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**BEFORE THE AJUDICATING AUTHORITY
(NATIONAL COMPANY LAW TRIBUNAL)
AHMEDABAD BENCH
AHMEDABAD**

IA 9/2018 in C.P. (I.B) No. 5/7/NCLT/AHM/2017




Coram: **Hon'ble Mr. BIKKI RAVEENDRA BABU, MEMBER JUDICIAL**
Hon'ble Ms. MANORAMA KUMARI, MEMBER JUDICIAL

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF AHMEDABAD
BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON 15.01.2018**

Name of the Company: Vivek Vijay Gupta
V/s.
Steel Konnect (India) Pvt. Ltd. & ors.

Section of the Companies Act: Insolvency and Bankruptcy Code

<u>S.NO.</u>	<u>NAME (CAPITAL LETTERS)</u>	<u>DESIGNATION</u>	<u>REPRESENTATION</u>	<u>SIGNATURE</u>
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1.	Jaimin R. Dave	Advocate	Resp. No. 5 & 6	
2.	NAVIN PAHWA WITH RITU SHAH FOR PRITHU PARIMAL	SL. Adv ADV ADV	Applicant	
3.	NIPUN SINGHVI VISHAL DAVE	ADV	Resp No. 3	

ORDER

Learned Senior Advocate Mr. Navin Pahwa with Learned Advocate Mr. Prithu Parimal with Learned Advocate Ms. Ritu Shah present for Applicant. Learned Advocate Mr. Vishal Dave with Learned Advocate Mr. Nipun Singhvi present for Respondent No.3. None present for Respondent No.4. Learned Advocate Mr. Jaimin Dave present for Respondents No. 5 and 6 in IA 9/2018.

Order in IA 9/2018 is pronounced in open Court. Vide separate sheets.


**MANORAMA KUMARI
MEMBER JUDICIAL**

Dated this the 15th day of January, 2018.


**BIKKI RAVEENDRA BABU
MEMBER JUDICIAL**

**BEFORE ADJUDICATING AUTHORITY
(NATIONAL COMPANY LAW TRIBUNAL)
AHMEDABAD BENCH**

IA No. 9 of 2018

In

C.P. (IB) No. 05/NCLT/AHM/2017

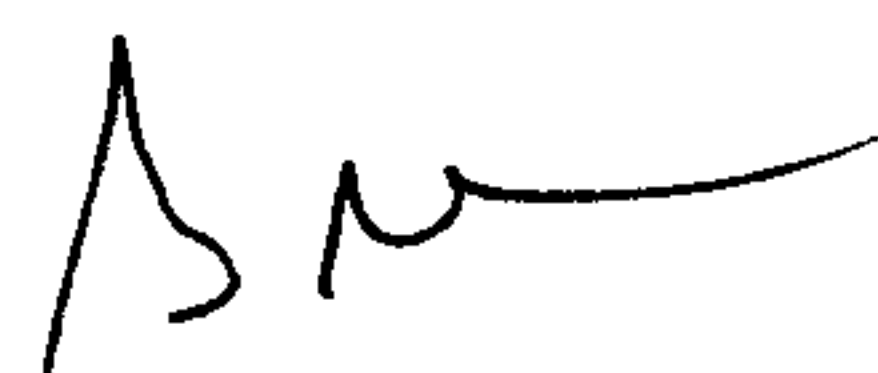
In the matter of:

Vivek Vijay Gupta
86,90,91, Sardar Patel Ring Road,
Hathijan, Ahmedabad-382445 : Applicant.
[Promoter of Corporate Debtor].

Versus

1. M/s. Steel Konnect India Pvt.Ltd.,
86,90,91, Sardar Patel Ring Road,
Hathijan, Ahmedabad-382445
2. M/s. Hero Fincorp Limited
34, Community Center,BasantLok,
Vasant Vihar,
New Delhi-110057
3. Shri R.D. Chaudhary
5A, Vardan Tower,
Nr. Vimal House,
Lakhudi Circle,
Ahmedabad-380014
4. Rare Asset Reconstruction Company
203, Gala Argos, Nr.Harikrupa Tower,
Ellisbridge Gymkhana
Gujarat College Road
Ahmedabad-380009
5. Bank of Baroda
Corporate Financial Service Branch
1st Floor, Bank of Baroda Tower,
Nr. Law Garden,Ellisbridge,
Ahmedabad-380006
6. State Bank of India
Commercial Branch,
Paramsiddhi Complex,
Ellisbridge,





Ahmedabad-380006

: Respondents.

