

(2020) 07 NCLT CK 0075

In the National Company Law Tribunal

Case No : Company Application No. 293 Of 2018, Interlocutory Appeal Nos. 7, 62, 222, 225, 237 Of 2020 In Company Petition (IB) No. 42/Chd/Hry Of 2017

Corporation Bank And Ors

APPELLANT

Vs

Amtek Auto Limited And Ors

RESPONDENT

Date of Decision : 09-07-2020

Acts Referred:

Insolvency And Bankruptcy (Application To Adjudicating Authority) Rules, 2016 — Rule 4

National Company Law Tribunal Rules, 2016 — Rule 11

Insolvency And Bankruptcy Code, 2016 — Section 7, 9, 14, 19, 29, 29(A), 30, 30(1), 30(2), 30(2)(b), 30(2)(d), 30(2)(e), 30(2)(f), 30(6), 31, 31(1), 31(2), 31(3), 31(4), 43, 45, 53, 53(1), 60(5), 60(5)(c), 60(6), 74(3), 238

Securitisation And Reconstruction Of Financial Assets And Enforcement Of Security Interest Act, 2002 — Section 13(2)

Transfer Of Property Act, 1882 — Section 65(A), 65(A)(3)

Insolvency And Bankruptcy Board Of India (Liquidation Process) Regulations, 2016 — Regulation 42, 44

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

Citation : (2020) 07 NCLT CK 0075

Hon'ble Judges : Ajay Kumar Vatsavayi, J; Pradeep R. Sethi, Member (Technical)

Bench : Division Bench

Advocate : Sumant Batra, Sanjay Bhatt, Niharika Sharma, Dinkar T. Subramanian, Misha, Nitin Kaushal, Siddhant Kant, Ish Puneet Singh, Gursher Bhandal, Alok Kumar, Abhayveer Sharma, Gopal Jain, Anindita Roy Chowdhary, Vatsala Rai, Bharat Makkar, Rohit Chandel, Chetan Mittal, Vikram Nankani, Chanakya Keswani, Himanshu Gupta, Sudhir Makkar, Saurabh Gautam

Final Decision : Dismissed

Judgement

Ajay Kumar Vatsavayi, J

I. This order shall dispose of CA No.293/2018, IA No.7/2020, IA No.62/2020, IA No.222/2020, IA No.225/2020 & IA No.237/2020, all filed in CP(IB) 42/Chd/

Hry/2017; Corporation Bank Versus Amtek Auto Ltd. Before taking up each application for consideration, it is necessary to note the brief facts in CP(IB) No.42/Chr/Hry/2017 and the facts leading to filing of IA No.225/2020.

II. Brief Facts of CP No.42 of 2017

Corporation Bank, now known as Union Bank of India, a Financial Creditor, filed CP No.42 of 2017 under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in short the 'Code') read with Rule 4 of the Insolvency and Bankruptcy Code (Application to Adjudicating Authority) Rules 2016 (in short the '2016 Rules') for initiating the Insolvency Resolution Process against Amtek Auto Limited (in short the 'Corporate Debtor/AAL'). This Adjudicating Authority, vide order dated 24.07.2017 admitted CP(IB) No.42 of 2017 and accordingly Corporate Insolvency Resolution Process was initiated against the Corporate Debtor/AAL. Vide order dated 27.07.2017, passed in CP No.42/2017, the Adjudicating Authority appointed Shri Dinkar T. Venkatsubramanian as the Interim Resolution Professional. The public announcement was published on 29.07.2017 and Committee of Creditors (in short 'Committee of Creditors') was constituted on 17.08.2017. The first Meeting of the Committee of Creditors was held on 22.08.2017 and Shri Dinkar T. Venkatsubramanian, who is the Interim Resolution Professional, was appointed as the Resolution Professional on 22.08.2017. Two Registered Valuers were appointed on 01.08.2017 and 02.08.2017. Invitation for expression of interest was issued on 30.08.2017. Vide order dated 17.01.2018, passed in CA No.8 of 2018, the period of CIRP was extended by 90 days. The Committee of Creditors in its meeting held on 02.04.2018 approved the Resolution Plan of Liberty Housing Group (in short 'LHG'). In pursuance thereof, the Resolution Professional filed CA No. 114/2018 under Section 30(6) and Section 31(1) of the Code for approval of the Resolution Plan of LHG before this Adjudicating Authority. On 25.07.2018, this Adjudicating Authority by a common order allowed CA No. 114/2018 filed by the Resolution Professional seeking approval of the Resolution Plan of LHG and disposed of CP No.112 of 2018 also filed by the RP seeking a clarification and dismissed CA No. 140 of 2018 filed by Deccan Value Investors and its Associates (for short 'DVI').

III. Facts leading to the filing of IA No.225/2020

1. All the financial creditors of the corporate debtor through the Corporation Bank now known as Union Bank of India filed CA No.567/2018, under Section 60(5) read with Section 74(3) of the Code seeking to declare that the Resolution Applicant M/s. LHG and its promoters upon whom the resolution plan is binding under Section 31 of the Code, have knowingly contravened the terms of the Resolution Plan and have failed to implement the same. In the said CA, it was also prayed to run the CD as a going concern and to grant 90 days to make a further attempt by fresh CIRP and LHG be debarred from applying for a fresh Resolution Plan and Insolvency and Bankruptcy Board of India may be directed to initiate the process under Section 74(3) of the Code. Vide order dated 13.02.2019, CA No.567/2018, was disposed of, by holding that Resolution Plan

submitted by LHG is not capable of implementation due to default in adhering to the payment schedule, restored the Committee of Creditors for considering the plan of DVI and also excluded certain period from the CIRP. CA No.601/2018, filed by LHG under Section 60(5) of the Code, stating that CIRP of the corporate debtor was vitiated by misrepresentation/fraud/mistake of fact was dismissed by the same order dated 13.02.2019.

2. In an appeal filed against the order dated 13.02.2019 passed in CA No.567/2018, the Hon'ble National Company Law Appellate Tribunal, ordered for liquidation of the Corporate Debtor, vide its order dated 16.08.2019.

3. Aggrieved with the said order, the Committee of Creditors of the Corporate Debtor preferred a Civil Appeal, being Civil Appeal No.6707 of 2019; Committee of Creditors of Amtek Auto Limited through Corporation Bank Versus Dinkar T. Venkatsubramanian, before the Hon'ble Supreme Court of India. Vide order dated 06.09.2019, the Hon'ble Supreme Court while issuing notice in the said Appeal, stayed the liquidation proceedings until further orders. Vide order dated 24.09.2019, the Hon'ble Supreme Court permitted the Resolution Professional to invite fresh offers from prospective Resolution Applicants within a period of 21 days. The Members of the Committee of Creditors were directed to take a final call within two weeks thereafter. Vide order dated 13.11.2019 passed in IA No. 168814 of 2019, the Hon'ble Supreme Court while extending time by three weeks for taking decision by the Committee of Creditors, ordered that the consideration be confined to five offers, received within the time specified in advertisement inviting offers. The Hon'ble Supreme Court, vide order dated 02.12.2019, recalled its earlier order dated 13.11.2019 and directed the Resolution Professional to invite fresh offers within 30 days of the order after due advertisement in accordance with the procedure and the Committee of Creditors to evaluate the plans within three weeks thereafter. The Committee of Creditors after evaluation of the Resolution Plans of four prospective Resolution Applicants declared DVI as the preferred/H1 bidder as per the evaluation criterion, subject to DVI's satisfactorily addressing the key commercial and legal issues as highlighted by the Committee of Creditors. Vide order dated 20.01.2020, the Hon'ble Supreme Court granted additional two weeks' time for concluding the voting on the Resolution Plan of DVI and adjourned the matter to 10.02.2020. Finally, the Resolution Plan dated 17.01.2020 together with its addendum dated 07.02.2020 was placed before the Committee of Creditors for approval via e-voting from 07.02.2020 till 11.02.2020. The Hon'ble Supreme Court, vide order dated 10.02.2020 granted one week additional time. The resolution plan dated 17.01.2020 read with addendum dated 07.02.2020, submitted by DVI, in respect of the Corporate Debtor, was approved by the Committee of Creditors by a majority of 70.07% votes, in its meeting held on 07.02.2020.

