

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH**

**MA 342/2018, 194/2018, 347/2018 and 293/2018
in C.P. (IB)1239/(MB)/2017**

(Under Section 60(5) of the IBC, 2016)

In the Matter of

Gupta Global Resources Private Limited

(MA 342/2018)

1. Padmesh Gupta
2. Piyush Marodia

Applicants/
Directors of Suspended
Board of Directors

Vs

1. Shri C Bala Mouli, Resolution Professional
2. State Bank of India
3. Bank of India,
4. Punjab National Bank
5. Axis Bank
6. IDBI Bank
7. SREI Equipment Finance Ltd
8. Vijaya Bank
9. Export Import Bank of India
10. Indian Overseas Bank
11. Allahabad Bank
12. ICICI Bank
13. L & T Infrastructure Finance Ltd.
14. Union Bank of India

MA 194/2018

Mr. C. Bala Mouli ... Applicant
Resolution Professional

MA 347/2018

SREI Equipment Finance Ltd ... Applicant

Vs

1. Mr. C. Bala Mouli, Resolution Professional
2. State Bank of India



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3. Bank of India,
4. Punjab National Bank
5. Axis Bank
6. IDBI Bank
7. Vijaya Bank
8. Export Import Bank of India
9. Indian Overseas Bank
10. Allahabad Bank
11. ICICI Bank
12. L & T Infrastructure Finance Ltd.
13. Union Bank of India
14. Padmesh Gupta
15. Piyush Marodia

MA 293/2018

Clean Coal Enterprises Pvt Ltd ... Applicant

Vs

Mr. C. Bala Mouli ... Resolution Professional

Order delivered on 28.08.2018

Coram: Hon'ble Shri B. S. V. Prakash Kumar, Member (Judicial)
Hon'ble Shri Ravikumar Duraisamy, Member (Technical)

For the Applicant : Rishabh Jaiswal, i/b Rajani Associates in MA 194/2018

Mr. Gaurav Joshi, Sr. Counsel, i/b Harshal Damania in MA 293/2018

Mr. Mayur Khandeparkar, Counsel, i/b Waquar Ahmad in MA 342/2018

Mr. Ashish Pyasi, alw Umang Thakar, i/b Dhir & Dhir Associates in MA 201/2018 and MA 333/2018

Per B. S. V. Prakash Kumar, Member (Judicial)

COMMON ORDER

Order pronounced on 21.08.2018

MA 342/2018



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It's MA 342/2018 filed by the Directors of the suspended Board of Directors of the Corporate Debtor u/s 60(5) of the Insolvency & Bankruptcy Code, 2016 ("the Code") arraying the Resolution Professional and various Financial Creditors as R2 to R14 asking this Bench to pass the following orders:

- (a) Leave be granted to intervene in CP 1239/MAH/2017,
- (b) 64 days be excluded while computing 180 days' time period of the Corporate Insolvency Resolution Process (CIRP) of the Corporate Debtor,
- (c) Alternatively, the Committee of Creditors (CoC) be directed to extend the CIRP time period for a further period of 90 days,
- (d) Direct the CoC to approve and pay the cost and expenses for obtaining the final Valuation Report of the Corporate Debtor as prepared by the Registered Valuers,
- (e) Direct the Resolution Professional (RP) to prepare, finalise and publish Information Memorandum of the Corporate Debtor,
- (f) Direct the CoC to approve the draft of the invitation for Expression of Interest (EOI) within a period of seven days failing which it will be deemed that the draft submitted by the Resolution Professional stands approved by the CoC,
- (g) Direct the RP to publish the invitation of EOI in accordance with law,
- (h) Such further order and/or other Orders be passed, direction and/or directions be given as this Hon'ble Tribunal may deem fit and proper.

2. Along with this application there are several other applications, one filed by the RP (MA 194/2018), one filed by one of the Financial Creditors namely SREI Equipment Finance Ltd (hereinafter referred to as "SREI") (MA 347/2018), one filed by a company called Clean Coal Enterprises Pvt Ltd. (MA 293/2018), stating that it is willing to submit a Resolution Plan for the purpose of the resolution of the Corporate Debtor.

3. Before going to deal with MA342/2018, I believe it is incumbent upon me to provide background history so far happened subsequent to admission of this Company Petition filed by the Corporate Debtor on 4.10.2017 u/s 10 of the Code for initiation of CIRP on appointment of Mr. Atul Rajwadkar as Interim Resolution Professional (IRP). In pursuance of the order, the IRP made the public announcement on 10.10.2017 in two newspapers

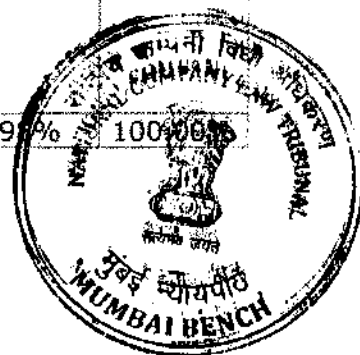


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(i) intimating the commencement of CIRP against the Corporate Debtor and
(ii) calling the creditors to submit the proof of claims putting last date of submission of claims as 21.10.2017. Basing on the information received, the IRP prepared the Information Memorandum (IM) in compliance with Section 29 of the Code r/w Regulation 36 of CIRP Regulations. Thereafter, in terms of the claims filed by the creditors, CoC was constituted on 30.10.2017. Accordingly, on 6.11.2017 first CoC meeting was held to discuss on fixation of the voting share of the members of the CoC, thereafter, as per Regulation 25 of CIRP Regulations, the IRP requested the members in the first CoC meeting to cast their votes and the results of E-voting are as under:

Sr. No.	Resolution Description	Yes	No	Abstained	Total
1.	To ratify fees of the Interim Resolution Professional amounting to ₹2,00,000/- plus applicable taxes and out of pocket expenses at actual	85.02%	2.23%	12.75%	100.00%
2.	To ratify fees of the 6 valuers cumulatively amounting to ₹12,50,000/- plus applicable taxes and out of pocket expenses at actual	85.02%	2.23%	12.75%	100.00%
3.	To ratify approximate cost of E-voting facility by CDSL amounting to ₹12,000/-	85.02%	2.23%	12.75%	100.00%
4.	To ratify approximate expense of conducting first CoC amounting to ₹75,000/-	85.02%	2.23%	12.75%	100.00%
5.	To appoint CA Mr. Atul Rajwadkar (Present IRP) as Resolution Professional at a fees of ₹2,00,000/- per month plus taxes (as per the terms of his offer letter)	4.67%	82.58 %	12.75%	100.00%
6.	To appoint Mr. C Bala Mouli, from RBSA Restructuring Advisors LLP as Resolution Professional at a remuneration of ₹6,00,000/- per month as proposed by some members of the CoC	83.54%	1.48%	14.98%	100.00%
7.	To/ authorise CA Atul	85.02%	0.00%	14.9 %	100.00%



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	Rajwadkar, the present IRP to continue to conduct CIRP on behalf of CoC, by discharging functions and duties of RP as stipulated in IBC, 2016 till the time the incoming RP gets appointed by Adjudicating Authority; at a fees of ₹2,00,000/- per month plus applicable taxes alongwith other terms as may be stated in his offer letter				
8.	To consider notice period of minimum 5 days in accordance with Regulation 19(2) of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.	87.25%	0.00%	12.75%	100.00%

4. Looking at the table, it is evident majority of CoC, as specified under the Code, ratified the fees of the IRP amounting to ₹2,00,000, and the fees of the Valuers, cost of E-Voting, cost of holding CoC meeting, appointment of Shri Bala Mouli as RP with a remuneration of ₹6,00,000 per month, and also to allow the IRP to continue until the Tribunal has given approval for the appointment of Shri Bala Mouli. On the application moved for approval of appointment of Shri Bala Mouli as RP, this Bench on 23.1.2018 approved appointment of Shri Bala Mouli as RP in the place of IRP.

5. In the second CoC meeting held on 1.2.2018, when one of the Financial Creditors (member of the CoC) wanted to move a resolution for liquidation of the Corporate Debtor, the RP informed the CoC that objective of the Code is the resolution, not liquidation. Then, it was decided in the said meeting that the current essential expenses payable would be shared by the members of the CoC in proportion to their share in the voting share and the same would be reimbursed to them once the stay on TRA Account is lifted by the Hon'ble High Court to the extent of amount payable in the TRA Account. It was also suggested by SREI Equipment Finance Ltd. (Applicant in MA 347/2018) to prepare a budget for next 3-6 months for the amount of interim finance required. In the discussion, State Bank of India (one of the Financial Creditors) made it clear that since such financing does not form part of their structure, it would not be able to participate in such financing.



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financing arrangement. To which, SREI informed that they would analyse the possibilities of raising such finance and come back on the same, so that the matter of raising interim finance and the amount to be raised would be put for e-voting.

6. It appears that valuation reports prepared by the Registered Valuers could not be collected by the RP as the CoC has not been contributing towards the cost/expenses of the Valuers. The RP stated in this MA that the Registered Valuers have not been inclined to share the valuation reports unless payment has been made to them, by which the RP was unable to perform its duties endowed upon him.

7. In the third CoC Meeting held on 20.2.2018, the points that came for discussion are (i) for reconsideration of earlier decision that CoC would share essential amounts payable towards insurance premiums, salaries to security, valuers fees, essential staff utility bills, CoC meeting expenses, advertisement charges for publication of EOI in proportion to their voting rights, (ii) to inform that the Liquidator of Gupta Coal India had kept a board claiming that the stock of coal at the Six Washery Sites at Ramagundam, Pimpalgaon, Ghugus, Wani, Sasti, Majri belong to Gupta Coal India Pvt Ltd to whom notice was given to explain; reply to which is yet to be received, (iii) to inform that the claim against the liquidator Gujarat NRE Coak Ltd., Kolkatta was launched which was announced by the Liquidator subject to his verification of the claim, (iv) to circulate the audited balance sheet of Gupta Global Resources Pvt Ltd for the F.Y. 2016-2017, (v) to ratify the appointment of Batra & Batra as Special Auditors to report old outstanding debtors, long term loans given, advances for purchases, old inventory, etc and prove their fees of ₹3,00,000 plus GST, (vi) to approve the monthly essential payments and to share according to the voting percentage till the completion of CIRP proceedings, (vii) to apprise the CoC members about the progress on lifting of stay to operate the TRA Account, (viii) to apprise the CoC members about a receipt of letter from the Liquidator of Gupta Coal India Pvt Ltd and seek directions for the same and to provide information sought by Rajani Associates, Attorneys, Mumbai in this connection, (ix) permitting RP to give authorisation to Rajani Associates to give legal notice to the Liquidator of Gupta Coal against the claims made, (x) to approve the budgeted expenses during the CIRP proceedings and authorise RP to approach SREI Infrastructure for interim finance on such terms as may be