Order delivered on 15th January, 2018.

**Coram: Hon'ble Mr. Bikki Raveendra Babu, Member (J) – And -
Hon'ble Ms. Manorama Kumari, Member (J).**

Appearance:

Mr. Navin Pahwa, learned Senior Advocate with Mr. Prithu Pariman, learned Advocate for the Applicant.

Mr. Vishal Dave with Mr. Nipun Singhvi, learned Advocate for Respondent No.3.

Mr. Lalit Patel, learned Advocate for Respondent No.4.

None present for Respondents No. 1 and 2.

Mr. Jaimin Dave, learned Advocate for Respondent No.5 and 6.

ORDER

[Per: Hon'ble Sri Bikki Raveendra Babu, Member (J)]

1. The Promoter/Director of the Corporate Debtor filed this Application seeking a direction to the Respondents to take all effective steps to ensure the Meeting of the Committee of Creditors is held and the Resolution Plan submitted by Respondent No.4/ARC is placed and considered by the Committee of Creditors and file appropriate Report before this Authority.

2. In the Reply filed by Respondent No.3/Resolution Professional, it is stated that the Resolution Plan given by Respondent No.4/ARC was placed before the Committee of Creditors ["COC" for short] on 4.1.2018 and COC rejected the said Resolution Plan. Thereupon, the Promoter/Director vide IA No. 20 of 2018 requested this Authority to treat the Draft Amendment as integral part of the IA No. 9 of 2018. In the Draft Amendment, it was proposed to amend the Memo of Application by inserting the prayer, i.e., to quash the Minutes of the Meeting of the Board of Directors dated

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4.1.2018 and to take on record the Resolution plan submitted by the Respondent No.4/ARC.

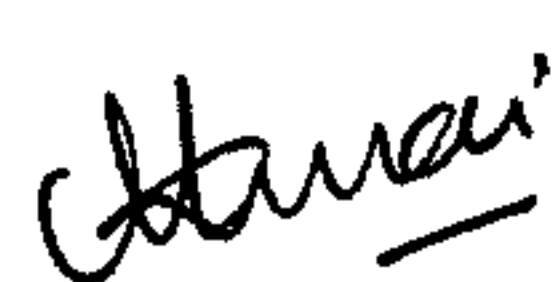
3. The Applicant is referred to as “Promoter/Director” of the Corporate Debtor, the 3rd Respondent is referred to as ‘Resolution Professional’; the 4th Respondent is referred to as “Resolution Applicant/ARC”; Respondent No.1 herein is the “Corporate Debtor”; and Respondent No.2 herein is the “Financial Creditor” who triggered the Corporate Insolvency Resolution Process by filing CP (IB) No. 5 of 2017 under Section 7 of the Code. The said CP (IB) No. 5 of 2017 was admitted by this Adjudicating Authority on 19.4.2017. The chronology of dates and events that are helpful for adjudication of the issues involved in this Application is as follows;

