

**NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH**

PRESENT: HON'BLE SHRI BIKKI RAVEENDRA BABU – MEMBER JUDICIAL

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING HELD ON 12.09.2018 AT 10.30 AM

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	IA No.149,153,254/2018 in CP(IB) No.150/9/HDB/2017
NAME OF THE COMPANY	Ind-Bharat Power (Madras) Ltd
NAME OF THE PETITIONER(S)	Rohan Varma Constructions Pvt Ltd
NAME OF THE RESPONDENT(S)	Ind-Bharat Power (Madras) Ltd
UNDER SECTION	9 OF IBC

Counsel for Petitioner(s):

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature
Praveen Kumar Jain	Advocate	praveen.jain@linklegal.in	9951609066
P. Anil Mukherjee Counsel in IA 254/18	Adv	9885314234	

Counsel for Respondent(s):

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature
Amir Bavani - for COC. with Sr. Adv. S. Niranjan Reddy	Advocate	9949216962.	Amir Bavani

ORDER

Learned counsel Mr.Praveen Kumar Jain present for Petitioner. Learned counsel Mr.P.Anil Mukherjee present for Applicant in IA 254/2018. Learned counsel senior counsel Mr.S.Niranjan Reddy along with Mr.Amir Bavani present for COC.

Common order pronounced in open court.

1. IA No.153/2018 is allowed directing the Axis Bank Limited to invoke the second Bank Guarantee No. 37003020000267, dated 25.11.2011, on production of undertaking letter and the indemnity bond by the Resolution Professional representing the Corporate Debtor, as required by the Axis Bank Limited in its email, dated 05.03.2018, before 30.09.2018.

P.T.O



However, in view of the Injunction order passed by Shandong Jinan Intermediate People's Court there shall not be remittance of amount to the account of the Corporate Debtor by virtue of invocation of Bank Guarantee.

2. IA No.149/2018 is allowed directing the Resolution Professional to include the Axis Bank Limited as member of the CoC treating it as Financial Creditor with immediate effect and the Resolution Professional is further directed to verify the claims of the Axis Bank Limited based on the claim dated 08.09.2017 and as well as the revised claim dated 10.05.2018 filed before the Resolution Professional.

3. IA No.254/2018 is disposed of with the following directions:-

(a) CoC to consider the Resolution Plan/Revised Resolution Plan/Alternate payment mechanism if any filed or to be filed by the Resolution Applicant within a period of 30 days from this day by giving reasons either for rejection or approval of the Resolution Plan following the relevant provisions of the IB Code and relevant regulations.

(b) 30 days period is excluded for the purpose of counting the CIRP Process period of 270 days so as to enable the CoC to consider the Resolution Plan/Revised Resolution Plan/Alternate payment mechanism if any filed or to be filed by the Resolution Applicant and thereby allow the Resolution Professional/CoC further 30 days with

P.T.O



immediate effect (i.e., 12.09.2018) to complete
Corporate Insolvency Resolution Process.

Vide separate common order.

List IA 254/2018 on 12.10.2018 for report of RP.


MEMBER JUDICIAL

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH, HYDERABAD**

I.A.No. 254 of 2018

In

C.P.(IB)No.150/9/HDB/2017

In the matter of:

M/s. Alliance Projects,

A Partnership firm being represented by

Its authorized signatory Mr.Kodali Siva Kumar

Having its Office at Plot NO.A, No.36/1,

Gandhi Mandapam Road, Kottur Puram,

Chennai 60008.

...Applicant/

Resolution Applicant

VS

1. M/s. Ind-Barath Power (Madras) Limited,

Plot No.30A, Road No.1, Film Nagar,

Jubilee Hills, Hyderabad 500033,

Telangana.

Represented by Resolution Professional

Mr.Ashish Rathi,

Having Office at BDO India LLP,

Level 9, The Ruby, NW Wing,

Senapati Bapat Marg, Dadar(W),

Mumbai 400028.

2. Power Finance Corporation Limited,

Having its Registered Office at,

Urja Nidhi, 1, Barakhamba Lane,

Connaught Place, New Delhi,

110001.