necessary as a priority debt and sign any relevant and necessary documents in this connection, (xi) to ratify the appointments and approve the fees of Rajani Associates and Dhir & Dhir Associates, (xii) **to pass a resolution to authorise RP to seek extension of time for the completion of the CIRP proceedings for 90 days** and authorise RP to appoint Rajani Associates to submit and represent before NCLT, (xiii) to pass a resolution to authorise one of the member Bankers of the CoC to issue a letter authorising the RP to open a current account styled as "RP Gupta Global Resources Pvt Ltd." with Andhra Bank, (xiv) to approve the evaluation matrix and approve the public announcement to be published on 24.2.2018, (xv) to consider appointment of investment banker, (xvi) to vote on status of corporate guarantee, essential expenses and budgeted expenses, extension of bank guarantee and Axis Bank in favour of MAGENCO as per Supreme Court order, on the fee payable to the Attorneys, the fee payable to Special Auditors, for the approval of essential expenses to be shared by CoC in proportion to their voting power as per the attached statement, voting on as to whether CoC members are in favour of inviting resolution plan or go for liquidation straight away, (xvii) to authorise RP to engage the attorneys Rajani Associates to seek extension of time by 90 days. These are the points that have been resolved to be voted for approval, but whereas none of these approvals were voted with majority of 75% as specified under Section 21 of the Code except to an item to approve the fees of Dhir & Dhir Associates and contribution to the same by the CoC members amongst themselves in the ratio of their voting rights (approval with 82.60% voting share). It is also clear in the voting that CoC members have not even approved to bear the essential expenditure as per their voting share and they have not even approved for extension of CIRP for another 90 days as specified under the Code. Finally, the CoC has not approved either resolution plan or liquidation.

8. The RP has stated in his application that the draft Expression of Interest and the Evaluation Matrix were circulated through email by RP on 15.2.2018, however no response has been received by the RP from any of the CoC members except one from SREI.

9. The RP submitted that as per Regulation 39 of CIRP, the Resolution Applicant is required to endeavour to submit a resolution plan at least 30 days before completion of 180 days of CIRP, in this case, for this period of 180 days would expire on 2.4.2018, he was of the opinion that it was

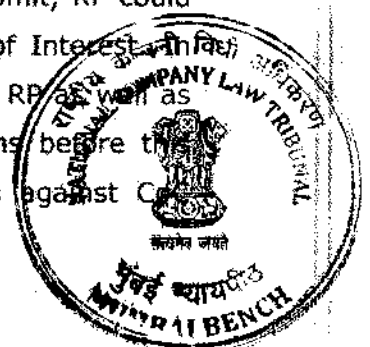


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unlikely that a resolution plan would be feasible because CoC made it clear that the members of CoC did not wish to extend the time period of CIRP for 90 days. For CoC has not provided any comments on the evaluation matrix and having the RP witnessed the standstill approach of CoC, looking at CIRP period of 180 days coming to close on 2.4.2018, he filed this application asking this Bench to pass appropriate directions to the CoC to co-operate with the RP in conducting meetings and also for a direction to the CoC to contribute towards expenses of the Corporate Debtor in terms of their voting share or in the alternative to pass an order for liquidation of the Corporate Debtor u/s 33 (1) (i) (ii) and (iii) of the Code by appointing RP as Liquidator of the Corporate Debtor with powers as enunciated u/s 34 of the Code.

10. Against this background, the Applicants in MA 342/2018 submit that despite circulation of the draft EOI dated 15.2.2018, except SREI, none of the members of CoC approved EOI recommending the same to be published inviting resolution plans from prospective resolution applicants. To substantiate this argument, these applicants submit that Regulation 39 (approval of resolution plan) of the CIRP Regulations provides that RP is duty bound to submit resolution plan at least 30 days prior to completion of the time limit of 180 days of the CIRP. They further submit as per Section 25 (2) (h) of the Code (duties of RP), it is the duty of the RP to invite prospective resolution applicants to submit their plans. They have also said that publication shall be made only with the approval of the CoC. They said that the purpose and intent of the Code is to obtain maximisation of the value of assets of the Corporate Debtor. Along this line with the object and purpose of the Code, they submit, it is imperative that CoC is impelled to act in the interest of all the stakeholders of the Corporate Debtor and to ensure revival of the Corporate Debtor through resolution process, therefore, CoC cannot misuse its powers through refusing inviting resolution plans from prospective resolution applicants. They further submit that RP is also duty bound u/s 29 of the Code (preparation of Information Memorandum) to prepare information memorandum, but the Resolution Professional could not do the same, for the valuers have not delivered the valuation reports because of their fee not being paid by CoC. Due to this reason, they submit, RP could not proceed any further for giving invitation of Expression of Interest in view thereof, not only these suspended directors but also the RP as well as one of the Financial Creditors, namely SREI filed applications before the Bench u/s 60(5) of the Code to get appropriate directions against CoC.



members to proceed for invitation of the resolution plans and for approval of the same instead of going directly to liquidation.