4. The Hon'ble Supreme Court, vide order dated 08.06.2020 relegated the matter to this Adjudicating Authority and the said order reads as under:-

"I.A. NO. 48906/2020

Since the fresh resolution has been passed by the Committee of Creditors with 70% majority, we relegate the matter of I.A. to the NCLT to consider the same and pass appropriate orders, after hearing the parties, within fifteen days from today.

The time spent before NCLT and before this Court is excluded for calculating long stop date.

The I.A. is accordingly, disposed of."

5. The said order was received in the Registry of this Tribunal on 11.06.2020 and accordingly, all the pending applications in CP(IB) No.42/Chd/Hry/2017, were directed to be listed for hearing through Video Conferencing on 12.06.2020. On the said date, the learned counsel for the Resolution Professional submitted that he is contemplating to file an application under Section 30(6) of the Code read with Section 31(1) of the Code, seeking approval of the Resolution Plan and accordingly, he filed the same on the same date, however, after the office hours of this Tribunal. 13.06.2020 and 14.06.2020 being Saturday and Sunday, the said application filed by the Resolution Professional was scrutinized and after removal of the objections by the Resolution Professional, was numbered as IA No.225/2020 and was listed for hearing on 16.06.2020. Accordingly, and as agreed by the parties, IA No.225/2020, CA No.293/2018, IA No.7/2020, IA No.62/2020, IA No.222/2020 and IA No.237/2020, were heard continuously till 30.06.2020 and all the applications were reserved for orders.

6. It is also relevant to state that the Hon'ble Supreme Court, vide order dated 18.06.2020, dismissed an IA filed in Civil Appeal No.6707/2019 by the resolution applicant, seeking withdrawal of its offer, and the said order reads as under:-

"The application made by the applicant for withdrawal of the offer is hereby rejected and in case he indulges in such kind of practice, it will be treated as contempt of this Court in view of the various orders passed by this Court at his instance. The application is accordingly dismissed.

As requested List I.A. No. 146604/2019 in the third week of July, 2020."

IV. CA 293/2018

7. Kind Special Steels (India) Private Limited, an Operational Creditor of the Corporate Debtor filed this CA under section 60(5) of the Insolvency and Bankruptcy Code, 2016 (in short the 'Code') read with Rule 11 of the National Company Law Tribunal Rules, 2016 (in short the 'Rules') on 27.07.2018 seeking the following reliefs:-

"i.) direct the Resolution Professional to revise and ascertain the liquidation value payable to Kind Special Steels (India) Pvt. Ltd. in accordance with law and facts;

ii.) direct the respondent to admit the claim filed by the applicant as submitted on 04.08.2017;

iii.) pass any other order(s) as this Honble Tribunal may deem fit."

8. The applicant states that out of its total claim of ` 73,82,273/-, the Resolution Professional admitted the claim of ` 25,84,915/- and not admitted the claim for the balance amount by stating that the applicant failed to provide proof of delivery of material at the store of the Corporate Debtor. The Resolution Professional in his reply to the CA stated that the claim of the applicant comprising of interest of ` 13.05 lacs and an amount of ` 34.90 lacs towards invoices for which applicant failed to produce proof of delivery was not admitted. With regard to the prayer of the applicant to revise and ascertain the liquidation value payable to the applicant, which was not seriously pursued by the applicant at the time of oral hearing, the Resolution Professional submitted that the liquidation value was assessed as per the Registered Valuers Reports, who were appointed as per the provisions of the Code and hence, it cannot be said that the liquidation value payable to the applicant was arbitrarily assessed.

9. The Hon'ble Supreme Court of India in Committee of Creditors of Essar Steel India Limited Through Authorised Signatory Versus Satish Kumar Gupta and Others, held as under: -

"88. For the same reason, the impugned NCLAT judgment in holding that claims that may exist apart from those decided on merits by the resolution professional and by the Adjudicating Authority/Appellate Tribunal can now be decided by an appropriate forum in terms of Section 60(6) of the Code, also militates against the rationale of Section 31 of the Code. A successful resolution applicant cannot suddenly be faced with "undecided" claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the successful resolution applicant does on a fresh slate, as has been pointed out by us hereinabove. For these reasons, the NCLAT judgment must also be set aside on this count. "

10. The Hon'ble National Company Law Appellate Tribunal in its recent decision dated 24.01.2020, passed in Santosh Wasantrao Walokar Versus Vijay Kumar V. Iyer and Another and batch, by following the decision of the Hon'ble Supreme Court in Committee of Creditors of Essar Steel India Limited (Supra), held as under: -

"32. XXX XXX XXX

(i) XXX XXX XXX

(ii) XXX XXX XXX

(iii) Whether those claims that are not dealt under the resolution plan can be

held to be extinguished under the provisions of the I&B Code?

The Hon'ble Supreme Court in Essar Judgment has vividly dealt with this issue. A successful Resolution Applicant cannot suddenly be faced with "undecided" claims after the Resolution Plan submitted by him has been accepted as this would amount to an extra amount coming up for payment after the debts have been dealt by the Resolution Applicant and the Resolution Plan has been approved. This would throw into uncertainty amounts payable by a prospective Resolution Applicant who successfully takes over the business of the Corporate Debtor. All claims must be submitted to and decided by the Resolution Professional so that a prospective Resolution Applicant knows exactly who has to be paid in order that it may then take over and run the business of the Corporate Debtor. Therefore, claims that are not submitted or are not accepted or dealt with by the Resolution Professional and such Resolution Plan submitted by the Resolution Professional is approved then those claims would stand extinguished. "

11. In the instant CP, the Committee of Creditors approved the resolution plan of the Liberty House Group ('LHG') on 02.04.2018. This Adjudicating Authority approved the said plan of LHG on 25.07.2018. Whereas the instant CA 293/2019 was filed on 27.07.2018.

12. In view of the judgment of the Hon'ble Supreme Court in Committee of Creditors of Essar Steel India (Supra) and as followed by the Hon'ble National Company Law Appellate Tribunal in Santosh Wasantrao Walokar (Supra), the instant CA filed for admission of its part claim, after the approval of the Resolution Plan by the Committee of Creditors and also by the Adjudicating Authority, is liable to be dismissed.

13. However, it is submitted that though the CA was filed subsequent to the approval of the resolution plan of LHG by the Committee of Creditors and also by this Adjudicating Authority, but once the said plan was declared as non-implementable and the Resolution Professional was directed to invite fresh offers by the Hon'ble Supreme Court, it cannot be said that the instant application is not maintainable. The said submission cannot be accepted since a bare perusal of the various orders passed by the Hon'ble Supreme Court in Civil Appeal No.6707 of 2019; Committee of Creditors of Amtek Auto Limited Through Corporation Bank Versus Dinkar T. Venkatsubramanian, makes it clear and unambiguous that the Hon'ble Supreme Court opened a limited window to the extent of inviting fresh offers only. It cannot also be said that the Hon'ble Supreme Court has reopened the entire corporate insolvency resolution process against the Corporate Debtor and that the Resolution Professional can entertain any fresh claims or that can admit any unadmitted claims afresh.

14. Further, the applicant failed to submit the proof of delivery in respect of the invoices, which were not admitted, even along with his pleadings in the CA.

15. The facts in the case of M/s. Prasad Gempex Versus Star Agro Marine Exports Pvt. Ltd. and Others; CA(AT) (Insolvency) No.291/2018 dated 01.02.2019,

passed by the Hon'ble National Company Law Appellate Tribunal, on which the learned counsel for the applicant placed reliance, are different and that the same is not applicable in view of the judgements of the Hon'ble Supreme Court in the case of Committee of Creditors of Essar Steel India Limited (Supra) and the Hon'ble National Company Law Appellate Tribunal in Santosh Wasantrao Walokar (Supra) and also in view of the peculiar facts of the present case.

16. In the circumstances and in view of the above discussion CA No.293 of 2018, is dismissed.

V. IA No.7/2020

17. M/s. Neha Associates filed the IA No.7/2020 under Section 60(5) of the Code, on 06.01.2020, seeking the following reliefs:-

- i.) Allow the present application of the Applicant;
- ii.) Direct the respondent to inform the status of the aforesaid claim of Z54.57 lakh of the Applicant against the Corporate Debtor and in case the same has yet not been admitted, direct the Respondent to admit the claims of the Applicant after verifying the veracity of the claims;
- iii.) Condone the delay in filing of the claims of the Applicant;
- iv.) Pass such other order/directions as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case."