B.N

3. Rural Electrification Corporation Limited,
Having its registered office at,
Core-4, Scope Complex, 7, Lodi Road,
New Delhi – 111003.
4. India Infrastructure Finance Company Limited,
Having its Registered Office at,
8th Floor, Hindustan Times Building,
18 & 20, Kasturba Gandhi Marg.
New Delhi – 110 001.

...Respondents

I.A.No. 149 of 2018

In

C.P.(IB)No.150/9/HDB/2017

In the matter of:

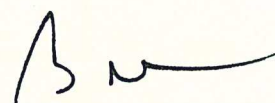
Axis Bank Limited,
Having its Registered Office at “Trishul”, 3rd floor,
Opposite Samaratheshwar Temple, Near Law Garden,
Ellisbridge, Ahmedabad-380006.

**...Applicant/
Financial Creditor**

Vs

1. Ind-Barath Power(Madras) Ltd..
Having registered office at Plot No 30A,
Road No.1, Film Nagar, Jubilee Hills,
Hyderabad-500033, Telangana
Represented by the Resolution Professional.

**...Respondent No.1/
Corporate Debtor**



2. Ashish Rathi

Resolution Professional,
BDO Restructuring Advisory LLP
The Ruby-Level 9, NW Wing
Senapati Bapat Marg, Dadar West
Mumbai – 400 028.

**...Respondent No.2/
Resolution Professional**

I.A.No. 153 of 2018

In

C.P.(IB)No.150/9/HDB/2017

Mr.Ashish Rathi,
Resolution Professional
Of Ind-Barath Power (Madras) Limited
Available at BDO India LLP,
Level 9, The Ruby, NW Wing, Senapati Bapat Marg,
Dadar(W), Mumbai 400028.

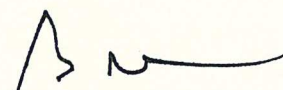
...Applicant

VS

Axis Bank Limited,
Available at Axis House,
Wadia International Centre,
Pandurang Budhkar Marg,
Worli, Mumbai-400 025.

...Respondent

Date of Order: 12.09.2018

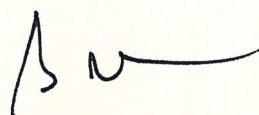


CORAM:-**Hon'ble Shri Bikki Raveendra Babu, Member
Judicial****Parties/Counsel present:-**

1. Learned counsel Mr.Praveen Kumar Jain and Mr.Hitesh Kumar present for Resolution Professional.
2. Learned counsel Mr.Avinash Desai and Ms.Kopal Saraff present for Axis Bank.
3. Learned counsel Mr.Niranjan Reddy and Mr.Amir Bavani present for COC.
4. Learned counsel Mr.Yogesh Kumar Jagia and Mr.Nitish Bandary present for Ex-Management.
5. Learned counsel Mr.P.Vikram and Mr.P.Anil Mukherji present for Resolution Applicant.

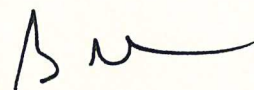
Common Order

1. IA 254/2018 is filed by the Resolution Applicant seeking approval of the Resolution Plan submitted by it which was rejected by the Committee of Creditors in its meeting held on 10.05.2018.
2. IA 149/2018 is filed by the Axis Bank Limited seeking to set aside the rejection order dated 06.12.2017 passed by the Resolution Professional and reconfirmed by email dated 13.12.2017 rejecting the claims of the Axis Bank



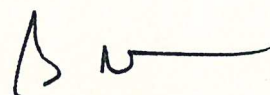
Limited for a sum of Rs.56,93,63,500 and interest at 18.80% pa on the invoked Bank guarantee of Rs.45Crores as being incorrect, illegal, arbitrary and consequently allow the claim of the Applicant of Rs.79,22,45,260 as submitted in the Revised Form C and with a prayer to request the Axis Bank Limited in the COC of the Corporate Debtor.

