that the amount of Rs. 225 Crores being offered by VIPL does not take into account any liability that may arise from L&DO, NDMC towards house tax, sales tax, Income Tax which may arise in future and the same is required to be waived by this Tribunal. In case the same are not waived, the Resolution Applicants have specifically stated in the meeting that the Resolution Plan shall stand withdrawn. After discussion with the representatives of the Resolution Applicants, [where all the non-compliance, the conditionally and the uncertainty were discussed in detail] the COC decided that the Resolution Plan by VIPL be recorded as non-compliant, conditional and uncertain plan and shall not be considered any further and put up for voting.

15. A discussion was also put in place with the other Resolution Applicant namely APPL who wanted some more time to finalize the distribution of financial payout of Rs. 265 crores and to address certain modifications as suggested by the Committee of Creditors.

16. It is also submitted that the adjourned fourteenth CoC meeting was resumed on 19.11.2019 and the Resolution plan of APPL was considered along with their affidavit under Section 29A of the Code stating that they are not ineligible for submitting the Resolution Plan. The undertaking that their Resolution Plan complies with all provisions of the Code and the Regulations was also considered by the CoC members. The CoC Members deliberated on the feasibility and viability of the Resolution plan of APPL and found the same to be financially feasible and viable.

17. The CoC members decided that updated Resolution Plan of M/s. Adani Properties Private Limited offering 265 Crores which provides payment for CIRP Cost, Secured Creditors, Unsecured Creditors (other than suspended directors and related parties of the Corporate Debtor) which is certain as it excludes payment of all statutory liabilities (past, present and future and in particular L&DO, house rent etc.) be considered and put up for voting.

18. The resolution for approval of the resolution plan submitted by the resolution

applicant was put for e-voting conducted from 19.11.2019 to 21.11.2019 and the following resolution was approved by 93.01% vote share of the members of the Committee of Creditors in terms of Section 30(4) of the Code: -

"Resolved that the resolution plan of Adani Properties Private Limited as circulated, discussed, debated, modified and thereafter updated and as placed before this meeting on 19 November 2019 be and is hereby approved.

Resolved further that, Alok K Saksena resolution professional of Aditya Estate Private Limited is hereby directed to file an application in case of approval with the Hon'ble Adjudicating Authority".

19. The details of members of Committee of Creditors and the break-up of the voting pattern of the Financial Creditors/Members of the Committee of Creditors in approving the Resolution Plan was as under:

Sr. No.

Financial Creditors

Voting Share

Voted

1

ICICI Bank UK PLC

89.52

For

2

ICICI Bank Limited

3.38

For

3

Spirit Infrapower & Multiventures Private Limited

6.99

Against

4

Shailja Commercial Trade Frenzy Limited

11

For

Total

100

Sr. No

Decision

Voting (%)

1

For

93.01

2

Against

6.99

Total

100

20. It is submitted that pursuant to the approval of the Resolution Plan by the Committee of Creditors, the Applicant issued a Letter of Intent dated 21.11.2019 to the Resolution Applicant inter-alia informing that the revised resolution plan as submitted before the CoC was approved and accordingly, the resolution applicant was requested to convey their unconditional acceptance. The Letter of Intent was duly accepted and signed by the APPL. However, despite three days' time given in the Letter of Intent dated 21.11.2019 the successful Resolution Applicant has not submitted the performance guarantee in compliance of Regulation 36 B (4A) of the Regulations. In this respect the applicant RP has stated in Form-H that the performance is in the process of being obtained. Letter of Intent dated 21.11.2019 duly sealed and signed by the Resolution Applicant, M/s. Adani Properties Private Limited has been placed on record.

21. The resolution professional has placed the compliance certificate under Section 30(2) of the Code and has confirmed that the resolution plan submitted by the APPL is in compliance with Section 30 of the Code read with Regulation 38 and 39 of the Regulations. Resolution professional has also placed a copy of the resolution plan as approved by CoC, stated to have been signed by the authorised representative of the resolution applicant.

22. The Compliance Certificate dated 21.11.2019 filed by the Resolution Professional in Form H under Regulation 39(4) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 has also been placed on record.