11. These applicants further submit that the major consumer/customer of the Corporate Debtor is Maharashtra State Electricity Corporation (MSEC) for washing of the coal that they get from Western Coalfields Limited (WCL) but because of some disputes between WCL and MSEC, MSEC stopped taking coal from WCL which has adversely affected several lives of the local people including the business of the Corporate Debtor. They further submit, since the Hon'ble High Court of Bombay at Nagpur has passed an order resolving the disputes between the WCL and the MSEC, there is every possibility of the revival of the business of the Corporate Debtor. These applicants themselves submit that since there are disputes and differences between the Corporate Debtor and MSEC, the disputes in between them have been referred to arbitration. They further submit for the arbitration award has been passed in favour of this Corporate Debtor, there is a fair chance of revival of the functioning of this Corporate Debtor which in turn will lead to maximum repayment of public money borrowed by the Corporate Debtor, but in the event this company goes into liquidation, there cannot be any chance for making any payment to the public and financial institutions lent money to this Corporate Debtor. They further submit in case this Corporate Debtor is put into liquidation, the assets of the company will not fetch proper value to settle the liabilities of the Corporate Debtor. They submit that the powers given to CoC has been grossly misused and the CoC has illegally and wrongfully withheld its approval causing impediments to the RP in discharging his statutory obligations.

12. This application in short is since more than 60 days have gone in appointing RP in the place of Interim Resolution Professional, if that period taken for appointment of RP is excluded with a direction to the CoC to examine the resolution applications come on invitation of EOI, there is every possibility for revival of the Corporate Debtor.

13. Since the observations in all the applications pending will be more or less common, for the sake of brevity, we are of the opinion that instead of deciding these applications independently, we decide all these applications with common observations after recording the averments of each of these applications so as to avoid repetition of the observations for the sake of



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adjudicating these applications independently. In view of the same, we proceed with recording the averments of each of the applications, thereafter make common observations over all these applications.

MA 347/2018

14. The applicant herein namely SREI Equipment Finance Ltd (SREI), being a Non-Banking Financial Company (NBFC) provided financial assistance of ₹88 crores on 3.1.2015 to this Corporate Debtor and this money not being repaid, the due outstanding against the Corporate Debtor along with interest has become ₹107 crores, for which it has made a claim before the RP, basing on this claim, this applicant has become one of the Financial Creditors of the CoC having 2.79% vote share in the CoC. The total financial debt claim admitted against this Corporate Debtor is ₹3850,19,01,834. In this application also, the applicant has repeated what all stated by the RP and the suspended Directors by saying that though the RP placed draft format of the EOI including the Evaluation Matrix, the CoC has not approved any of the draft proposals placed by the RP, and for there being no concrete decision on any of the issues placed before the CoC, this Financial Creditor which has only 2.79% has come out with this application with the same relief of seeking exclusion of 60 days from 180 days' time period of CIRP and also for extension of 90 days' time in addition to 180 days enabling the RP to forthwith prepare, finalise and publish Information Memorandum of the Corporate Debtor and the invitation of EOI in accordance with law.

MA 293/2018

15. It is another MA filed by a company called Clean Coal Enterprises Pvt Ltd stating that this applicant is willing to submit a resolution plan for the purpose of the resolution of the Corporate Debtor, however in the absence of publication of EOI by the RP, the applicant is constrained to approach this Bench. The applicant addressed a communication dated 27.3.2018 to the RP expressing its interest to submit a resolution plan in the case of the Corporate Debtor. This applicant submits that the bar under Section 29A of the Code is not applicable to it. It has a strong financial position and capable of infusing sufficient funds for the resolution of the Corporate Debtor. This applicant has also more or less placed the same averments which were placed stating that the liquidation is the last resort under IBC, and for the same, in the application itself, the applicant has relied upon

Singh vs. Mariners Buildcon India Ltd. (185 (PB)/2017



29.1.2018)" and also "Vedika Nut Crafts Pvt Ltd (IB-40(PB)/2017)"

to say that the basic objective of the Code is resolution and liquidation has to be a measure of last resort, therefore, a direction shall be given to the RP to float EOI as per the provisions of Section 25 (2)(h) of the Code after floating such EOI, the resolution plans if any received in response should be placed before the CoC, to achieve the same, the period of CIRP shall be extended for another 90 days which this Corporate Debtor has not availed of.

16. With these averments, this applicant has sought for direction for extension of CIRP for another 90 days in terms of Section 12 of the Code to let the RP to float EOI in terms of Section 25(2)(h) of the Code, inviting Resolution Applicants for placing their Resolution plans.

MA 194/2018

17. It is another MA filed by the RP namely, Mr. C Bala Mouli seeking reliefs as follows:

1. To pass an appropriate direction to the CoC to co-operate in the meetings conducted by the RP;
2. To pass appropriate directions to the CoC to co-operate and to contribute towards expenses of the Corporate Debtor in terms of their voting share;
3. In the alternative, to pass an order requiring that the Corporate Debtor be liquidated in the manner as provided under Section 33(1)(i)(ii) and (iii) of the Code and pass an order appointing the current RP, Mr. C B Mouli, as the Liquidator of the Corporate Debtor under Section 34 of the Code along with all the powers as required under the Code;
4. For cost and order thereon provided for;
5. Such other reliefs as this Hon'ble NCLT may deem fit and appropriate in the nature and circumstances of the instant case.