3. IA 153/2018 is filed by the Resolution Professional seeking direction to the Axis Bank to initiate invocation of Bank Guarantee bearing number: 37003020000267 for an amount of USD 68,46,000.
4. The brief facts that are necessary for the disposal of all these three Application are as follows:-
5. This Adjudicating Authority by its Order dated 14.08.2017 made in CP(IB) No.150/9/HDB/2017 commenced the CIRP Process in respect of Ind-Barath Power(Madras) Limited herein after referred to as Corporate Debtor.
6. The Resolution Professional on 03.05.2018 published invitation for Expression of Interest to submit Resolution Plan for the Corporate Debtor.
7. The Resolution Applicant submitted the Resolution Plan on 06.05.2018.
8. The Resolution Plan came up for consideration before the COC meeting held on 08.05.2018. In the said meeting of COC Power Finance Corporation Limited(PFCL), Rural Electrification Corporation Limited(RECL) and India Infrastructure Finance Company Limited(IIFCL) were present.

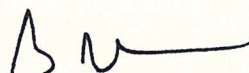


9. The Resolution Applicant was also present along with its team members in the said meeting.
10. In the said meeting the CoC asked the Resolution Applicant to come back with revised plan.
11. In the COC meeting held on 10.05.2018, the Resolution Plan submitted by the Resolution Applicant for the Corporate Debtor was rejected by all the three Financial Creditors (PFCL, RECL, IIFCL) present in the COC.
12. The case of the Resolution Applicant in IA 254/2018:-

It is stated by the Resolution Applicant that it belongs to Alliance Group and the group had a turnover of Rs.250 Crores with a profit after tax of Rs.30 Crores in Financial year ended 31.03.2018.
13. It is also stated that the Resolution Applicant completed the Real Estate Projects of approximately 35 Lakhs sq.ft. (3.5 million Sq. Ft.) and it is having land parcel of approximately 75 Acres of urban land.
14. The Applicant in view of the fact that statutory period of 270 days of the CIRP expired by 10.05.2018 made an effort to know the outcome of its plan but it cannot get any information on minutes of COC held on 10.05.2018.
15. Then the Resolution Applicant approached this Authority by filing CA 150/2018 on 11.05.2018 with a prayer to issue direction to Resolution Professional to place on record the minutes of meeting of COC held on 10.05.2018.

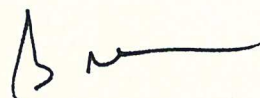


16. After notice on the Application was send to the Resolution Professional, minutes of the meeting of COC was provided to the Resolution Applicant.
17. The Resolution Applicant filed IA 198/2018 seeking the permission to modify prayer in IA 150/2018. But there after without prejudice to its rights, Resolution Applicant withdrew the IA 150/2018 and IA 198/2018 with a liberty to file a fresh Petition challenging the rejection of the Resolution Plan. That is how the IA No.254/2018 came to be filed.
18. According to the Resolution Applicant the COC in their meeting held on 10.05.2018 in the agenda no.15 without assigning any reason or justification rejected the Resolution Plan submitted by the Resolution Applicant having informed the Resolution Applicant that they would further discuss the issue of proposal to discontinue/drop the criminal proceedings being initiated against the Corporate Debtor among themselves but no such discussion has been recorded in the minutes of meeting.
19. Further according to the Resolution Applicant, the Resolution Plan has been rejected by the COC only on the non-germane ground of insistence to continue with the criminal proceedings initiated by members of COC against the Corporate Debtor although no case has been so far registered or FIR has been registered on the complaint filed by COC with Economic Offence Wing, Delhi Police.
20. It is stated that no criminal proceedings can be initiated against the Company being



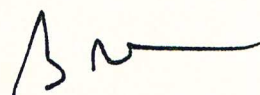
acquired/amalgamated although the criminal proceedings can be initiated against the erstwhile management and officers in default as was upheld by the Hon'ble Supreme Court.