23. In terms of Section 30(6) of the Code read with Regulation 39 of the CIRP

Regulations, 2016 the resolution professional has submitted the Resolution Plan for seeking an order under Section 31(1) of the Code for approval of the resolution plan passed by the committee of creditors under sub-section (4) of Section 30 with 93.01% voting share.

24. Section 31 of the Insolvency and Bankruptcy Code, deals with the approval or rejection of a resolution plan by the Adjudicating Authority. Approval of the resolution Plan is accorded under the provisions of Section 31(1) of the Code.

25. Section 31 of the Insolvency and Bankruptcy Code, 2016 is reproduced below for ready reference.

'Approval of Resolution Plan-

31. (1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan.

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

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

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

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

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

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

Provided that where the resolution plan contains a provision for combination, as referred to in section 5 of the Competition Act, 2002 (12 of 2003), the resolution applicant shall obtain the approval of the Competition Commission of India under the Act prior to the approval of such resolution plan by the Committee of Creditors."

(Emphasis given)

26. Therefore, before approving the Resolution Plan, the Code mandates the Adjudicating Authority to ensure that,

(1) the Resolution Plan meets the requirements of Section 30(2) of the Code and

(2) the resolution plan has provisions for its effective implementation.

27. In respect of compliance of condition (1) above, it is necessary to refer to sub-section (2) of Section 30 of the Code which reads as follows:

"30. Submission of resolution plan. -(1)............

(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan -

(a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor;

(b) provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than-

(i) the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or

(ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53, whichever is higher, and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor.

Explanation 1. - For removal of doubts, it is hereby clarified that a distribution in accordance with the provisions of this clause shall be fair and equitable to such creditors. Explanation 2. - For the purpose of this clause, it is hereby declared that on and from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019, the provisions of this clause shall also apply to the corporate insolvency resolution process of a corporate debtor-

(i) where a resolution plan has not been approved or rejected by the Adjudicating Authority;

(ii) where an appeal has been preferred under section 61 or section 62 or such an appeal is not time barred under any provision of law for the time being in force; or

(iii) where a legal proceeding has been initiated in any court against the decision of the Adjudicating Authority in respect of a resolution plan;]

(c) provides for the management of the affairs of the Corporate debtor after approval of the resolution plan;

(d) The implementation and supervision of the resolution plan;

(e) does not contravene any of the provisions of the law for the time being in force

f) confirms to such other requirements as may be specified by the Board.

Explanation. -For the purposes of clause (e), if any approval of shareholders is required under the Companies Act, 2013(18 of 2013) or any other law for the time being in force for the implementation of actions under the resolution plan, such approval shall be deemed to have been given and it shall not be a contravention of that Act or law.

(3) ...."

28. Sub-section 2 of Section 30 casts a duty on the Resolution Professional to examine the Resolution Plan received by him to confirm that such Resolution Plan provides for the payment of insolvency resolution process costs, provides for the payment of the debts of the operational creditors and financial creditors in such manner as specified, provides for the management of the affairs of the corporate debtor after approval of the Resolution Plan; the implementation and supervision of the Resolution Plan, that the Resolution Plan does not contravene any of the provisions of the law, and that the Resolution Plan conforms to such other requirements as may be specified by the Board.

29. The Resolution Professional has filed compliance certificate in Form H dated 21.11.2019 and inter alia has confirmed that he has examined and verified the Resolution Plan approved by the Committee of Creditors of the Corporate Debtor M/s. Aditya Estates Private Limited, in the light of the requirements of the Code and Regulations and that the approved plan is compliant to the relevant provisions of the Code and Regulations.

30. In terms of Section 31(1) of the Code, Adjudicating Authority has also to examine whether the requirements of sub-section (2) of Section 30 have been complied with or not.

31. It has been submitted in the application and in Form H duly certified by Resolution Professional that the Resolution Plan approved by 93.01% majority vote share of the members of the Committee of Creditors meets the requirements as laid down in various clauses of sub-section (2) of Section 30 of the Code.