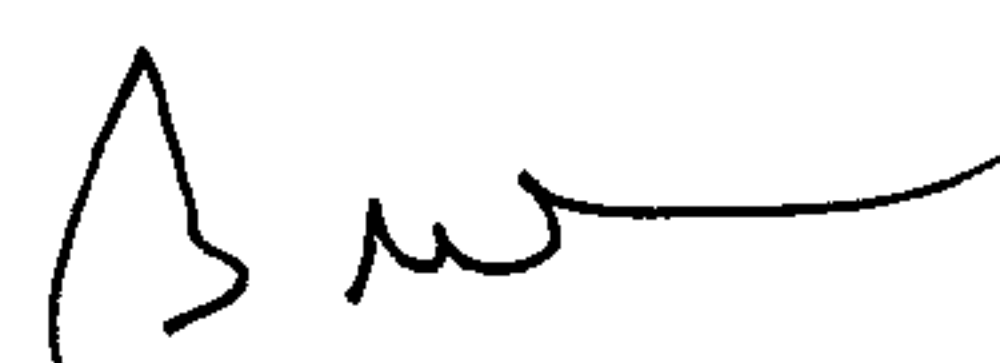
- (a) CP (IB) No. 5 of 2017 filed by Financial Creditor under Section 7 was admitted on 19.4.2017;
- (b) First Appeal preferred by the Corporate Debtor was dismissed by the Hon’ble National Company Law Tribunal on 28.9.2017;
- (c) Second Appeal preferred by the Corporate Debtor was dismissed by the Hon’ble Supreme Court of India on 3.10.2017;
- (d) The initial duration of Corporate Insolvency Resolution Process expired by 5.10.2017;
- (e) The Corporation Insolvency Resolution Process was extended for another period of 90 days and it expired on 13.1.2018;
- (f) The present Resolution Professional was appointed on 2.11.2017;
- (g) The Valuation Report was finalised on 10.11.2017 by the Resolution Professional

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- (h) The liquidation value of the Corporate Debtor was initially fixed at Rs. 39 Crores by the Resolution Professional;
- (i) The Promoters of the Company, i.e., the present Applicant and another Director submitted the Resolution Plan for Rs. 85 Crores on 25.11.2017;
- (j) In view of the Ordinance passed by the Central Government amending Section 29 of the Insolvency and Bankruptcy Code, 2016, the Resolution Plan submitted by the Promoters was rejected as they are not eligible to submit a Resolution Plan and the COC did not accept the same;
- (k) On 10.12.2017 the Resolution Professional made a publication in English daily newspapers inviting Resolution Applications on or before 20.12.2017;
- (l) On 19.12.2017 Resolution Applicant/ARC filed a Resolution Plan for Rs. 93.42 Crores;
- (m) On 30.12.2017, Resolution Professional rejected the Resolution Plan filed by the Resolution Applicant/ARC;
- (n) On 1.1.2018, Resolution Professional issued a Notice for convening meeting of the COC on 4.1.2018 with an Agenda to decide on the liquidation of the Corporate Debtor and to decide the name of the Liquidator for liquidation process;
- (o) On 2.1.2018, Resolution Applicant/ARC submitted a modified Plan to Respondent No.3 by e.Mail;
- (p) Resolution Professional requested the Resolution Applicant/ARC to forward a signed copy of the Resolution Plan to enable him to place it before the COC meeting held on 4.1.2018;
- (q) Resolution Applicant/ARC submitted the signed copy of the Resolution Plan on 3.1.2018; and





- (r) The said Resolution Plan was placed before the COC on 4.1.2018 and the same was rejected by the COC.

4. The initial plea and contention of the Promoter/Director is that the Resolution Professional did not place the Resolution Plan dated 2/3.1.2018 before the COC on 4.1.2018 but after the amendment of the prayer, the contention of the learned Senior Counsel appearing for the Promoter/Director is that the Resolution Professional after satisfying that the Resolution Plan is in consonance with the requirements of Section 30 sub-section (2) and Regulation 37 of the Insolvency And Bankruptcy Board of India (Insolvency Resolution Profess for Corporate Persons) Regulations, 2016 was placed before the COC and the COC without assigning any reason by simply saying that the Resolution Plan does not meet the criteria of the IB Code rejected the Resolution Plan although it is in the interest of the Corporate Debtor, its Promoters, Members, Financial Creditors and other Stakeholders. During the course of arguments, learned Senior Counsel appearing for the Promoter/Directors referred to Sections 30, 60 60(5), 37, 38 of the Regulation 37 of the Insolvency And Bankruptcy Board of India (Insolvency Resolution Profess for Corporate Persons) Regulations, 2016 under Section 31(1) of the Code and vehemently contended that this Adjudicating Authority has got every authority and jurisdiction to quash and set aside the decision of the COC in rejecting the Resolution Plan filed by the Resolution Applicant/ARC and this Authority can accept the Resolution Plan filed by the Resolution Applicant/ARC without ordering liquidation process.