21. COC filed the counter. It is stated that the Adjudicating Authority can only consider and approve the Resolution Plan which is approved by the COC and it has no Authority to approve a plan rejected by COC.
22. It is also the case of the COC that Section 30 of the IBC empowers the COC to accept or reject a Resolution Plan after examining the feasibility and viability of the Resolution Plan.
23. It is also stated that the Code does not provide that COC ought to record or disclose the reasons for accepting or rejecting a Resolution Plan.
24. It is stated that the COC is not a Judicial/Quasi-Judicial Authority that is settling the rights or liabilities of a person, but is carrying out a purely commercial function in considering and accepting or rejecting, as the case may be of a Resolution Plan.
25. It is further stated that COC is not a body, but a group of individual creditors by exercising their right to vote whether approve or reject the Resolution Plan and therefore, the question of giving reasons for acceptance or rejection of the Resolution Plan does not arise.
26. It is also stated that Regulation 39 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides for Approval



of the Resolution Plan and such Resolution Plan approved by COC shall be submitted to the Adjudicating Authority by the Resolution Professional and therefore, complete liberty is given to the COC in the matter of acceptance or rejection of the Resolution Plan.

27. The COC denied the averments that it rejected the Resolution Plan submitted by the Resolution Applicant in its meeting held on 10.05.2018 on the sole ground for not accepting the proposal of dropping the criminal proceedings being initiated by the Financial Creditors against the Corporate Debtor.
28. It is stated that the decision of the COC is also based upon the viability of the Resolution Plan in as much as the debts of the Corporate Debtor is concerned.
29. The Resolution Plan is also rejected on the ground of treatment of recoveries to be made from the affiliates and other parties.
30. It is further stated that the Resolution Applicant initially offered Rs.202 Crores as detailed in their Resolution Plan, to build a solar power project at the factory site of the Corporate Debtor.
31. The Resolution Applicant came up with an alternative plan in which the fixed consideration offered by the Resolution Applicant was reduced to Rs.102 Crores besides any recovery by the Resolution Applicant from the Related Group Companies of the Corporate Debtor would be shared in a ratio of 50:50 between the Resolution



Applicant and the COC members until a specified period of 3 years.

32. Two scenarios have been placed by the Resolution Applicant-

(i) Giving a lump sum of Rs.202 Crores with conditions and

(j) Rs.102 Crores with conditions.

The comparative analysis of Plan A and B are as under:-

Rs. In Crore	Plan A (Existing Plan already submitted by Resolution Applicant)	Plan B (New alternate plan for discussion purpose only)
Payment of CRP cost	4	4
Payment towards statutory Creditors	2	2
Payment of Firm commitment amount to Secured Financial Creditors	196	96
Sharing of any recovery (less recovery expenses from Runh Power Corporation	100%	100%
Would Corporate Debtor pursue recovery of claims against erstwhile group companies (Rs.578 Crores and Sokeo (Rs.351 Crores))(together defined as "Specified Claims")	Yes	Yes
Sharing of any recovery	No	50% of recovered

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amount (less recovery expenses) against Specified Claims with the secured Financial Creditors		amount less recovery expenses
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Either of the two plans is not acceptable to COC.

33. The Resolution Applicant did not give any guarantee or assurance of recovery of the debts. The Resolution Applicant came up with a proposal to pursue any criminal proceedings against the erstwhile promoters of the Corporate Debtor in accordance with the Applicable Law without any resource or liability on the Corporate Debtor or the Resolution Applicant. According to the COC, it is a matter of constraint for them.
34. It is stated that the Resolution Applicant should have taken steps to recover the loans and advances due to the Corporate Debtor.
35. According to the COC, if the Resolution Plan is accepted, it would lead to abatement of legal and penal proceedings against the Corporate Debtor, who has defrauded the Financial Creditors to the extent of Rs.947.71 crores.
36. It is stated by the COC that the Resolution Plan was not acceptable to the Respondents on economic considerations also. The relevant extract of the meeting of COC held on 10.05.2018 is as follows:-

“The revised plan was discussed among members of COC and RA, and the discussions mainly included the payment to lenders of the money, which may be recovered from the group

companies and from Sokeo Power, alternate payment plan proposed by RA, source of funds and issues relating to continuity of criminal proceedings initiated by members of COC. Regarding the issue of payment to lenders from recoveries from group companies, etc., the RA clarified that in this regard it proposes an alternative payment mechanism in which the fixed consideration offered by it is lesser, but any recovery by the RA would be shared in a ratio of 50:50 between the RA and the members until a specified period. On the issue of continuity of criminal proceedings against the Corporate Debtor, the RA clarified that it is not willing to accept the position that once the Corporate Debtor is acquired by the RA, such proceedings can be continued against the Corporate Debtor by the members.”