32. In respect of compliance of Section 30(2)(a) of the Code, it is seen that there

is a provision in the resolution plan at Section 3.1 of the resolution plan which provides for payment of CIRP costs in priority over payments to any other creditors. It has been inter alia confirmed that the CIRP cost upto the date of approval of Hon'ble NCLT would be considered on an actual basis. Besides the Resolution Professional has also confirmed in the compliance certificate given in Form H that the Resolution Plan provides for the payment of Insolvency Resolution Process costs within 30 days after approval of the plan. Be that as it may it is made clear that Insolvency Resolution Process cost shall be paid in its entirety by the resolution applicant in priority to other debts of the corporate debtor.

33. As regards compliance of clause (b) of Section 30(2) of the Code, the Resolution Professional has certified that Section 3.3 of the resolution plan provides for the payment of the debts of operational creditors in such manner as may be specified by the Board which shall not be less than the amount to be paid to the operational creditors in the event of a liquidation of the corporate debtor under Section 53.

34. It is submitted in the plan that the corporate debtor does not have any employees or workmen. It is stated that in the absence of any claim from any employee or workman NIL payment is proposed in the plan. Similarly, it is stated that no claim has been filed by Government and Statutory Authorities, therefore, NIL payment is proposed in the plan in this respect also. However, it is clarified that in case any claim is preferred by any workman, the same shall be considered as per law.

35. There appears to be no discrimination in the resolution plan in respective class of creditors, as same treatment is provided to similarly situated each class of creditors. So long as the provisions of the Code and the Regulations have been met, it is the commercial wisdom of the requisite majority of the Committee of Creditors which is to negotiate and accept a resolution plan, which may involve differential payment to different classes of creditors. Needless to say, that the ultimate discretion of what to pay and how much to pay each class or subclass of creditors is with the Committee of Creditors. Be that as it may in the present case equitable treatment has been accorded to each creditor depending upon the class to which it belongs.

36. As a sequel to the aforesaid discussion it is seen that clause (b) of sub-section (2) of Section 30 of the Code stands satisfied.

37. In terms of Section 30(2)(c), the Resolution Plan provides for management of affairs of the corporate debtor after approval of the Resolution Plan. The management of the affairs and control of the business of the corporate debtor after approval of the Resolution Plan has been provided at Section 7 of the Resolution plan which inter alia provides that the Company shall continue as a going concern and operate in its normal course of business upon implementation of the Resolution Plan. The Resolution Professional has confirmed in the

compliance certificate given in Form H that Section 7 of the Resolution Plan provides for the management and control of the business of the corporate debtor.

38. The fourth requirement envisaged by Section 32(2)(d) is that it must provide for the implementation and supervision of the resolution plan. The Resolution Professional has confirmed in the compliance certificate given in Form H that Section 8 of the Resolution Plan provides for adequate means for supervising its implementation.

39. It has been stated that Resolution Professional along with 2 representatives of approving financial creditors and two representatives of resolution applicant shall act as the monitoring agency. It is clarified that the Monitoring Committee be comprised of five members including the resolution professional as insolvency professional to be chaired by the IP.

40. The fifth and sixth conditions in terms of clause (e) & (f) of sub-section (2) of Section 30 of the Code provide to ensure that the Resolution Plan does not contravene any of the provisions of the law and conforms to such other requirements as may be specified by the Board.

41. In this regard the resolution professional has certified that the said Resolution Plan complies with all the provisions of the Insolvency and Bankruptcy Code 2016, the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and does not contravene any of the provisions of the law for the time being in force. The Resolution Applicant has also given a declaration to that effect in Section 1.4 of the Resolution Plan. Be that as it may in terms of clause (e) & (f) of sub-section (2) of Section 30 of the Code, we make it clear that the Resolution Applicant shall comply with all applicable laws under the proposed Resolution Plan, whether or not specifically provided therein.

42. It is pertinent to state here that Section 29A of the Code prescribes certain eligibility criteria and disqualifications for persons who submit a resolution plan. Resolution Applicant has given adequate declaration and undertaking on their eligibility to submit the Resolution Plan. At para 4(ii) of Form H Resolution Professional has also certified that the Resolution Applicant has submitted an affidavit in this regard. It has been confirmed that the Resolution Applicant is eligible to submit resolution plan and does not fall under any of the category as mentioned in Section 29A of the Code.