18. The applicant states that in respect of its transactions with the Corporate Debtor, it has availed the vendor financing facility on 25.03.2014 with IDBI Bank, inter alia, for financing sales of stocks/machines/equipment/and such other activities/services manufactured.

19. In response to the public announcement dated 29.07.2017, issued by the Resolution Professional, the applicant submitted its claims for an amount of ` 1,23,77,222/- and out of the same the Resolution Professional did not admit the claim for an amount of ` 54.57 lakhs by stating that the same was already claimed by IDBI Bank in terms of the vendor facility agreement entered into by the applicant with the said bank. It is further submitted that the applicant settled the matter with the IDBI Bank on 27.12.2018 and hence, the applicant preferred its claim for the same amount of ` 54.57 lakhs, but the same was not accepted by the Resolution Professional and hence, the IA.

20. The instant IA is also liable to be dismissed in view of the judgment passed by the Hon'ble Supreme Court in Committee of Creditors of Essar Steel India Limited (Supra) and also the judgment of the Hon'ble National Company Law Appellate Tribunal in Santosh Wasant Rao Walokar (Supra), as the instant IA was filed only on 06.01.2020.

21. Further, admittedly, as on the relevant date, in respect of the same amount, the IDBI Bank in terms of the vendor facility agreement executed in its favour by

the applicant itself, preferred the claim with the Resolution Professional and the same had also been admitted. Hence, the applicant cannot now raise the same claim, once again.

22. In the circumstances and for the aforesaid reasons, we do not find any merit in the instant IA and accordingly the same is dismissed. However, it is made clear that we have not expressed any opinion on the rights of the applicant in terms of the vendor facility agreement.

VI. IA No.222/2020

23. Corporation Bank, a financial creditor of the Corporate Debtor, now known as Union Bank of India, filed the instant IA on 12.03.2020, against Resolution Professional of the Corporate Debtor (Respondent No.1) and Successful Resolution Applicants, (Respondent Nos.2 and 3), under Section 60(5)(c) of the Code, read with Rule 11 of the NCLT Rules, 2016, seeking the following reliefs:-

"1. Allow the instant application filed by the applicant and direct the IRP to get the Resolution Plan modified so as to comply with Regulation 42 and 44 of the Liquidation Process Regulations, 2016; and

2. Direct the respondent Resolution Professional to not to deduct the amount of Rs. 34 Crore from the final payment to be made to applicant as per the scheme of distribution of amount under Resolution Plan; and

3. Direct the Respondent Resolution Professional to further include amounts of Rs.6,22,58,072.64 towards LC payments and Rs.61,39,0007- towards Bank Guarantee (BG) payments in the total admitted claim of applicant; or

4. To pass such other order or relief be granted as this Hon 'ble Tribunal deems fit and proper having regard to the facts and circumstances mentioned in the present application. "

24. The applicant through this IA is seeking modification of the resolution plan which was admitted by the Committee of Creditors with the required percentage, wherein the applicant was also a member, though it has dissented with the said approval.

25. At the outset, it is relevant to note that the CI RP against the Corporate Debtor was initiated at the instance of the applicant in the instant IA. Further, the applicant in its capacity as a financial creditor also was made as one of the Member of the Committee of Creditors. The Committee of Creditors in which the applicant is one of the Member approved the resolution plan of Respondent Nos.2 and 3 i.e. Deccan Value Investor Group with the majority of 70.07%, though the applicant bank dissented with the said decision.

26. The applicant submits that the Resolution Plan of DVI, violated the mandate of Section 30(1)(e), inasmuch as having considered the applicant being a dissenting creditor and entitled to liquidation value in accordance with Section 53 of the Code and it does not comply with the provisions of Regulation 42 and 44

of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016.

27. It is also stated that the bills drawn by the vendors of the Corporate Debtor under LCs established by the applicant, were paid to the vendors who happen to be ultimate beneficiaries, as and when the bills became due after debiting the current account of the Corporate Debtor, amounting to ` 34 Crores and the said amount cannot be treated as recovery by the applicant and cannot be deducted from the final payment to be made to the applicant as per the scheme of distribution of amount under the Resolution Plan. It is also stated that the amounts of ` 6,22,58,072.64 towards LC payments, and ` 61,39,000/- towards bank guarantee payments are to be included in the total admitted claim of the applicant.

28. Respondent No. 1/Resolution Professional vide his reply stated that the Committee of Creditors, wherein the applicant is also a member, deliberated and consented for all the actions of the Resolution Professional including for the deduction of the amount of ` 33.34 Crores and for the distribution of amount payable to the applicant under the present DVI Resolution Plan, in its 30th and 31st Meetings held on 05.02.2020 and 07.02.2020. It is also stated that the applicant has not even protested the said actions in the said Committee of Creditors meetings. Hence, the applicant being a member of the Committee of Creditors is bound by the said majority decisions of the Committee of Creditors and cannot challenge the same by filing the present IA.

29. The decisions of the Committee of Creditors passed with the required majority percentage as per the Code, are binding on all the stake holders, including the dissenting members of Committee of Creditors, if any. No member of the Committee of Creditors, after a resolution plan was approved by the Committee of Creditors with the required majority percentage, on one ground or other, cannot challenge the said decisions of the Committee of Creditors. It is for the Adjudicating Authority to apply its judicious mind whether a particular plan submitted for its approval is in compliance of the provisions of the Code and the Regulations made thereunder. The applicant even in its rejoinder, to the reply filed by the Resolution Professional, has not denied the fact of deliberations and acceptance of the action of the Resolution Professional for deducting the amount of ` 34 Crores and for distribution of amount payable to the applicant under the Resolution Plan of DVI, by the Committee of Creditors, wherein the applicant is a member.

30. In the circumstances and for the aforesaid reasons, we do not find any merit in the IA and accordingly, the same is dismissed.

VII. IA No.62/2020

31. Vistra ITCL (India) Limited (formerly, IL&FS Trust Company Ltd.), KKR India Financial Services Private Limited and L&T Finance Limited (formerly, L&T Fincorp Limited), jointly filed this IA against the Resolution Professional and the

Committee of Creditors of the Corporate Debtor- M/s. Amtek Auto Ltd. under Section 60(5) of the Code, on 11.02.2020, seeking the following reliefs:-

"(a) Direct the Resolution Professional to include the applicant No. 1 (acting on behalf of applicant Nos. 2 & 3) a part of the Committee of Creditors, as a Secured Financial Creditor and afford all rights and benefits of a Secured Financial Creditor available to applicant No. 1 (acting on behalf of applicant Nos.2 & 3); and

(b) pass such further and other directions as this Hon 'ble Tribunal may deem fit and expedient."

32. The applicant states that a Security Trustee Agreement dated 28.12.2015 was executed between the applicant No.2 KKR India Financial Services Private Limited as Lender and WLD Investments Private Limited, (in short 'WLD') as borrower and the Applicant No.1 IL&FS Trust Company Limited (now known as Vistra ITCL India Limited) as security trustee. Another security trustee agreement dated 28.03.2016 was executed by and between the Applicant No.2 KKR India Financial Services Private Limited as the Lender and BRASSCO Engineering Private Limited (in short 'BRASSCO') as borrower and the Applicant No.1 IL&FS Trust Company Limited (now known as Vistra ITCL India Limited) as security trustee. Another Security Trustee Agreement dated 30.06.2016 was executed by and between Applicant No.2, KKR India Financial Services Private Limited and Applicant No.3 L&T Fincorp Limited (now known as L&T Finance Limited) as lenders and BRASSCO Engineering Limited as borrower and Applicant No.1 IL&FS Trust Company Limited (now known as Vistra ITCL India Limited), as security trustee.

33. A facility agreement dated 30.06.2016 was executed by and between Applicant No.2 KKR India Financial Services Private Limited and Applicant No.3 L&T Fincorp Limited (now known as L&T Finance Ltd.) as lenders and BRASSCO Engineering Limited as borrower and Mr. Arvind Dham as guarantor and applicant No.1 IL&FS Trust Company Limited (now known as Vistra ITCL India Limited) as security trustee.