5. There is no express provision in the Insolvency and Bankruptcy Code, 2016 ["the Code" for short] that gives authority to the Adjudicating Authority to sit over Judgment on the Resolution of the COC in rejecting a Resolution Plan. Section 31(1) of the Code gives authority to this Adjudicating Authority to approve the Resolution Plan approved by the COC. Section 31(2) of the Code gives

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authority to the Adjudicating Authority to reject the Resolution Plan if it does not conform to the requirements referred to in sub-section (2) of Section 30. The Parliament, in its wisdom, though it fit to give the authority to this Adjudicating Authority to accept the Resolution Plan approved by the COC or to reject the Resolution Plan approved by the COC but not to sit over Judgment on the Resolution of the COC in rejecting the Resolution Plan. Here itself, it is necessary to refer to Section 33 of the Code. Section 33 of the Code gives authority to this Adjudicating Authority to consider a Resolution Plan that is given before it before the expiry of Insolvency Resolution Process period or the maximum period permitted for completion of the Corporate Insolvency Resolution Process under Section 12. In case if no Resolution Plan is placed before this Adjudicating Authority before the expiry of the Insolvency Resolution Process period or the extended period, then this Adjudicating Authority has no other go except to order for liquidation. Section 33(1)(b) gives authority to this Adjudicating Authority to order liquidation in case it rejects the Resolution Plan under Section 31(2) for non-compliance of the requirements satisfied therein. Therefore, even at the stage of ordering liquidation, this Adjudicating Authority has no authority to consider a Resolution Plan that was rejected by the COC.

6. In this context, it is necessary to refer to the Background and Object-Purpose of the Insolvency Code, that is referred to by the Hon'ble Supreme Court of India in **Innoventive Industries Ltd., Vs. ICICI Bank and Anr.**,

*"49. The Hon'ble Supreme Court of India, in Innoventive Industries Ltd (Supra), has referred to the report of Bankruptcy Law Reforms Committee 2015 ("**Reforms Committee**") in order to gain an insight into why IBC was enacted and purpose for which it was enacted.*

Briefly stated the Reforms Committee examined whether in the case of a company which has committed a default in repaying its debt obligations, whereas secured creditors are able to repossess the fixed assets which are pledged with them, there are several creditors and lenders

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who are not secured lender and when default takes place lenders are able to recover only 20% of the value of debt on a Net Present Value (NPV) basis.

In short, the Reforms Committee came to the conclusion that those industries which do not have a strong asset base are being deprived of credit which makes it difficult for corporates to raise finance by issuance of long dated corporate bonds (unsecured) which are essential for most infrastructure projects.

The Reforms Committee found that where a default occurs, an unsecured lender was either to take the company into liquidation or to negotiate a debt restructuring, where the creditors accept a reduced amount on NPV basis, in the hope that negotiated value exceeds the liquidation value.

A third possibility would be to sell the firm as a going concern and pay off the creditors. Many hybrid structures of these broad categories can be envisioned.

The Reforms Committee after examination came to the conclusion that it would be better that only one forum evaluates such possibilities and makes a decision, which in opinion of the Reforms Committee was a "Creditors Committee", where all financial creditors have a vote in proportion to magnitude of debt they held.

As to what should happen to a defaulting firm, in the opinion of Creditors Committee is a business decision and only creditors should make it. The Reforms Committee also came to the conclusion that liquidation is not a viable solution because of delays in implementing liquidation process which resulted in liquidation value going down with time on account of high economic rate of depreciation. As noted at Pg.7 of Innoventive (supra) the Reforms Committee has stated:

"The Committee believes that there is only one correct forum, for evaluating such possibilities, and making a decision: a creditors committee, where all financial creditors have votes in proportion to the magnitude of debt that they hold. In the past, the laws in India have brought arms of the government (legislature, executive or judiciary) into this question. This has been strictly avoided by the Committee. The appropriate disposition of a defaulting firm

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is a business decision, and only the creditors should make it."

The Committee came to the conclusion that the creditors and debts ought to be left to decide and realise and agree on whether the entity was facing financial failure or business failure and whether it was capable of being revived. The most significant change being, that when a company defaults on its debt, control of the company should shift to creditors rather than the management who was retaining control after default.