43. Regulation 36B(4A) of the CIRP Regulations requires that the Resolution Applicant shall provide a performance security. The Resolution Applicant has given its unconditional acceptance to the Letter of Intent but has not furnished performance guarantee within three days as stipulated in the Letter of Intent. In compliance of Regulation 36B(4A) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 the Resolution applicant is directed to furnish performance guarantee of Rs. 5 Crores within seven days from the date of receipt of this order.

44. As a sequel to aforesaid discussions we are satisfied that all the requirements of Section 30(2) are fulfilled and no provision of the law for the time being in force appears to have been contravened.

45. During final hearing dissenting financial creditor M/s. Spirit Infrapower & Multiventures Private Limited has raised objection on the ground that the resolution applicant has reduced its offer from 400 Crores to 265 Crores, thereby the main object of the Code to maximise the value of assets of the Corporate Debtor has been defeated.

46. In this regard RP and CoC have contended that the initial resolution plan for Rs. 400 Crores was received with a condition that the consideration shall be subject to reduction/ adjustment of the liabilities arising out of the transaction payable to L&DO for conversion of property to free hold, property tax, stamp duty and other related charges. The conditional plan was subject to adjustment of various charges and was not certain as to how much exactly shall be paid to the creditors. As the requirement of the CoC as articulated in the request for resolution plan (RFRP) was to provide a resolution plan to acquire on an "as is where is" basis, resolution applicants were asked to de-link the L&DO related risks and to remove contingency and uncertainty. Accordingly, the financial proposal was reduced from conditional Rs. 400 crores to fixed upfront payment of Rs. 265 Crores, which was accepted by CoC with overwhelming majority of 93.01 % votes.

47. In addition to the revised offer of payment of Rs. 265 Crores the resolution applicant undertook to make all payments towards conversion of the property from leasehold to freehold through a fresh infusion of additional fund. The rational for reduction of the financial proposal is as per the estimates the additional amount to be incurred towards the L&DO related issues including the cost of conversion would be about 177 crores. As per the deliberation at the CoC meeting the cost of conversion and other associated payments were estimated at a substantial sum of Rs. 139.93 Crores. As the aforesaid charges were unclear and ambiguous, CoC took a prudent commercial decision to ensure a fixed minimum payment to the creditors under the plan, in the light of highest financial proposal available before it.

48. Adjudicating Authority is not expected to substitute its view with the commercial wisdom of the CoC nor should it deal with the technical complexity and merits of Resolution Plan, unless it is found contrary to express provision of law and goes against the public interest. The object of the Code is to promote resolution and every effort must be made to try and see that resolution is made possible.

49. In the present case CoC with overwhelming majority of 93.01 % votes has taken a commercial and business decision to approve the revised plan after due negotiations and after obtaining highest possible financial proposal. Besides during argument only objections were raised against the plan, without placing

any better/ higher financial proposal for consideration.

50. Another objection taken by the dissenting creditor precisely is that the value under the resolution plan is lower than the liquidation value and therefore cannot be accepted. It was strenuously argued that the liquidation value in the present case is Rs. 306 Crores and therefore the resolution plan for a much below sum of Rs. 265 Crores cannot be approved.

51. It is appropriate to mention here that the principal asset of the corporate debtor M/s. Aditya Estates Private Limited is the leasehold immovable property admeasuring 3.4 acres and the property is held on a leasehold basis from the Land and Development Office, Ministry of Urban Housing Affairs (L&DO). The liquidation value for the property was assessed by two valuers and the average valuation was found to be Rs. 306,80,15,490.50/-. However, while preparing the liquidation value both the valuers specifically carved out the charges that any buyer/auction purchaser is liable to pay to L&DO. It is submitted that as per supplemental letter received from the valuer it is clarified that once such payment is considered the valuation shall reduce by another 50 % leading to liquidation value around Rs. 153 Crores. Accordingly, it is the stand of CoC that the resolution plan is well in excess of the value realizable in case of liquidation of the corporate debtor.