18. Most of the averments made in this application have already been depicted as historical facts from the date of admission till the date of filing this application, whereby we have not separately dealt with the averments of this application herein but by reading this application, the issue seen to be in the application is that CoC has not co-operated with the RP to proceed further to invite resolution plans from the prospective resolution applicants.



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therefore, sought co-operation of the CoC or in the alternative to pass liquidation order.

19. After having the holistic view of the averments of all these applications, it is evident that,

- (i) this Corporate Debtor is a company not doing business as on the date of filing Section 10 petition before this Bench. It is not that either Section 7 or Section 9 Petition admission is thrust upon this Corporate Debtor. The Corporate Debtor admitted financial debt itself as per the RP is ₹3850,19,01,834.62, this debt is minus other payables to the Operational Creditors including Government dues. Majority of the financial dues payable by this Corporate Debtor are to Public Sector Banks. One of the financial creditors having voting share of only 2.79% has also filed MA 347/18 u/s 60(5) of the Code for exclusion of 60 days from the CIRP and for a direction to the CoC to extend the CIRP time period, but no reason has been mentioned anywhere as to how this applicant would be aggrieved if it has gone for liquidation, moreover it has also not been said whether sending it for liquidation is in violation of any provision of law.
- (ii) On record and admittedly as well, this Corporate Debtor is shut long before, it has disputes with MSEC, Western Coalfield which was purportedly providing coal to MSEC has also been in dispute with MSEC, in this web of litigation, this Corporate Debtor has not been getting any business. Unless coal is supplied to MSEC, unless such coal is given to this Corporate Debtor for washing, this Corporate Debtor will not have any business. What likely happens in future, nobody knows. To prove that this Corporate Debtor is likely to get some business in future, all these applicants who are interested for resolution should have placed some material before this Bench. But no such material has been placed before this Bench except an abstract argument about provision of law. There are no facts available to breathe life into the expectations canvassed by the applicants. Mere discussion of contingencies in future in the affidavits without support of factual background is of no use for adjudicating an issue. Here there is no material reflecting that the company is a going concern and it would suffer in case resolution process has not been adopted.



- (iii) This Corporate Debtor position is that it is not in a position to pay the cost of the RP and essential expenditure as well. The CoC has not evinced any interest to pay even essential expenditure. The CoC has not shied away in discussing any of the issues raised by these applicants, they discussed about essential expenditure, they discussed about payables to this Corporate Debtor, they discussed about payments to the legal Attorneys, they discussed about extension of CIRP period, they discussed about liquidation also but finally when it has come for voting, the CoC members could not have come to concurrence to give their approval as specified under the Code to any of the issues mentioned above. In the same breath, we should not also shy away from discussing the powers conferred upon RP as well as CoC, so as to understand as to who has to take call over extension of time, over a decision as to whether to go for resolution or to go for liquidation. This issue will be decided in the ensuing discussion because these observations are mainly limited to look into the factual aspect available on record.
- (iv) The Corporate Debtor position is so bad that no money is available even to pay to Registered Valuers who were asked to provide the Valuation Reports. The CoC have also not paid money to it. Of course, it is up to them whether it is prudent on their part to shell out further money over a company which would not give anything to them. May be if they feel that it would be throwing good money after bad money, they may not invest any further. It has also not been said by any of these applicants that this Corporate Debtor has valuable assets in the company and that if it is not proceeded with resolution, the value of such valuable assets would come down. They only said that if all litigations have been cleared between Western Coalfield Ltd and MSEC and between MSEC and this Corporate Debtor, the business would likely to be revived. It is all guess work not supported by any material.

20. If we come to legal proposition against these background factualities, no doubt it is a Code that has come into existence to go for resolution, if not, then for liquidation. It is not legislated anywhere that CoC is commanded to go for resolution alone and they shall not go for liquidation directly. If nothing is there for resolution, then the only go for



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liquidation so that at least the CoC would fetch something out of the breakup value of whatever residue remained in the Corporate Debtor. If we see the CoC attitude right from the beginning, CoC is not interested even to spend a single pie over this Corporate Debtor. It is not that this Corporate Debtor alone has come for liquidation process. It has been day in and day out, IBC Adjudicating Authority has been dealing with various IBC Cases, every case will have its own facts. There are cases where CoC spent money looking at the asset lying in the Corporate Debtor, there are cases where CoC has not spent any money. It is a business decision taken by the CoC within the realm of it. This Bench cannot thrust upon the CoC to go for resolution on the assumption this Code objective is for resolution, not for liquidation. Indeed, no such legislation is present anywhere in this Code.

21. Before going to the objectives of this Code, let us visit the relevant provision of law in relation to the powers of the CoC, then the powers of the RP. In between, this Bench wants to remind that legislation has been laid down saying that the creditors are given a chance to realise their value from the Corporate Debtor in a way that maximises the value of the assets of the company. It is all pure business. Here is not the case of anybody that if this company goes into liquidation, so and so workmen are going to suffer. And one basic thing that is to be looked is even if workers are there, how long would they survive on a company that is not in a position to sustain on its own? This point has not been elaborately dealt with because workmen cause is not an issue before this Bench.