37. It is stated that the Resolution Plan was not confirmed with a bid document as per Clause 1.11.3.

Clause 1.11.3

“The bidder shall furnish the proof of availability of readily available funds to satisfy the upfront portion of the settlement amount (including commitment letter/sanction letter/any other document acceptable to Resolution Professional/COC).”

38. It is stated that as per Clause 3 of the Bid Document the successful Bidder shall be required to comply with the following conditions:-
“3.1 Obtaining requisite Statutory and Regulatory Approvals

The Successful Bidder shall obtain all the relevant statutory and regulatory approvals required under Applicable Law for the Proposed Transaction upon acceptance of the Qualified Plan by the Adjudicating Authority.

Execution of Definitive Agreements

The Successful Bidder shall, upon approval by the Adjudicating Authority, execute Definitive Agreements as may be applicable and shall further comply with the conditions set out there in within the stipulated timelines.”

39. It is also stated that it is the duty of the Resolution Applicant to obtain requisite statutory ad regulatory approvals.
40. It is stated that the Resolution Applicant is also seeking extinguishment of all claims against the Corporate Debtor, including criminal proceedings, encumbrances, income tax dues, indirect taxes including excise, service tax, customs, sales tax, GST, TDS/TCS, duties, penalties, fines and also deemed waiver by Govt. authorities of all the penalties and fees for arising out of non-compliance of Corporate Debtor etc.
41. It is stated by the COC that, since the plan was conditional it was rejected.
42. In the rejoinder, it is stated that the Resolution Applicant satisfied by the conditions of Section 30(2) and the Resolution Plan has been rejected in whimsical manner.
43. It is stated that the contention of the COC that it is not bound to follow principles of natural

justice being non quasi-Judicial Authority is contrary to the fundamentals of the Constitution of India as held by Hon'ble Supreme Court in C.B.Gautam Vs. Union of India (1993) 1 SCC 78. It is stated that the COC exercise powers conferred by IB Code and hence they are duty bound to follow principles of natural justice.

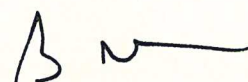
44. The Resolution Applicant in the Application itself stated that the Resolution Applicant has no objection for continuation of proceedings against the erstwhile Management of the Corporate Debtor.

Facts in IA No.149/2018

45. The brief facts that are necessary for the disposal of IA No.149/2018 filed by Axis Bank Limited are as follows:-
46. Ind-Barath Power Infra Limited (IBPIL) requested the Axis Bank Limited to lend and advance additional credit facilities (Bank guarantee Facility) aggregating to Rs.200,00,00,000/- for its business purpose. Accordingly, the Axis Bank Limited granted the said credit facility to IBPIL on the terms and conditions contained in the sanction letter dated 15.02.2010.
47. The Bank Guarantee Limit was subsequently reduced to a limit of Rs.93.37 crores vide sanction letter dated 04.04.2016.
48. In the above said Sanction Letters, IBPIL has agreed that it shall continue to be the primary obligor at all times for the said Bank Guarantees.

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49. The Sanction Letter permitted IBPIL's subsidiaries and associate companies to utilize the said guarantee limits. The Sanction Letters also require a corporate guarantee to be provided by the Corporate Debtor/Ind-Barath Power(Madras) Limited in favour of the Axis Bank Limited in unequivocal terms.
50. Accordingly, the Corporate Debtor in consideration of the Axis Bank Limited extending credit facilities to its holding company IBPIL, its subsidiaries and associates, including the Corporate Debtor as IBPIL's subsidiary SPV, executed a Deed of Guarantee dated 16.02.2010 for an amount of Rs.200 crores in favour of the Axis Bank Limited, wherein *inter alia* the Corporate Debtor undertook to pay the Axis Bank Limited the outstanding amounts in case of delay by IBPIL in paying the amounts.
51. Pursuant to the Sanction Letter, the Corporate Debtor, being subsidiary/SPV of IBPIL, executed an undertaking in favour of the Applicant on 16.02.2010, signifying its intent to avail the Bank guarantee Facility and also creating subservient charge in its assets and cash flows. The Corporate Debtor also executed a 'Counter Indemnity for Guarantee Limit' on 16.02.2010 in favour of the Axis Bank Limited. The Corporate Debtor also agreed to pay and indemnify the Axis Bank Limited with respect to all amounts that may be payable by the Axis Bank Limited under related deed or documents.
52. At the request of the Corporate Debtor, the Axis Bank Limited had issued bank guarantee (BG