52. The financial proposal under the plan would be Rs. 265 Crores plus the substantial amount payable to L&DO, which will be paid by the resolution applicant additionally through fresh infusion of funds. Therefore, there is force in the contention of RP and CoC that the financial proposal under the plan would be more than the liquidation value of the corporate debtor.

53. In the case of Maharasthra Seamless Limited Vs. Padmanabhan Venkatesh & Ors. passed in Civil Appeal No. 4242 of 2019 decided on 22.01.2020, the Hon'ble Supreme Court framed the issue to be answered "whether the Scheme of the Code contemplates that the sum forming part of the resolution plan should match the liquidation value or not" and held as follows:

"26. No provision in the Code or Regulations has been brought to our notice under which the bid of any Resolution Applicant has to match liquidation value arrived at in the manner provided in Clause 35 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. This point has been dealt with in the case of Essar Steel (supra). We have quoted above the relevant passages from this judgment.

27. It appears to us that the object behind prescribing such valuation process is to assist the CoC to take decision on a resolution plan properly. Once, a resolution plan is approved by the CoC, the statutory mandate on the Adjudicating Authority under Section 31(1) of the Code is to ascertain that a resolution plan meets the requirement of sub-sections (2) and (4) of Section 30 thereof. We, per se, do not find any breach of the said provisions in the order of the Adjudicating Authority in approving the resolution plan.

28. The Appellate Authority has, in our opinion, proceeded on equitable perception rather than commercial wisdom. On the face of it, release of assets at a value 20% below its liquidation value arrived at by the valuers seems inequitable. Here, we feel the Court ought to cede around to the commercial wisdom of the creditors rather than assess the resolution plan on the basis of quantitative analysis. Such is the scheme of the Code. Section 31(1) of the Code lays down in clear terms that for final approval of a resolution plan, the Adjudicating Authority has to be satisfied that the requirement of sub-section (2) of Section 30 of the Code has been complied with. The proviso to Section 31(1) of the Code stipulates the other point on which an Adjudicating Authority has to be satisfied. That factor is that the resolution plan has provisions for its implementation. The scope of interference by the Adjudicating Authority in limited judicial review has been laid down in the case of Essar Steel (supra), the relevant passage (para 54) of which we have reproduced in earlier part of this judgment. The case of MSL in their appeal is that they want to run the company and infuse more funds. In such circumstances, we do not think the Appellate Authority ought to have interfered with the order of the Adjudicating Authority in directing the successful Resolution Applicant to enhance their fund inflow upfront." (emphasis given)

54. It is thus now well settled that it is not mandatory under the provisions of the Code that a resolution plan ought to be offering more than the estimated liquidation value of the corporate debtor. The judgements of NCLAT relied upon by the objector are not discussed in view of clear precedent of the Hon'ble Supreme Court in this regard. It is also pertinent to note here that there is no other better resolution plan or any proposal from any corner offering a higher value for the property of the corporate debtor for consideration, if any. In the aforesaid discussions the objections raised would not survive.

55. There is also no dispute that the Resolution Plan has been approved by overwhelming majority of 93.01 % of voting share of financial creditors after considering its feasibility and viability and other requirements specified by the Code and CIRP Regulations.

56. Adjudicating Authority is not expected to substitute its view with the commercial wisdom of the CoC nor should it deal with the technical complexity and merits of Resolution Plan, unless it is found contrary to express provision of law and goes against the public interest. The object of the Code is to promote resolution and every effort must be made to try and see that resolution is made possible.

57. Accepting the Resolution Plan is advantageous to all the stake holders and amounts to maximisation of the assets of the Corporate Debtor and promotes entrepreneurship and to ensure that the Company continue to function as a going concern. The right of rejection or approval of a plan is with the CoC. In a particular case, what should be the percentage of claim amount payable to one or other 'Financial Creditor' or 'Operational Creditor' or 'Secured Creditor' or

'Unsecured Creditor' can be decided by the Committee of Creditors based on facts and circumstances of each case. What can be screened by this Bench is that whether the plan approved by CoC meets the requirements as referred to in sub-section (2) of Section 30 of the Code.