22. If we come to the approvals of the CoC, they have been consolidated u/s 28 of the Code as to which situations, RP shall take approvals of CoC to deal with Corporate Debtor functioning. It is not only in Section-28, this Code has dealt with rights and powers of CoC, it has been dealt with in various places deciding that RP shall not go on his own unless approval is taken from CoC, in addition to the approvals mentioned under Section 28, it has been very much mentioned in Section 25 (2)(h) of the Code that RP is under obligation to take approval of the CoC to invite prospective resolution applicants, it is not that as stated by the various applicants that RP is free to invite prospective resolution plans notwithstanding the approval of CoC. To have clarity, let us revisit Section 25(2)(h) which is as follows:

"25. Duties of Resolution professional.

(1).....



(2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely: -----

(a) -----

(h) **invite prospective resolution applicants, who fulfil such criteria, as may be laid down by him with the approval of Committee of Creditors, having regard to the complexity and scale of operations of the business of the Corporate Debtor and such other conditions as may be specified by the Board, to submit a resolution plan or plans;**

23. On careful reading of this Clause along with the heading of this Section, it is apparent on face that RP has been given duties to exercise, but no rights have been vested with RP under this Code to do anything other than the duty cast upon him as specified under the Code. The duty lies in Section 25 (2)(h) is to invite resolution applicant with the approval of the CoC, it is not that RP is free enough to invite prospective resolution applicants on his own without approval of CoC. That being the mandate of the legislature, it can never be visualised that RP shall invite for the prospective resolution applicants by issuing an invitation of EOI which is nothing but transgressing the duty cast upon the RP. Even in a pigment of imagination, it cannot be contemplated that either the RP violated the Code or the CoC violated the Code. RP will not have interest regarding the assets of the company, but whereas CoC is vested with interest upon the assets of a company. It is a right vested with the creditors of the company to proceed against the assets of company. It's a basic proposition of law available right from Contract Act to various commercial laws subsequently evolved giving a right to creditor to proceed against debtor. Basing on this legal proposition, I hold that this Bench cannot venture into saying that the discretion vested with the creditors could be modified by this Bench. The rights emanating from the operation of law cannot be modified by a Court of Law. Court of Law is entitled only to declare the law as specified by the Legislature, not to modify the right conferred upon a party by legislation. What all I say is, it is a discretion given to the Creditors either to go for resolution or to go for liquidation. If at all Court goes beyond the jurisdiction, it is nothing but interference with the rights of the parties which is not permitted under Law.

24. Objectives of any enactment or preamble of any enactment, what is the gist of an enactment, it is not something above the mandate



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given in the sections of an enactment. Objectives or preamble of any enactment can be looked into only when ambiguity is present in the Section and when section not giving meaningful reading, then to give a meaningful reading, Court is required to look up at the preamble so as to read the provision in a meaningful perspective. Here in this Code, it is known to everybody that the corporate debtor management has been shifted from the Board of Directors to the CoC. It is not said anywhere that rights of the CoC in managing the company are eclipsed by some caveats. The RP is limited to work to the extent that has been mentioned in the Code and obtain time to time approvals from CoC in running the company. If at all his duties are extended beyond the stretch that has been mentioned in the Code, it is arbitrary and in contravention to the powers conferred upon the CoC. In view of this legal proposition, I don't believe that the RP can overlook the CoC in inviting prospective resolution applicants by publishing EOI. It is not the understanding of law.

25. Side by side it is also imperative to see what powers are conferred upon this Adjudicating Authority either for approval of the resolution plan or for initiation of liquidation as enunciated under Section 33 of the Code. It is also important to look into general power, that is not dealt with under any of the provisions of law except under Section 60 (5) of the Code. It has been mentioned at various places in the Code itself when this Adjudicating Authority has to exercise its jurisdiction. Under Section 31 of the Code, it has to either approve, reject, or by virtue of amendment to the Code to modify the resolution plan, this jurisdiction could be invoked only and only when the resolution plan has been placed before the Adjudicating Authority until such time, this Adjudicating Authority cannot invoke jurisdiction to question the discretion of the CoC.

26. As to initiation of liquidation, this Adjudication Authority can invoke its jurisdiction when it does not receive resolution plan under sub-section (6) of Section 30 or when resolution plan has been rejected under Section 31 of the Code. If such situation arises, it is a mandate upon this Adjudicating Authority to pass an order requiring the Corporate Debtor to be liquidated in the manner as laid down in the Liquidation Process Chapter; issue public announcement stating that the Corporate Debtor is in liquidation; require such order to be sent to the Authority with which the Corporate Debtor is registered. This Adjudicating Authority has not been ordained in the Code to



find out as to why EOI has not been invited, as to why CoC has not decided to opt for resolution process. The only requirement to initiate the liquidation is as to whether resolution plan has been received by the Adjudicating Authority within the time under sub section 6 of Section 30 or in the case where resolution plan has been rejected under Section 31 of the Code. It has not been mentioned anywhere that RP shall file an application for initiation of liquidation. It has only been said where the Adjudicating Authority has not received the resolution plan within the time specified, it has to pass an order for liquidation.