34. It is stated that under the aforesaid agreements that Applicant Nos.2 and 3 had extended financial assistance in the form of short term loans of an aggregate principal amount of ` 500 Crores to WLD Investments Private Limited and BRASSCO Engineering Limited and the said loan was used by and for the benefit of the Corporate Debtor. The Corporate Debtor, in consideration of the short term loans that were made available, had created a first ranking exclusive pledge, vide Pledge Agreement dated 05.07.2016 in favour of Applicant No. 1 -1 L&FS Trust Company Limited (now known as Vistra ITCL (India) Limited), over 16,82,06,100 equity shares of face value of ` 2/- each of JMT Auto Limited, held by the Corporate Debtor. Following a subdivision of the shares of JMT Auto Limited (the record date for which was 22.09.2016), the number of pledged shares was altered to 33,64,12,200 equity shares of face value of ` 1/- each of JMT Auto

Limited, held by the Corporate Debtor.

35. Placing reliance on the above referred agreements, Applicant No.1 submits that in its capacity as the secured trustee for and acting on behalf of Applicant No.2 and 3, is a secured financial creditor of the Corporate Debtor and therefore, the applicant No.1 is entitled to be included as a member of the Committee of Creditors and to be allowed to participate in the process of negotiating with the Prospective Resolution Applicants in order to preserve and secure its rights over the pledged shares.

36. It is also stated that on 02.11.2017, Applicant No.1 for and on behalf of Applicant Nos.2 &3, filed its claim as a secured financial creditor of the corporate debtor, claiming a principal amount of ` 500 Crores. The same was not admitted by the Resolution Professional. However, since, to the best of the Applicants' knowledge and to the understanding of the Applicants, the resolution plan submitted by Liberty House Group, which was earlier approved by the Committee of Creditors and also by this Adjudicating Authority, recognized and preserved the pledged shares created in favour of the applicant No.1 by the Corporate Debtor, the Applicant did not challenge the non-admission of its claim to recognize as the secured financial creditor of the Corporate Debtor and not making it as a part of the Committee of Creditors.

37. It is further stated that after the orders of this Adjudicating Authority dated 13.02.2019, whereunder it was held that the Resolution Plan submitted by Liberty House Group is not capable of implementation due to default in adhering to the payment schedule and restoring the Committee of Creditors for considering the plan of Deccan Value Investors by excluding certain period and in view of the order dated 16.08.2019, passed by the Hon'ble National Company Law Appellate Tribunal, ordering for liquidation of the Corporate Debtor and in view of the various orders passed by the Hon'ble Supreme Court in Civil Appeal No.6707/2019; a fresh resolution plan was submitted by the Deccan Value Investors. Basing on a filing made with the Bombay Stock Exchange on 08.01.2020, the Applicants became aware of the fact that DVI being selected as a preferred bidder. The Applicant through its various correspondences called upon the Resolution Professional to provide information of the resolution plan submitted by DVI and how it proposed to deal with the pledged shares. The Resolution Professional, vide letter dated 15.01.2020 confirming that the pledge created over the pledged shares has been disclosed with the information memorandum which is made available to the Committee of Creditors and eligible Resolution Applicants and he further stated that "it is for the resolution applicants submitting the resolution plans to take note of the contents of the information memorandum while submitting and considering the resolution plans, respectively". The latest developments before the Hon'ble Supreme Court and further the non-committal response by the Resolution Professional has constrained the applicants to file the instant IA to treat the Applicant No.1 as a secured financial creditor, at this stage.

38. The Resolution Professional submitted that the instant application suffers from delay and laches and cause disruption to the Corporate Insolvency Resolution Process of the Corporate Debtor, which is progressing under the directions and supervision of the Hon'ble Supreme Court. He further stated that the claim of the Applicants to treat them as a secured financial creditor of the Corporate Debtor and its request for inclusion as the member of the Committee of Creditors, was admittedly rejected in the year 2017 itself and the applicant having not raised any grievance for all these years, cannot be permitted to challenge the said action or to make the same prayer, once again, belatedly at this stage. The Resolution Professional further submitted that admittedly, the applicants have not lent any money directly to the Corporate Debtor and that the Corporate Debtor has not owed any financial debt to the applicant other than executing the pledge of shares and hence, the applicant cannot be treated as a financial creditor of the Corporate Debtor in terms of the provisions of the Code. It is also stated that creation of pledge of shares by the Corporate Debtor cannot be termed as guarantee or indemnity. Further, it is submitted by the Resolution Professional that when it is the case of the applicants that they have lent money to WLD and BRASSCO for the use and benefit of the Corporate Debtor, the instant IA filed without impleading WLD and BRASSCO is liable to be dismissed on the ground of non-joinder of necessary parties.

39. Admittedly, the Applicants have not lent any money to the Corporate Debtor. Therefore, they cannot be treated as the financial creditor of the corporate debtors. Though the claim of the applicant as a secured financial creditor was rejected by the Resolution Professional in 2017, the applicant has not challenged the same. The applicant having given up its right as a financial creditor of the Corporate Debtor by not challenging the rejection of its identical claim by the Resolution Professional, at the appropriate time, cannot now file the instant IA, belatedly, for the same relief. Its submission that it has not challenged the rejection of its claim as a financial creditor under the bona fide belief that its interest could be sufficiently protected and preserved under the LHG Resolution Plan, does not stand to the legal scrutiny.

40. In view of the findings that the instant IA is not maintainable, we need not delve upon the other issues raised, during the hearing of the IA.

41. In the circumstances and for the aforesaid reasons, we do not find any merit in the IA and accordingly, the same is dismissed.

VIII. IA No.225/2020

42. This IA has been filed on 15.06.2020 by the Resolution Professional of the Corporate Debtor- Amtek Auto Limited, for approval of the resolution plan submitted by Deccan Value Investors L.P. and DVI PE (Mauritius) Ltd. (in short 'DVI'), under Section 30(6) read with Section 31 and Section 60(5) of the Code, read with Regulation 39(4) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016,

seeking the following reliefs:-

- a. Pass and order approving the DVI Final Resolution Plan dated 17.01.2020 together with DVI Plan Addendum dated 07.02.2020 of the Successful Resolution Applicant in respect of the corporate debtor under Section 31(1) and declare that the same shall be binding on the corporate debtor and its employees, members, all 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 in the CIRP of the Corporate Debtor;
- b. Pass directions for grant of reliefs as sought under Section 9, Part V by the Successful Resolution Applicant in the Final Resolution Plan dated 17.01.2020 together with DVI Plan Addendum dated 07.02.2020 if deemed appropriate;
- c. Pass such other order/orders as it may deem fit and proper in the facts and circumstances of the case.

43. Having heard the learned counsels for the Resolution Professional, learned counsel for the Committee of Creditors and the Resolution Applicant, we find that it would be first necessary to ascertain whether the requirements of the Code and Regulations made thereunder, have been complied with or not.

44. According to the Scheme of the Code, a Resolution Applicant is required to submit a resolution plan through the RP prepared on the basis of information memorandum. The information memorandum is a document envisaged under Section 29 of the Code and it is required to contain such relevant information as may be specified by IBBI. Accordingly, in Regulation 36 of the CIRP Regulations, details have been provided with regard to the contents of information memorandum. On the submission of the resolution Plan, the Resolution Professional is under mandatory obligation to examine each resolution plan received by him under Section 30(2) of the Code and he is to confirm that each resolution plan provides for all items listed under Section 30(2)(a) to (f) of the Code. If the aforesaid conditions, as envisaged by Section 30(2) are fulfilled then such a resolution plan is to be presented to the Committee OF Creditors. The Committee of Creditors may then approve a resolution plan by a vote of not less than 66% of voting share of the Committee of Creditors after considering its feasibility and viability along with other requirements, as may be specified by the Board. Under Section 30(6) of the Code, the RP is obliged to submit a resolution plan as approved by the Committee of Creditors to the adjudicating authority.