It is apparent from a reading of the object and purpose for which IBC has been enacted is to set up an Insolvency and Bankruptcy resolution process, which has to be implemented in a strict time bound manner, by the appointment of an IRP and creation of a creditors Committee. These are powers which can be exercised only by NCLT and not by the Company Court. It is for this reason that pending the Insolvency Resolution Process a moratorium is provided for under Section 14 of IBC.

Therefore, the most fundamental distinction between the provision of the Companies Act and IBC is, whereas under the Companies Act winding up would be a manner for the Court alone to decide, under IBC, there is a paradigm shift in as much as it displaces the management of the Company and an IRP is appointed and the Creditors Committee is left to decide the fate of the company."

7. Therefore, the wisdom of the Parliament is that it is for the COC to take a business decision to reject or accept a Resolution Plan. In case if the COC accepts a Resolution Plan, then it is subject to the authority and jurisdiction of the Adjudicating Authority. As already said, no provision is made in the IB Code or in the Rules or in the Regulations that would enable or enjoin upon the Adjudicating

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Authority to sit over the Resolution of the COC in rejecting a particular Resolution Plan.

7.1 Therefore, this Adjudicating Authority is of the considered view that it has no authority or jurisdiction to interfere with the Resolution of the COC in rejecting the Resolution Plan.

8. Learned Senior Counsel appearing for the Applicant vehemently contended that when a Resolution Plan is placed before the COC by Resolution Professional it is deemed that it is in accordance with the requirements of the Code and Regulations and therefore there is no reason for the COC to reject such Resolution Plan on the ground that it is not according to the requirements or according to the provisions of the Code ~~of~~ Regulations]

8.1. Assuming that this Authority is having jurisdiction to look into the validity or otherwise of rejection of Resolution plan by COC we proceed to consider the factual aspect. Coming to the factual aspect, it has to be borne in mind that the Applicant herein and another Director in the first instance filed the Resolution Plan and that was not accepted by the COC because it is against the mandate of Section 29-A of the Code as amended by Ordinance No. 7 of 2017 of Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 of Ministry of Law and Justice (Legislative Department). Thereafter, the Resolution Applicant/ARC submitted a Resolution Plan on 20.12.2017. It is styled as "Indicative Resolution Plan". It was submitted without obtaining Information Memorandum (I.A.) and signing Non-disclosure Agreement ('NDA'). The said Resolution Plan was rejected by the Resolution Applicant. There is no grievance about the rejection of the Resolution Plan given by the Resolution Applicant on 20th December, 2017. Thereafter on 2.1.2018, unsigned Resolution Plan was submitted. It was only on 3.1.2018 the signed Resolution Plan was submitted. As can be seen from the Minutes of

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the Meeting held on 4.1.2018, the Resolution Professional obtained the legal opinion also on the Resolution Plan filed by the Resolution Applicant on 3.1.2018. The Resolution Applicant informed the COC that the Resolution Plan filed by the Resolution Applicant did not conform to the mandatory criteria and it was relied on some information which was never part of the Information Memorandum. The Resolution Professional also brought to the notice of the COC the instances that were stated in the Resolution Plan are not there in the Information Memorandum. The Resolution Professional also informed the COC that the Resolution Plan does not meet the criteria specified in IBC, 2016. From the reading of the above Minutes, it is clear that the Resolution Professional, instead of himself rejecting the Resolution Plan on 3.1.2018, placed the Resolution Plan before the COC with full information about the Resolution Plan. In fact, the Resolution Applicant could have himself rejected the Resolution Plan because he was of the opinion that the Resolution Plan is not in accordance with the provisions of the IB Code. But, instead of doing so, the Resolution Professional placed the Resolution Plan before the COC.

9. Here, it is pertinent to refer to Section 25 of the Code which deals with duties of Resolution Professional. Section 25(2)(i) reads as follows;

Duties of resolution professional

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

(a) to (h).....