27. As we all know, this is a Tribunal, not a Court therefore, whenever jurisdiction is exercised by Tribunal, it has to be cautious as to whether subject matter jurisdiction has been conferred upon this Adjudicating Authority to deal with such issue. As to applicability of the discretion by CoC, it has not been mentioned anywhere that Adjudicating Authority can interfere with prudence of the CoC. Of course, one may say that general power under Section 60(5) of the Code is akin to Section 151 of the CPC, but the inherent jurisdiction u/s 151 of CPC can travel to any place wherever specific jurisdiction has not been given. No doubt it is true that general power has been given under Section 60(5) of the Code, but it has to be seen when and where such jurisdiction could be exercised. If at all, any action has been taken contravening the provisions of the Code or any fraud is committed under the garb of any of the section then such action could be called as vitiated by fraud. In a situation like that, may be, since this Adjudicating Authority has no other provision, it may invoke Section 60(5) of the Code. But when an action by any of the parties dehors fraud and noncompliance of the provisions of the Code cannot be said as an action open to this Adjudicating Authority to exercise jurisdiction u/s 60 (5) of the Code.

28. If we ask explanation why CoC has not gone for resolution, it is nothing but transgressing into the discretion of the CoC. It has not been said anywhere in these applications that the CoC acted beyond its jurisdiction and beyond its powers. It has only been said that there is a possibility for revival therefore, instead of going for liquidation, the CoC should have gone for resolution process. As I said earlier, it is a business decision whether to go for resolution or liquidation always lies in the hands of the CoC, therefore this Bench cannot question the merit of that decision unless it is in



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noncompliance of law or vitiated by fraud. That is not the case here. Therefore, we believe that discretion is within the hands of CoC, the procedure to be followed for approval of resolution plan will come into picture only when CoC has taken a decision to go for resolution. When no proposal for resolution has come from CoC, this Adjudicating Authority cannot press upon the CoC to go for only resolution and not for liquidation. As to Section 33, I again reiterate that when the case falls under (a) or (b) of Section 33(1) of the Code, the Adjudicating Authority **shall** order for liquidation. To say that it is mandate, I believe, I must read the text of Section 33(1) of the Code, which is as follows:

"33(1) Where the Adjudicating Authority, -

(a) before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate insolvency resolution process under section 12 or the fast track corporate insolvency resolution process under section 56, as the case may be, does not receive a resolution plan under sub-section (6) of Section 30; or

(b) rejects the resolution plan under Section 31 for the noncompliance of the requirements specified therein,

it shall-

(i) pass an order requiring the corporate debtor to be liquidated in the manner as laid down in this Chapter;

(ii) issue a public announcement stating that the corporate debtor is in liquidation; and

(iii) require such order to be sent to the authority with which the corporate debtor is registered."

29. This is a Code that has been set with timelines, unless such timelines are followed, the position will become worse than SICA. After making all these discussion, I don't believe that we need to travel back to the objectives and preamble of this Code for saying that it is an option left to the CoC whether to go for resolution or liquidation. After all, it is their interest involved in the asset of the company. The ground situation is, the financial creditors liability against the corporate debtor alone is ₹3850,19,01,834.62, we don't know how much liability is remained payable to other creditors including Government dues. The interesting part is none of these applicants said anywhere that there are valuable assets in this company costing much and such value. To me it appears, it is nothing but delay tactics to **avoid**



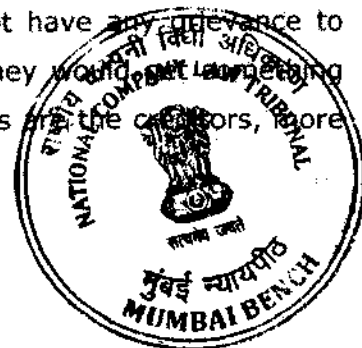
the CoC from proceeding further to realise whatever that is remained in the company. There is no requirement to see the valuations or to see the Information Memorandum to order for liquidation u/s 33 except seeing as to whether resolution plan has been received under sub-section (6) of Section 30 or the rejected resolution plan u/s 31 of the Code. That being the legal proposition, there is no need to put the clock back to direct CoC for inviting EOI, and for receiving resolution plans, then to examine the same.

30. In view of the reasons aforementioned, CoC not approving to invite resolution plans will not become noncompliance of the duties of the RP because this duty will cast upon the RP only when a decision has been approved by the CoC to invite resolution plans therefore, the RP not inviting resolution plans will not tantamount to noncompliance of Section 25(2)(h) of the Code.

31. In the facts above mentioned and the reasons given above, the citations "*InderPreet Singh vs. Mariners Buildcon India Ltd. (185 (PB)/2017 dated 29.1.2018)*" and also "*Vedika Nut Crafts Pvt Ltd (IB-40(PB)/2017)*" aforementioned are not applicable to the facts of this case.

32. As to exclusion of 60 days from CIRP period, none of the applications filed by the parties can be considered as having grievance because as to RP is concerned, his only duty is to carry out the approvals given by the CoC, he cannot question that as to why CoC has not sought for extension of time, as to why CoC has not given approval for invitation of resolution plans. He is neither an Adjudicating Authority nor an officer to supervise the discretion vested with the CoC.