45. As per the requirement of Section 29 of the Code read with Regulation 36 of the CIRP Regulations, an information memorandum prepared and a certification regarding the same was furnished by the Resolution Professional to the Committee of Creditors as well as before this Tribunal. When the resolution plan as approved by Committee of Creditors is placed before the adjudicating authority then it is to record its satisfaction as per the requirement of Section

31(1) of the Code as to whether the conditions as referred in subsection (2) of Section 30 have been fulfilled. On its satisfaction, the Adjudicating Authority, is to approve the resolution plan which is to be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders, involved in the resolution plan. As per the proviso to Section 31(2) of the Code, the Adjudicating Authority before passing an order for approval of the Plan, shall satisfy that the plan has provisions for its effective implementation. As per Section 31(3) of the Code, a further provision has been made that after the approval of a resolution plan the moratorium order passed under Section 14 of the Code would cease to have effect and the RP is under obligation to forward the whole record relating to the conduct of the CIRP and the resolution plan to the IBBI to be recorded in its database. The conclusion of the aforesaid discussion is that Adjudicating Authority must be satisfied that the resolution plan conforms to the requirements provided in Section 30(2) of the Code and also has provisions for its effective implementation.

46. Keeping in view the above referred mandatory requirements of Section 30(2) of the Code, and the peculiar facts of this case and the various orders passed by the Hon'ble Supreme Court in Civil Appeal No.6707/2019, we examine the resolution plan dated 17.01.2020 along with its addendum dated 07.02.2020 of the DVI and as approved by the Committee of Creditors.

47. The Resolution plan approved by the Committee of Creditors must provide for payment of insolvency resolution process cost in a manner specified by the Board in priority to the payment of other debts of the corporate debtor. With the present application i.e. IA No.225/2020, the RP has placed on record a copy of the Committee of Creditors approved resolution plan dated 17.01.2020 along with its addendum dated 07.02.2020 of the resolution applicant- Deccan Value Investors LP and DVI PE (Mauritius) Limited, filed vide Spl. Diary No.107A dated 15.06.2020. In Part 4- Financial Proposal, the resolution applicant has identified the specific sources of funds that would be used for payment of the insolvency resolution process cost in priority to the payment of other debts of the corporate debtor.

48. The resolution plan must provide for payments 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 liquidation of the corporate debtor under Section 53 or 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 under Section 53(1) whichever is higher. The Resolution Professional in Form H, filed vide Spl. Diary No. 181 dated 25.06.2020, certified that in Part 2 Clause 3.2 under the heading Treatment of Operational Creditors' read with Part 5 Clause 1.4 'Allocation of Funds', the resolution applicant has provided the payment to the operational creditors in terms of Section 30(2)(b) of the Code. As regards, dissenting financial creditors, it is stated in Form 'H' that the Plan provides for

the payment to the financial creditors, who did not vote in favour of the resolution plan, at Clause 1.6 of Part IV of the Plan, in terms of Section 30(2) of the Code.

49. The resolution plan must provide for the management of the affairs of the corporate debtor after its approval. There is specific provision made for the management and control of the company after the approval of the resolution plan. A detailed mechanism regarding the management and control is discussed in Part 2 Clause 3.6 under the heading 'Management and Control of the Corporate Debtor'. It is stated therein that from the NCLT approval date, an implementation and monitoring committee comprising of 5 persons of which one will be Mr. Dinkar T. Venkatasubramanian, three will be nominated by the key lenders, and one will be a nominee of the resolution applicants, to be constituted and the said committee shall continue to function until the effective date and shall stand dissolved upon acquisition of the corporate debtor by the resolution applicants.

50. Section 30(2)(d) of the Code envisages that it must provide for implementation and supervision of the resolution plan. Part 2 Clause 3.5 and 3.7 of the resolution plan provides for a detailed mechanism for effective implementation of the resolution plan.

51. Section 30(2)(e) of the Code requires that the resolution plan does not contravene any of the provisions of the law for the time being in force. In Form H filed as Annexure P-1 to the additional affidavit filed vide Spl. Diary No.181 dated 25.06.2020 submitted by the RP as per the requirement of Regulation 39(4) of the CIRP Regulations, he has certified that the resolution plan did not contravene any of the provision of the law for the time being in force and is in compliance with the provisions of the Code and the CIRP Regulations.

52. The resolution applicants confirmed that they are not disqualified under Section 29A of the Code to submit a resolution plan or under any other law applicable which further shows that the resolution plan conforms to the provisions of the law for the time being in force and did not contravene any such provision. The RP in the Form H referred above, has certified the same.

53. The Resolution Plan should conform to all such requirements which may be specified by the IBBI. A statement to this effect has been made by the RP in the Form H referred above.

54. However, before we record our satisfaction to the resolution plan, it is necessary to examine some of the issues, which were cropped up during the hearing of the IA.

Ace Complex Land:

(a) (i) Clause 2.5.2 which is part of 'Indicative Timeline of Events for Implementation of Proposed Resolution Plan', of the Resolution Plan dated 17.01.2020 read with addendum dated 07.02.2020, at Page Nos. 130 and 131 of

the Resolution Plan filed vide Spl. Diary No. 107A dated 15.06.2020, reads as under: -

"Changes in 2.5 on Timeline of Events for Implementation of Resolution Plan:

Sub-section 2.5.2 shall stand replaced in the clause set out below:-

unless waived (where permissible under Applicable Law) by the Resolution Applicants, the consumption and completion (including the Acquisition of the Corporate Debtor by the Resolution Applicants in terms of sub-section 5.1 and disbursement of Upfront Cash Infusion for settlement of dues of the Corporate Debtor (Acquisition as a Going Concern) of this Resolution Plan and any other action set out in sub-section 5.1 and 5.2 (Acquisition as a Going Concern) of the Resolution Plan is are contingent on the following conditions having been fulfilled in a form and manner satisfactory to the Resolution Applicants ('Effective Date Conditions Precedent'):

(a) Occurrence of Final NCLT Approval Date;

(b) Receipt of a copy of the order of the relevant adjudicating authority NCLT approving this Resolution Plan; and

(c) Execution of a long term lease (subsisting for 20 years or more) for the ACE Complex Land and Acceptable Terms."

(a) (ii) The definition of the relevant terms mentioned at Page 67 of the resolution plan read as under:-

"Acceptable Terms

Shall mean term relating to the lease of ACE Complex Land and shall be suitable protective terms acceptable to the Resolution Applicants including: (i) confirmation of the validity and subsistence of the lease arrangement by way of prior written consent of Vistra ITCL (India) Limited acting as the security trustee on behalf of KKR India Financial Services Limited and L&T Finance Limited in a form and substance acceptable to the Resolution Applicants; (ii) no right of termination accruing to the lessor as long as lease rentals are paid; and (iii) right of first refusal accruing to the Resolution Applicants, in case of sale of ACE Complex Land.

ACE Complex Land

Shall mean 21.11 acres of land located at village Malpura, Industrial Area, Sectyor 9/10, Dharuhera, District Rewari, Haryana. "

(a) (iii) The Ace Complex Land referred above, which is owned by Gateway Impex Private Limited, was leased to the corporate debtor under 4 unregistered lease deeds, all dated 16.03.2016 and were expired on 31.03.2019 i.e. during the period of CIRP. The resolution plan was submitted by the DVI to the Committee of Creditors on 17.01.2020. Gateway Impex Pvt. Ltd., the owner of the ACE Complex Land executed a registered lease deed on 28.01.2020 in favour

of the corporate debtor for a period of 20 years, with effect from 01.04.2019. The resolution applicant issued the addendum to the resolution plan on 07.02.2020. The Committee of Creditors approved the resolution plan dated 17.01.2020 read with addendum dated 07.02.2020 on 07.02.2020. Therefore, though Clause 2.5.2 of the Resolution Plan read with addendum makes it contingent on the "execution of a long term lease (subsisting for 20 years or more) for the ACE complex land with applicable terms" and the definition of 'Acceptable Terms' requires the prior written consent of a third party namely, Vistra ITCL (India) Ltd. acting as a security trustee on behalf of KKR India Financial Services Limited and L&T Finance Limited, the said requirement becomes infructuous as Gateway Impex Private Limited the owner of ACE Complex Land had already executed the required lease deed for 20 years in favour of the corporate debtor even before the Committee of Creditors approved the resolution plan. Hence, we need not go into the issue that whether this adjudicating authority can compel Vistra ITCL (India) Ltd. to act in a particular manner with regard to ACE Complex land, on which it is claiming certain mortgage rights. However, it is made clear that we have not expressed any opinion on the validity or otherwise of the lease deed dated 28.01.2020.