(i) present all resolution plans at the meetings of the committee of creditors;

Therefore, the Resolution Professional is right in his duty in presenting the Resolution Plan dated 3.1.2018 also before the

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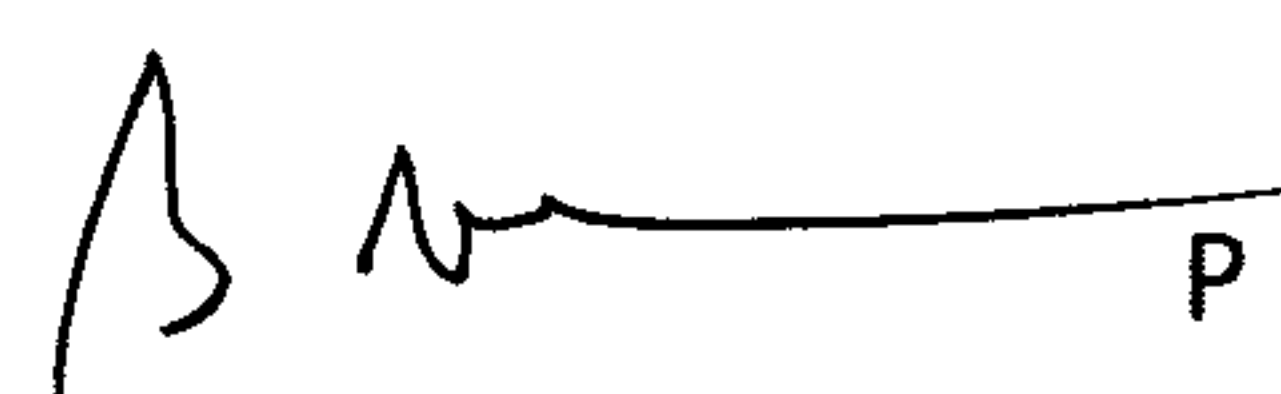
Committee of Creditors for its decision with full details and stating that the Resolution Plan does not meet the criteria specified in IBC, 2016. Further, the Regulation 39, if not totally inconsistent with Section 25(2)(i), is imposing a further duty on the Resolution Professional to scrutiny the Resolution Plan and come to a conclusion that the Resolution Plan is in accordance with Section 30 and Regulation 37 of the Insolvency & Bankruptcy (Insolvency Resolution) Regulations 2016. However, the learned Senior Counsel appearing for the Applicant contended that the Resolution Plan when once placed before the COC it is deemed that the Resolution Plan is in compliance with the requirements of the Code and relevant Regulations. This argument of the learned Senior Counsel for the Applicant does not merit acceptance, for the reason that the non-compliance of the requirements has been noted by the Resolution Professional and was brought it to the notice of the COC. Even assuming that the argument of the learned Senior Counsel for the Applicant merits acceptance, it is the duty of the Promoter/Director who filed this Application or the Resolution Applicant to satisfy this Adjudicating Authority to show that the Resolution Plan is in accordance with the requirements of Section 30 and Regulations 37 and 39. Regulation 39 require the filing of the Resolution Plan within 30 days before the expiry of the Corporate Insolvency Resolution Process period. But, in the case on hand, the Resolution Plan was filed only on 3.1.2018, whereas the Corporate Insolvency Resolution Process period was going to expire by 13.1.2018, and that too one day before the Meeting of the COC. To meet with this situation, it is contended by the learned Senior Counsel for the Promoter/Directors and learned Counsel for the Resolution Applicant that Resolution Applications were invited only on 10.12.2017 mentioning the last date as "20th December, 2017". It is also contended that Section 29 of the Code enjoins upon the Resolution Professional to furnish Information Memorandum to the potential Resolution Applicant and the same has not been done. In the case on hand, for the first time, the Resolution Applicant filed the Resolution Plan dated 19th December, 2017 on 20th December, 2017 without obtaining