58. Hon'ble NCLAT in the case of Darshak Enterprise Pvt Ltd Chhaparia Industries Pvt. Ltd & Ors. Passed in Civil Appeal (AT) (Ins) No.327 of 2017 has held that:

"In absence of any discrimination or perverse decision, it is not open to the Adjudicating Authority or the Appellate Tribunal to modify the plan."

59. In the present case the resolution plan has been approved with overwhelming majority of 93.01 % voting share much above the statutory requirement of 66 % in terms of Section 30(4) of the Code and has the requisite statutory voting share. Besides the decision of CoC is a reasoned and self-speaking one as required under proviso to Regulation 39(3) of the CIRP Regulations, 2016.

60. Needless to state here that the Resolution Plan cannot take care of total outstanding dues of the creditors in its entirety. It is however seen that the initial resolution plan of Rs. 400 Crores was including of all the statutory and Government charges inclusive of L&DO Charges, hence actual pay out to financial creditors was not certain. L&DO Charges and other costs have been estimated at 177 crores and can exceed beyond it. In that view the approved resolution plan was for fixed sum of Rs. 265 crores and does not leave any liability of any kind to be adjusted. In addition to the aforesaid charges' applicant proposes to pay the total consideration amount of Rs. 265 Crores which was agreeable by CoC with majority vote of 93.01 % voting share.

61. It is well settled proposition of law that commercial and business decisions of CoC are not open to judicial review. Adjudicating Authority cannot enquire into the commercial wisdom of CoC. The ground for rejection is limited to the matter specified under Section 30(2). It is however reiterated that the resolution plan in question meets the requirements specified in Section 30(2) of the Code and the reasoned commercial decision of CoC is neither discriminatory nor perverse.

62. In the facts we are satisfied that the requirements as per the Code and regulations have been complied with. Moreover, the Resolution Plan has been approved by 93.01% voting share of the members of CoC and has been submitted in compliance of Section 30 of the Code for approval. In view of the aforesaid discussions and as no infirmity have been brought out upon screening of the Resolution Plan; we hereby approve the Resolution Plan submitted by M/s. Adani Power Private Limited under sub-section (1) of Section 31 of the Code.

63. The Resolution Applicant is directed to submit Performance Guarantee for Rs. 5,00,00,000/- (Rupees Five Crores only) in compliance of Regulation 36B(4A) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 within a week from the receipt of this

order.

64. We further direct appointment of 'Monitoring Committee' comprised of five members constituting the resolution professional as insolvency professional and two representatives of the resolution applicant and approving financial creditors, to be chaired by the IP. Resolution Professional (IP) shall be a member thereof at least for three months to monitor and supervise the implementation of the Resolution Plan. We also grant liberty to the monitoring Committee to apply to the Tribunal for any further direction in order to ensure effective implementation of the plan, if such a necessity arises.

65. In respect of reliefs and concession sought for in the Plan which are beyond the jurisdiction of this Tribunal, liberty is accorded to the Monitoring Committee to pursue such matters before the relevant authorities which shall be considered in accordance with law.

66. In terms of sub-section (4) of Section 31 of the Code the resolution applicant shall obtain the necessary approval required under any law for the time being in force within a period of one year from the date of this order or within such period as provided for in such law, whichever is later.

67. It is clarified that Section 30(2) (f) of the Code mandates that the resolution plan should not be against any provisions of the existing law. The Resolution applicant therefore, shall adhere to all the applicable laws for the time being in force under the proposed Resolution Plan, whether or not specifically provided therein.

68. Approval of Resolution Plan shall confer change in the management and ownership of the corporate debtor and the control of the corporate debtor shall vest with the new management.

69. We hereby exclude the period spent under adjudication and it is declared that the moratorium order passed by this Bench under Section 14 of the Code shall cease to have effect from the date of this order.

70. The Resolution Professional shall forward all records relating to the CIR Process and the Resolution Plan to IBBI to be recorded at its data base in terms of Section 31(3)(b) of the Code.

71. The approved 'Resolution Plan' shall become effective from the date of passing of this order.

72. C.A. 2655 (PB) 2019 and CP No. (IB) 974 (PB)/ 2018 are disposed of accordingly.

Let the copy of the order be served to the parties.