(b) (i) Letter of Intent (LOI) and Performance Bank Guarantee (PBG) In the instant case, admittedly no LOI was ever issued to the successful resolution applicant i.e. DVI and also admittedly, the successful resolution applicant-DVI submitted the part Performance Bank Guarantee only i.e. for ` 150 Crores as against the requirement of ` 300 Crores. The Resolution Professional through his affidavit bearing Spl. Diary No.247 dated 02.07.2020, while drawing our attention to Step V to Step VIII of Clause 21.1.1 of the request for resolution plan dated 13.12.2019, approved by the Committee of Creditors, stated that as per the said Clause under the RFRP, LOI was required to be issued, stating that the resolution applicant has been selected as the successful resolution applicant and accordingly, the Resolution Professional, vide his e-mail dated 11.06.2020, informed the Committee of Creditors of his intent to file the application under Section 30(6) of the Code to comply with the order dated 08.06.2020 passed by the Hon'ble Supreme Court and called upon the Committee of Creditors to let him know by 12 noon on 12.08.2020, if the Committee of Creditors had any reservations on filing the said application without the executed LOI and submission of balance Performance Bank Guarantee, but no reply or objection to the filing of the application under Section 30(6) was received from the Committee of Creditors and accordingly, he filed the instant IA 225/2020 under Section 30(6) of the Code.

(b) (ii) The Resolution Professional vide his affidavit bearing Spl. Diary No. 181 dated 25.06.2020, categorically submitted that the payment of full performance Bank Guarantee is not a condition precedent either for filing of an application under Section 30(6) of the Code or for approval of the resolution plan by the Adjudicating Authority under Section 31(1) of the Code. He further submitted that in view of the time limit of 15 days fixed by the Hon'ble Supreme Court in its

order dated 08.06.2020 and keeping in view the peculiar circumstances of the case, this Adjudicating Authority may not reject/return the plan on the ground of non-issuance of LOI and non-payment of balance performance bank guarantee.

(b) (iii) The learned counsel for the Committee of Creditors while drawing our attention to Step VI of RFRP, submits that Committee of Creditors has filed IA No.48906/2020 in Civil Appeal No.6707/2019, before the Hon'ble Supreme Court, seeking approval of resolution plan on account of the special process having been undertaken under the inherent powers of the Hon'ble Supreme Court and since the Hon'ble Supreme Court relegated the matter i.e. matter of considering approval of the resolution plan to this Tribunal and directed to dispose it of within 15 days, the issuance of the LOI and the underlying purpose thereto in terms of the RFRP became nugatory and was no more required to be followed prior to the filing of the application for approval of the plan.

(b) (iv) With regard to the submission of the Performance Bank Guarantee by the resolution applicant is concerned, the learned counsel for the Committee of Creditors, while drawing our attention to Clause 12 of the RFRP submits that the successful Resolution Applicant was bound to submit the Performance Bank Guarantee after the hearing before the Hon'ble Supreme Court and the same was not in any way linked to the issuance of the LOI in any manner whatsoever. It is further submitted that since the successful Resolution Applicant has failed to submit the balance 50% Performance Bank Guarantee, this Adjudicating Authority while approving the plan, may direct the resolution applicant to submit the same within a specific time.

(b) (v) The learned senior counsel appearing for the successful Resolution Applicant submits that issuance of LOI was a pre-condition for submission of Performance Bank Guarantee.

(b) (vi) It is further submitted by learned counsel for the Resolution Professional as well as Committee of Creditors that the approval of the plan and various clauses and conditions therein by the Committee of Creditors is well within its realm of commercial wisdom and hence, this Adjudicating Authority, once satisfied that the plan fulfills the requirements under Section 30(2) of the Code, requires to approve the plan.

(b) (vii) A perusal of the various clauses of the RFRP and the provisions of the Code i.e. Section 31 read with Section 30(2)(f) and Regulation 36B (4A) read with 39(4) of the Insolvency and Bankruptcy Board of India (Corporate Insolvency Resolution Process) Regulations, 2016, clearly mandates that after declaring a party as a successful resolution applicant, the Committee of Creditors was required to issue the LOI and that the successful Resolution Applicant was required to execute the same and is required to submit the full Performance Bank Guarantee before the Resolution Professional files an application under Section 30(6) read with Section 31(1) of the Code.

(b) (viii) However, in view of the peculiar circumstances under which the Hon'ble

Supreme Court passed various orders in Civil Appeal No.6707/2019 and in various IAs filed therein, and in view of the very limited time left for filing the instant IA No.225/2020 for approval of the resolution plan, and keeping in view the interest of the corporate debtor and other stake holders and the object of the Code, instead of returning the plan to the Committee of Creditors on the ground of non-issuance of LOI by Committee of Creditors and non-furnishing of the full Performance Bank Guarantee by the Resolution Applicant, we direct the Resolution Applicant not to insist for LOI and to submit the balance Performance Bank Guarantee within 15 days from the date of receipt of a certified copy of this order.

55. With regard to the compliance of the second proviso to Section 31(4) i.e. obtaining the approval of the Competition Commission of India, the Resolution Professional in Form 'H' stated that as the process was being conducted under strict timelines, prescribed by the Hon'ble Supreme Court, approval of the Competition Commission of India was not obtained by the Resolution Applicant before the approval of the Plan by the Committee of Creditors and the same would be required to be obtained by the Resolution Applicant in the manner as may be directed by the Adjudicating Authority.

56. With regard to the compliance under Regulation 35A, it is stated that CA No.297/2018 filed under Section 43 and 45 of the Code and IA No.67/2020, filed under Section 19 of the Code, are pending before this Adjudicating Authority and the same to be continued even after approval of the Resolution Plan.

57. Further, the resolution plan fulfils all the requirements of Regulation 38 and 39 of the CIRP Regulations. A perusal of Regulation 38 would clearly show that by virtue of mandatory contents of resolution plan as discussed in the preceding paragraphs in relation to Section 30 and Section 31 of the Code, the requirement of Regulation 38 also stands fulfilled. Even the requirement of Regulation 39 has been satisfied, as the RP has submitted that the resolution plan of Resolution applicant, as approved by the Committee of Creditors, to this Tribunal along with the compliance certificate in Form H, as per the requirements of Regulation 39(4) of the CIRP Regulations meets all the requirements of the Code and the CIRP Regulations and that the resolution plan has been duly approved by the Committee of Creditors.

58. In view of the above, we accept and approve the Committee of Creditors approved resolution plan of Resolution Applicant-DVI.

59. In respect of the reliefs and concessions as set-forth in Section 9-Prayer of the resolution plan dated 17.01.2020 along with addendum dated 07.02.2020, it is not possible for us to issue any direction except to say that the resolution applicant may take appropriate steps in accordance with law, in respect of the said reliefs and concessions. It is needless to say that the public authorities/government authorities/any other party would duly consider the requests/applications of the resolution applicant in accordance with law. We make it clear

that we are not expressing any opinion on the claim concerning reliefs and concessions nor any part of this order shall be understood in that spirit. Moreover, these reliefs and concessions/prayers are also not condition precedent for the acceptance of resolution plan. It would not be any impediment for us to accept the resolution plan.

60. As sequel to the above, we pass the following orders:-

- a. The Resolution Plan, as approved by the Committee of Creditors and submitted by Deccan Value Investors LP and DVI PE Mauritius Limited-Resolution Applicants, is approved and the same is 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 the other stakeholders involved in the Resolution Plan.
- b. The Resolution Applicant shall furnish the balance Performance Bank Guarantee within 15 days from the date of receipt of a certified copy of this order.
- c. The Resolution Applicant shall submit the application seeking approval of the Competition Commission of India within 15 days from the date of receipt of certified copy of this order and the same shall be considered in accordance with the law.
- d. The moratorium order passed by the adjudicating authority under Section 14 shall cease to have effect.
- e. The RP shall forward all records relating to the CIRP and the resolution plan to IBBI to be recorded at its database in terms of Section 31(3)(b) of the Code.
- f. Accordingly, CA No.225/2020, is disposed of.

IX. IA No.237/2020

61. Vistra ITCL (India) Limited (formerly IL&FS Trust Company Ltd.) filed the IA against the Resolution Professional (Respondent No.1), Committee of Creditors (Respondent No.2), Resolution Applicant/Deccan Value Investors (Respondent No.3) and Gateway Impex Private Limited (Respondent No.4), under Section 60(5) of the Code, on 22.06.2020, seeking the following reliefs:-

"(a) pass appropriate direction to ensure that the rights of the Applicant with respect to Secured Property under law shall not be affected in any manner by approval of the resolution plan by this Hon'ble Adjudicating Authority;

In the alternative, the Secured Property/the Mortgaged Property should be directed to be kept outside the CIRP of the Corporate Debtor as well as outside the confines of any resolution plan.