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Information Memorandum. It is the duty of the Resolution Applicant if he is really intended to file a Resolution Plan to obtain Information Memorandum and basing upon it he has to file the Resolution Plan. But the Resolution Applicant did not choose to ask for Information Memorandum from the Resolution Professional. Therefore, the question of Resolution Professional providing information including the Information Memorandum to the Resolution Applicant did not arise till 20th December, 2017. In fact, on 30th December, 2017 the Resolution Professional informed the Resolution Applicant that the Resolution Plan is not based on Information Memorandum and asked the Resolution Applicant to file a Resolution Plan after obtaining the Information Memorandum and after entering into 'NDA'. Thereafter, the Resolution Applicant entered into NDA and obtained Information Memorandum and filed the signed Resolution Plan on 3.1.2018. Therefore, there is no lapse on the part of the Resolution Professional. More so, it is the Resolution Applicant who failed to act in a diligent manner and file the Resolution Plan well within time, if not within 30 days before the expiry of the Corporate Insolvency Resolution Process period. More over, the Resolution Plan filed by the Resolution Applicant contained information other than the information based on Information Memorandum. When such is the case, it is not possible for the COC to take a decision on such a Resolution Plan because they have no information about the information that has been furnished by the Resolution Applicant. Therefore, the rejection of the Resolution Plan by the COC cannot be assailed either by the Resolution Applicant or by the Promoter/Directors.

10. Further, this Application is not filed by the Resolution Applicant, but is filed by the Promoter/Director whose Resolution Plan was not accepted by the COC. It is not known what prevented the Resolution Applicant from filing this Application being the first aggrieved person because of rejection of Resolution Plan. It is contended by the learned Senior Counsel for the Promoter/Director that the Applicant being the Promoter/Director is also an aggrieved

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person. No doubt, if the Resolution Plan goes to the benefit of the Corporate Debtor and all its stakeholders, the Promoter/Directors are aggrieved persons. In fact, the Promoter/Directors were invited to the meeting of the Committee of Creditors on 4.1.2018 but they did not choose to attend. Without exhibiting how the Resolution Plan is beneficial to Corporate Debtor and all stakeholders than the liquidation of the Corporate Debtor, it is not possible to hold that the Promoter/Director is also an affected person or aggrieved person.

11. It is contended on behalf of the Resolution Applicant that no notice of the meeting of the COC was given to the Resolution Applicant. In fact, the signed Resolution Plan was submitted by the Resolution Applicant on 3.1.2018; and the Meeting was held on 4.1.2018. No doubt, there was a request by the Promoter/Director to postpone the Meeting of the COC. But that was not considered. Section 30 sub-section (5) of the Code only says that Resolution applicant may attend the meeting of the Committee of Creditors in which the Resolution Plan of the Applicant was considered. But no duty is cast upon the Resolution Professional to inform the date of Meeting of the Committee of Creditors to the Resolution Applicant. But without knowledge of the date of Committee of Creditors' Meeting it is not possible for the Resolution Applicant to attend before the COC meeting in which its application was taken up for consideration. Therefore, there is a need for the notice of the COC meeting to the Resolution Applicant, but no such notice was given. The reason may be there is only one day time gap between the date of submission of Resolution Plan and the date of COC meeting. Therefore, the non-issuance of the notice of the Meeting of the COC held on 4.1.2018 to the Resolution Applicant in this case is not fatal which requires interference of this Adjudicating Authority with the decision of the COC. Here, the COC rejected the Resolution Plan not on the ground that it is not a viable Resolution Plan, but on the ground that it is not in conformity with the requirements of the Code. On the ground that the Resolution Plan is not rejected by the Resolution Professional on



the basis that it does not confirm to the requirements of the Code and Regulations, it cannot be concluded that the Resolution Plan is in accordance with the requirements. When the information is there before the COC regarding the non-compliance of the requirements of the Code and Regulations, Committee of Creditors is perfectly justified in rejecting the Resolution Plan. Therefore, there are no facts and circumstances that warrant interference by this Adjudicating Authority in the rejection of the Resolution Plan dated 3.1.2018 submitted by the Resolution Applicant, even assuming that this Adjudicating Authority has got jurisdiction to decide the validity or otherwise of the rejection of the Resolution Plan submitted by the Resolution Applicant.

12. The Application is dismissed. No order as to costs.

Signature:



Ms. Manorama Kumari,
Member (J).
Adjudicating Authority

Signature:



Sri Bikki Raveendra Babu,
Member (J).
Adjudicating Authority

Rmr.