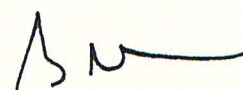


No.00300100000181) dated 19.02.2010 for Rs.45 crores in favour of Power Grid Corporation India Limited (PGCIL) and bank guarantee (BG No.00300100000194) dated 07.05.2010 for Rs.11.78 crores in favour of Coal India Limited (CIL), on behalf of the Corporate Debtor.

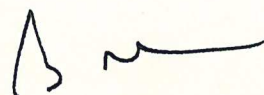
53. Axis Bank Limited also issued (BG No.00300100000182) dated 19.02.2010 for Rs.30.80 crores on behalf of Ind-Barath Energy (Utkal) Limited in favour of PGCIL and bank guarantee (BG No.16340100001289) dated 18.02.2013 for Rs.20,00,000 on behalf of M/s. Arkay Energy (Rameswaram) Limited in favour of The President of India, through the Commissioner Customs, Customs House, Tuticorin.

54. The PGCIL invoked the bank guarantee of Rs.45 crores on 28.08.2017, i.e., after the initiation of CIRP process and the Axis Bank Limited was constrained to make the payment to PGCIL on 30.08.2017. The said amount is due and payable by the Corporate Debtor to the Axis Bank Limited. The said amount carries an interest @18.80% p.a. till the date of payment.

55. On 29.08.2017, the IRP issued a public announcement inviting claims against the Corporate Debtor. On 08.09.2017, the Axis Bank Limited submitted its claim as a Financial Creditor as required in Form C under Regulation 8 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 to the IRP.



56. Subsequent to the submission of the claim by Axis Bank, IRP vide email dated 19.09.2017 informed the creditors including the Axis Bank Limited about the first Committee of Creditors meeting to be held on 25.09.2017 and shared the Minutes of the first meeting of the Committee of Creditors vide email dated 27.09.2017 with the Axis Bank Limited. Thereafter, vide email dated 04.12.2017 the RP also shared the minutes of the meeting of the second Committee of Creditors Meeting.
57. Subsequently, Ashish Rathi/Respondent No.2 was appointed by the Committee of Creditors as the Resolution Professional (RP) and approved by this Adjudicating Authority vide its order dated 18.10.2017.
58. On 06.12.2017, the Resolution Professional/Respondent No.2 addressed an email to the Axis Bank Limited rejecting the claims of the Applicant as a Financial Creditor on the following grounds:-
- (i) From a joint reading of Sanction Letter and Balance Confirmation dated September 30, 2014, it is understood that the BG facility was **advanced by Axis to IBPIL** and not IBPML and accordingly **IBPIL** on September 30, 2014 **confirmed the balance due from them to Axis Being approx.. Rs.101 Crores;**
- (ii) From the Invocation Letter issued to IBPIL, it is understood that the bank guarantee in favour of PGCIL **was invoked by PGCIL on August 30, 2017** which is after the CIRP Date i.e. August 14, 2017;



(iii) From the perusal of corporate guarantee dated February 16, 2010 executed by IBPML, it is understood that IBPML guaranteed payment of the outstanding amount (payable by the Borrower i.e. IBPIL) to Axis, **if the Borrower (IBPIL) defaults in payment of amount or otherwise;**

(iv) From the perusal of Counter Indemnity by IBPML, it is understood that IBPML agreed to pay to Axis **on its first demand**, all the amounts which Axis may have to pay in connection with the deeds.”