(b) Direct the Respondent No. 1 to provide a copy of the part of the resolution plan which deals with and discusses the Mortgaged Property;

(c) Direct that the lease rentals payable in respect of the security property be deposited in the account of the Security Trustee

(d) pass such further and other direction as this Hon'ble tribunal may deem fit and expedient."

62. The Applicant, vide Spl Diary No.216 dated 26.06.2020 has filed the proof of service of advance notice of the IA before its filing i.e. on 19.06.2020 and also the proof of service of the IA on 23.06.2020 in terms of the notice issued by the NCLT in IA by order dated 23.06.2020 on respondent No.4- Gateway Impex Private Limited. But inspite of the said service of notice, there is no representation on its behalf in the IA.

63. It is stated that the applicant filed the IA in its capacity as the Security Trustee for and acting on the instructions and on behalf of KKR India Financial Services Private Ltd. and L&T Finance Limited (formerly L&T Fincorp Limited). It is also stated that the applicant has been appointed as a Security Trustee for KKR India Financial Services Private Limited and L&T Finance Limited under the provisions of the Security Trustee Agreements dated 28.12.2015, 28.03.2016 and 30.06.2016. It is stated that the corporate debtor through the Resolution Professional has executed a lease deed with respondent No.4- Gateway Impex Private Limited (in short 'Gateway') which has resulted in creating a lease in favour of the corporate debtor for a period of 20 years on a property which has been mortgaged to the applicant and thereby, encumbering the assets on the land. It is further stated that the Resolution Professional could not have entered into any such agreement/arrangement over the property in question as the same has been mortgaged to the applicant by the owner of the property i.e. Gateway Impex Private Limited with an undertaking that it will be kept free from all encumbrances. Further a notice under Section 13(2) of the SARFAESI Act, 2002, was issued to Gateway i.e. the mortgagor and the borrowers on 21.01.2020 i.e. before the execution of the lease deed dated 28.01.2020 by Gateway in favour of the corporate debtor. It is also stated that the new lease deed entered by the Resolution Professional is contrary to the applicable laws and lies in the teeth of Section 65A(3) of the Transfer of Property Act, 1882 and hence, a new lease deed which is illegal in its very conception and execution is liable to be set aside and declared as non-est.

64. It is stated that an aggregate amount of Rs.500 Crores was disbursed by the KKR and L&T to WLD Investments Private Limited (in short 'WLD') and BRASSCO Engineering Private Limited (in short 'BRASSCO'), which were thereafter utilized to extend inter-corporate loan to the corporate debtor, pursuant to three facility agreements dated 28.12.2015, 28.03.2016 and 30.06.2016. Towards the purpose of securing the short term loan obtained under the Facility Agreement dated 30.06.2016 (Annexure A-2), certain securities were provided inter alia, by Respondent No.4- Gateway. As per the facility agreement, Respondent No.4 Gateway is also referred to as an obligor. In terms of the facility agreement, respondent No.4 Gateway provided/mortgaged its land and assets or such land

to the applicant and the description of the said land, wherein the land and building called as 'ACE Complex Land' is a part, is as under: -

"The freehold plot of industrial land (admeasuring approximately 21.11 acre) together with all properties and structures built thereon and immovable property comprised therein, located at Industrial Sector-9/10, Dharuhera, District Rewari, Haryana'(Secured Property/MortgagedProperty)"

65. It is also submitted that prior to the period of mortgage, 4 unregistered lease deeds were entered into by and between the Respondent No.4 Gateway and the corporate debtor. All the four said lease deeds were dated 16.03.2016 and were expired on 31.03.2019, i.e. during the period of CIRP.

66. The learned senior counsel appearing for the applicant-Vistra ITCL (India) Ltd., at the outset, submitted that if the clauses/paragraphs mentioned in the resolution plan read with addendum of DVI and pertaining to ACE Complex land property, which is part of the industrial land, admeasuring approximately 21.11 Acres and has been mortgaged to the applicant, are deleted, it has no objection for the Plan. In view of the same, it is necessary to note the relevant clauses/ paragraphs of the resolution plan of DVI, for the approval of which, the Resolution Professional has filed IA No.225/2020.

67. The learned senior counsel appearing for the applicant-Vistra ITCL India Limited while drawing our attention to various clauses of the facility agreements and other connected documents, mainly submits that respondent No.4 Gateway, which has mortgaged the industrial land approximately admeasuring 21.11 acres, cannot execute the registered lease deed dated 28.01.2020 in favour of the corporate debtor in respect of the said property and hence the said lease deed is illegal and non-est and that the resolution plan of DVI making the said lease deed as part of the plan is against Section 30(2)(e) of the Code and hence, this Adjudicating Authority should reject the plan of DVI.

68. The various clauses of the Resolution Plan read with Addendum, which, the Applicant is objecting, are as under: -

Clause 2.5.2 which is part of 'Indicative Timeline of Events for Implementation of Proposed Resolution Plan', of the Resolution Plan dated 17.01.2020 read with addendum dated 07.02.2020, reads as under:-

"Changes in 2.5 on Timeline of Events for Implementation of Resolution Plan:

Sub-section 2.5.2 shall stand replaced in the clause set out below:-

"unless waived (where permissible under Applicable Law) by the Resolution Applicants, the consumption and completion (including the Acquisition of the Corporate Debtor by the Resolution Applicants in terms of sub-section 5.1 and disbursement of Upfront Cash Infusion for settlement of dues of the Corporate Debtor (Acquisition as a Going Concern) of this Resolution Plan and any other action set out in sub-section 5.1 and 5.2 (Acquisition as a Going Concern) of the

Resolution Plan is are contingent on the following conditions having been fulfilled in a form and manner satisfactory to the Resolution Applicants ("Effective Date Conditions Precedent"):

(d) Occurrence of Final NCLT Approval Date;

(e) Receipt of a copy of the order of the relevant adjudicating authority NCLT approving this Resolution Plan; and

(f) Execution of a long term lease (subsisting for 20 years or more) for the ACE Complex Land and Acceptable Terms."

The definition of the relevant terms mentioned at Page 67 of the resolution plan read as under: -

Acceptable Terms

Shall mean term relating to the lease of ACE Complex Land and shall be suitable protective terms acceptable to the Resolution Applicants including: (i) confirmation of the validity and subsistence of the lease arrangement by way of prior written consent of Vistra ITCL (India) Limited acting as the security trustee on behalf of KKR India Financial Services Limited and L&T Finance Limited in a form and substance acceptable to the Resolution Applicants; (ii) no right of termination accruing to the lessor as long as lease rentals are paid; and (iii) right of first refusal accruing to the Resolution Applicants, in case of sale of ACE Complex Land.

ACE Complex Land

Shall mean 21.11 acres of land located at village Malpura, Industrial Area, Sector 9/10, Dharuhera, District Rewari, Haryana.