33. As to the application filed by suspended directors, they have no role to ask for any relief before this Bench, they may have a chance to ask in case liquidation value or at least fair value is more than the liabilities admitted by the RP. There is no whisper in respect to this aspect and it cannot be in contemplation that assets would be more than liabilities because it is the Corporate Debtor who filed section 10 petition to initiate CIRP process, it happens only when the company is not in a position to pay the liabilities of it. In any event, these suspended directors cannot have any grievance to say that if the company is opted for resolution, they would not be getting out of the company. Here the principal stakeholders are the creditors, more



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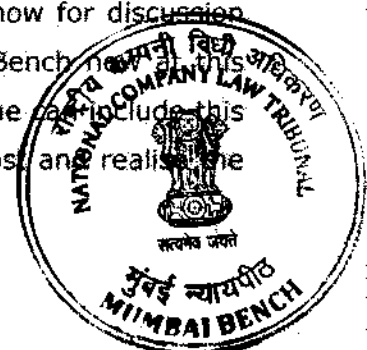
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specifically financial creditors whose interest is stuck in the Corporate Debtor, if they themselves opt for liquidation, such decision or indecision cannot be reversed so as to send it back to the CoC. Moreover, I say that this Adjudicating Authority has no jurisdiction either u/s 31 or u/s 33 to send it back to the CoC. The reason is, under Section 31 it has to either accept, reject or modify the resolution plan, under Section 33, it has to pass an order for liquidation when it is in compliance of 33(1)(a) or 33(1)(b) of the Code. Therefore, we have not found any merit in the application filed by the suspended directors as well.

34. As to application filed by a company called Clean Coal Enterprises Pvt Ltd styling itself as prospective resolution applicant, I wonder what kind of locus it has, to file this application before this Bench when the CoC has not even invited resolution plans by giving an advertisement. This application is not only devoid of any merit but also abuse of process of law.

35. As to MA 347/2018 filed by SREI Equipment Finance Ltd having 2.79% voting share in the CoC seeking exclusion of 60 days' time, its voting share will not make any difference to any of the decisions of the CoC. First its voting share is miniscule moreover whatever that is required to be done within 270 days, i.e. to go for resolution or for liquidation, that exercise has already been taken place, discussion has happened in the CoC and voting has taken place. Voting has been fractured not weighing either side. In this backdrop, law does not permit this Bench to send it back to the CoC jumping all the provisions of law. However, I make it again clear that CoC has discussed every issue accordingly, they voted therefore, whatever to be done within the CIRP period that has been done, and henceforth there is no requirement of exclusion of the period that has been mentioned in this application. In view of the same, we don't find any merit in this application filed by this financial creditor having 2.79% voting share in the CoC.

36. As to MA 194/2018 filed by the RP, whatever points he has raised in his application, have already been discussed by this Bench and observations have been made noting that nothing new has remained now for discussion except about his fees. As to his fees is concerned, this Bench at this juncture cannot give any direction to CoC to pay this RP, he cannot include this cost payable by the Corporate Debtor in the liquidation cost and realise the



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same as per the waterfall mechanism arranged under Section 53 of the Code.

37. For having all the applicants are in one chorus that 60 days' delay has been taken in RP taking charge, therefore that period is to be excluded, but if we go through the Code, it is evident that IRP, as per Section 22 (5) of the Code, will continue to function as the RP until the time, RP appointment is confirmed by IBBI. It is not the case of anybody, IRP did not continue functioning as RP until charge has been handed over to the RP. So mere RP not taking over the charge from the IRP in any way has not brought the CIRP to standstill therefore, this argument of exclusion of the period for handing over charge to RP by IRP is nothing but a myth manifested by all these applicants to deprive the CoC to realise whatever remained in the Corporate Debtor.

38. In view of these reasons, this Bench hereby orders for liquidation as stated under Section 33 with the following directions:

- a. This Bench hereby orders the Corporate Debtor to be liquidated in the manner as laid down in the Chapter by issuing a Public Notice stating that the Corporate Debtor is in liquidation with a direction to the Liquidator to send this order to RoC under which this Company has been registered.
- b. As to appointment of Liquidator, the Resolution Professional i.e. the applicant herein is hereby directed to act as a Liquidator for the purpose of liquidation with all powers of the Board of Directors, key managerial persons and the partners of the Corporate Debtor shall cease to have effect and hereby vested in the Liquidator. The personnel of the Corporate Debtor are directed to extend all co-operation to the Liquidator as may be required by him in managing the affairs of the Corporate Debtor. The Resolution Professional appointed as Liquidator will charge fees for conduct of the liquidation proceedings in proportion to the value of the liquidation estate assets as specified under Regulation 4 of Insolvency and Bankruptcy (Liquidation Process) Regulations, 2016 and the same shall be paid to the Liquidator from the proceeds of the liquidation estate under Section 53 of the Code.



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c. Since this liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the Corporate Debtor without prior approval of this Adjudicating Authority save and except as mentioned in sub-section 6 of Section 33 of the Code.

d. This liquidation order shall be deemed to be notice of discharge to the officers, employees and workmen of the Corporate Debtor except to the extent of the business of the Corporate Debtor is continued during the liquidation process by the Liquidator.

e. The moratorium declared vide order dated 4.10.2017 ceased to exist.

39. Accordingly MA 194/2018 is hereby disposed of and MA 342/2018, 347/2018 and 293/2018 are hereby dismissed. The Registry is hereby directed to communicate this order to the parties, within seven days from the date order is made available.

SD/-

RAVIKUMAR DURAISAMY
Member(Technical)

SD/-

B. S. V. PRAKASH KUMAR
Member (Judicial)



Certified True Copy
Copy Issued "free of cost"
On 31/8/2018

Assistant Registrar
National Company Law Tribunal Mumbai Bench