Section 5:- Acquisition as a Going Concern

"Substitution of the opening paragraphs in sub-sections 5.1 and 5.4 on Acquisition as a Going Concern:

The opening paragraph of sub-section 5.4 shall stand replaced by the clause set out below:

On the date identified by the Resolution Applicants which shall be (a) after the completion of the Condition Precedent for execution of a long term lease for the ACE Complex Land with Acceptable Terms in accordance with subsection 2.5.2; and (b) 30 (thirty) days from the date of NCLT Approval Date Effective Date Condition Precedent Satisfaction Date or such earlier date after the NCLT Approval Date as may be notified in writing to the erstwhile COMMITTEE OF CREDITORS by the Resolution Applicants, whichever is later ("Effective Date"), the Resolution Applicants and / or their affiliates including DVIFPI, shall subscribe to equity shares, debt, or quasi debt, and /or convertible instruments of the Corporate Debtor such that they will hold 90% (ninety per cent) of the share capital of the Corporate Debtor and acquire control of the Corporate Debtor

("Acquisition") as a going concern in accordance with Applicable Law and the Corporate Debtor will make payment of amounts payable to the Creditors as set out in this Resolution Plan. The detailed steps involved in the Acquisition are as follows, which shall occur simultaneously on the Effective Date;"

Section 9:- Prayer

"In view of the facts mentioned above, the Resolution Applicants submit that the following prayers shall be included, with or without such modifications as may be considered necessary by the Resolution Applicants in the Resolution Plan. It is clarified that any prayers requested to be granted by the NCLT to the Resolution Applicants shall not be construed as conditionalities to the implementation of this Resolution Plan:"

xxx xxx xxx xxx xxx

(xii) To pass an order for cancellation and release of pledge over the JMT Shares and relieve the Corporate Debtor of all financial liabilities in respect of the pledge pursuant to this Resolution Plan;

(xiii) To pass an order that this Resolution Plan shall be binding in terms of the Code on Vistra ITCL (India) Limited, KKR India Financial Services Limited and L&T Finance Limited and that no action will be against the Corporate Debtor and / or Resolution Applicants, for any action undertaken in terms of the Resolution Plan, in relation to any financing arrangements between Vistra ITCL (India) Limited, KKR India Financial Services Limited, L&T Finance Limited and the Corporate Debtor;

(xiv) To note that the use of the ACE Complex Land (which is presently mortgaged to Vistra ITCL (India) Limited as a trustee for KKR India Financial Services Limited and L&T Finance Limited) is essential to carry on the business of the Corporate Debtor as a going concern, and accordingly, to pass an order directing that (a) the Corporate Debtor shall be entitled to continue to use and enjoy tenancy, leasehold and easement rights over the ACE Complex Land for a period of 20 years from the NCLT Approval Date without any interference, so long as the Corporate Debtor continues to pay rent for the enjoyment of such tenancy, leasehold and easement rights in accordance with its existing arrangements; and (b) Section 238 of the Code overrides any provision under Applicable Law which restricts the usage of ACE Complex Land by the Corporate Debtor to manage the operations of the Corporate debtor as a going concern;"

Addendum dated 07.02.2020

"xxxx xxxx xxxx xxxx xxxx

II. The following sub-section of Part IV of the Resolution Plan are amended and/or replaced by the sub-sections set out below:

1. Insertion of sub-section 1.6(xi) on conditional NOC: The following sub-section 1.6 (xi) shall be inserted in the Resolution Plan:

In consideration of the transactions contemplated in this Resolution Plan, each Financial Creditor agrees and undertakes to issue a conditional NOC to the Corporate Debtor which shall be effective on Closing Date. "

2. Substitution of sub-section 1.8 (Hi), 1.6 (vi) and insertion of 1.9 on the commercial proposal of DVI to purchase ACE Complex Land: The following sub-section 1.9 shall be inserted in the Resolution Plan:

"Proposal for running the Corporate Debtor as a Going Concern

(i) The Resolution Applicants and / or their affiliates (including DVIFPI) reserve the right to infuse amounts in the form of equity, debt, quasi equity or debt, or a combination thereof ("Purchase Funds"), into the Corporate Debtor for the purpose of running the Corporate Debtor as a going concern including to purchase ACE Complex Land.

(ii) The Resolution Applicants propose to negotiate with Vistra ITCL (India) Limited, KKR India Financial Services Limited and L&T Finance Limited for the purchase of ACE Complex Land by the Corporate Debtor, directly or indirectly through its subsidiaries, affiliates or other nominees in accordance with Applicable Law. The Resolution Applicants by themselves or through their affiliates (including DVI FPI), at their discretion, undertake to infuse Purchase Funds, as required, for the purchase of the ACE Complex Land.

69. The learned senior counsel for the applicant while fairly submitting that this adjudicating authority while exercising its jurisdiction under the provisions of the Code cannot decide the validity of the registered lease deed dated 28.01.2020 executed by respondent No.4 Gateway in favour of the corporate debtor, however, submits that the respondents under the guise of seeking approval for the resolution plan by making the execution of lease deed for 20 years as a pre-condition for approval of the plan, also seeking approval for the said illegal and non-est lease deed from this adjudicating authority and thereby all the rights of the applicant to challenge the said illegal lease deed, would be foreclosed.

70. Per contra, learned counsel for the resolution professional submits that execution of the lease deed in respect of ACE Complex land for 20 years in favour of the corporate debtor and the prior written consent by the applicant for the said lease deed, are not conditions precedent for approval of the plan and on the other hand, are the conditions for implementation of the plan and hence, there is no impediment in approving the resolution plan of DVI by this adjudicating authority. The learned counsel while drawing our attention to the various clauses of the facility agreement and other connected documents thereon, submits that there was no bar on Gateway from executing the lease deed in favour of the corporate debtor in respect of the ACE Complex land. He further submits that Section 65A of the Transfer of Property Act, 1882, has no application to the facts of the present case. However, the learned counsel has submitted that the execution of the registered lease deed in respect of ACE Complex land by Gateway in favour of the corporate debtor for a period of 20

years is highly essential and crucial for the continuation of the corporate debtor as a going concern and for effective and successful implementation of the resolution plan of DVI. 11

71. The learned counsel for the Committee of Creditors of the corporate debtor while supporting the submissions made by the learned counsel for the RP further submitted that the lease of ACE Complex Land forms an integral part of the business of the corporate debtor and the prayer in Section 9(xiv) of the Resolution Plan, though stated to be a condition not precedent for approval of the plan, may be granted for the effective implementation of the resolution plan.

72. The Resolution applicant submitted that execution of the lease deed in respect of the ACE Complex land for a period of 20 years in favour of the corporate debtor is a condition precedent in terms of Clause 2.5.2 of the Resolution Plan and if the instant IA is allowed, the same would result in resolution plan becoming commercially infeasible and unviable.

73. At this stage, it is relevant to note certain dates. Respondent N0.3-DVI submitted its resolution plan to the Committee of Creditors on 17.01.2020. Respondent No.4 Gateway executed a registered sale deed on 28.01.2020 in favour of the corporate debtor. The Resolution Applicant issued the addendum to the resolution plan on 07.02.2020. The Committee of Creditors approved the resolution plan dated 17.01.2020 read with addendum dated 07.02.2020 on 07.02.2020.

74. Clause 2.5.2 of the Resolution Plan dated 17.01.2020 read with addendum dated 07.02.2020 clearly shows that the "execution of a long term lease (subsisting for 20 years or more) for the ACE Complex land with acceptable terms" is not a condition precedent for approval of the plan, but the same is an "effective date condition precedent. The requirement of "confirmation of the validity and subsistence of the lease arrangement by way of prior written consent of Vistra ITCL (India) Ltd. acting as a security trustee on behalf of KKR India Financial Service Limited and L&T Finance Limited in a form and substance acceptable to the resolution applicants" and other requirements mentioned under the definition 'Acceptable Terms' becomes redundant and infructuous since Gateway has already executed registered lease deed for 20 years even without the prior written consent from the Applicant and even before the Committee of Creditors approved the Resolution Plan. Since, all the counsels are ad-idem that this adjudicating authority while exercising its jurisdiction under the provisions of Code, cannot decide the validity of a lease deed, we are of the considered view that there is no necessity for us to go and examine the various contentions of all the parties with regard to the said issue. Further, for the same reason i.e. execution of the registered lease deed even prior to the approval of the resolution plan by the Committee of Creditors, we need not go into the issue whether execution of the instant lease deed was a to be understood as a pre-condition for approval of the resolution plan, though the Plan stated otherwise. In this view of this matter, and for the aforesaid reasons and also in view of our

observations at Paragraphs Nos. 13(a) (i) and 18 of IA No.225/2020, there is no need to discuss the extensive arguments advanced and judgments relied on by both the sides, on the issues that whether the lease deed dated 28.01.2020, is valid or whether this Adjudicating Authority can compel the applicant to act in a particular manner in respect of the ACE Complex Land property on which it is claiming certain mortgage rights or whether granting of prayers in Section 9 of the Resolution Plan, along with Addendum, would prejudice the rights of the Applicant etc.

75. Accordingly, and in the circumstances and for the reasons mentioned above, the instant IA is dismissed. However, it is made clear that we have not expressed any opinion on the validity or otherwise of the lease deed dated 28.01.2020 executed by Gateway in favour of the corporate debtor or on the rights of any party over the ACE Complex Land.