59. The Resolution Professional also disallowed the Axis Bank Limited from participating and/or exercising any right as the member of the committee of creditors of the Corporate Debtor.
60. Axis Bank again requested the Resolution Professional for considering its claim vide email dated 12.12.2017. The Resolution Professional vide its email dated 13.12.2017 refused to accept the claim of the Axis Bank Limited.
61. According to the Axis Bank Limited the findings given for the rejection of the claim filed by it are completely arbitrary, based on erroneous grounds and are misconceived in law. The order of rejection is bereft of any reasoning and vague.
62. It is stated that although Sanction Letter is in favour of the IBPIL, the Sanction itself permits the subsidiaries and associate companies of IBPIL to utilize the credit facilities. Moreover, the Corporate Debtor itself had availed the Bank Guarantee limit as a Special Purpose Vehicle.

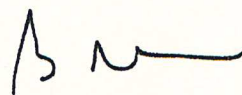
63. The Corporate Debtor itself had furnished a Counter Indemnity in favour of the Axis Bank Limited. Had the terms of the Sanction Letter and the financial documents together are taken into consideration by the RP, he would not have rejected the claim filed by the Axis Bank Limited.
64. It is further stated that, there is no prohibition in law barring PGCIL from invoking the bank guarantee after the initiation of CIRP Process i.e., after 14.08.2017. It is settled position of law that Bank Guarantees can be invoked during the moratorium period. As a natural corollary, a claim of the Financial Creditor on the basis of such invocation of bank guarantee by the beneficiary after admission of the company petition is also tenable in law.
65. The claim of the Axis Bank Limited related to the following:-
- a. Amount paid to PGCIL under the invoked BG(i.e. 45 Crores) plus interest thereon;
 - b. Amount of Rs.11.78 Crores for which the BG has already been issued in favour of PGCIL for which the Applicant has a right to recall this money and which the Corporate Debtor has no right to stop invocation of;
 - c. The amount payable by the Corporate Debtor towards the margin money for the bank guarantees and interest thereon.
66. Axis Bank is claiming the amounts with respect to which the Bank Guarantees were issued on behalf of IBPIL/ its subsidiaries.

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67. It is stated that, it is not necessary that Financial Debt be due as well as payable before a claim in respect thereof can be admitted and that a claim would itself be sufficient for the purpose of admission and collation of the list of creditors under the Code.
68. It is further stated that there is a different threshold for an application U/s.7 of the Code seeking to trigger the Insolvency Resolution Process and a creditor simply seeking i.e., claim can be taken into account during the Insolvency Resolution Process.
69. It is also stated that the Counter Indemnity in unequivocal terms specifies that the Corporate Debtor is liable to pay the Axis Bank Limited, all those amounts which the Axis Bank Limited may have to pay in connection with/on account of the defaults of the Corporate Debtor as stipulate in the relevant documents.
70. The obligation of the Corporate Debtor under the Counter indemnity is clearly classified as Financial Debt under the Code.
71. It is stated that the RP was obligated to determine the claim of the Axis Bank Limited as a Financial Creditor of the Corporate Debtor as per the provisions of the Code.
72. Due to the rejection of the claim of the Axis Bank Limited it was deprived for representation in the Committee of Creditors constituted by the RP and consequently denied participation in the decision making process in relation to CIRP process of Corporate Debtor.



73. On 10.05.2018 the Applicant issued the Form C with amended claims to the RP vide its email dated 10.05.2018. The revised Form C issued on 10.05.2018 reflects a total claim amount of Rs.79,22,45,260, on the basis of four bank guarantees including the aforesaid bank guarantees of Rs.45 crores and Rs.11.78 crores.
74. The third bank guarantee (BG No.00300100000182) dated 19.02.2010 for Rs.30.80 crores as mentioned in Annexure II of the Revised Form C on behalf of Ind-Barath Energy (Utkal) Limited in favour of PGCIL. PGCIL invoked the bank guarantee of Rs.30.80 crores on 24.10.2017 i.e., after the initiation of CIRP process and after the Axis Bank had already submitted the initial Form C. The said amount immediately became due and payable by the Corporate Debtor to the Axis Bank in terms of the Corporate Guarantee. The said amount carried an interest at the rate of 18.80 % p.a. till the date of recovery.
75. The fourth bank guarantee (BG No.16340100001289) dated 18.02.2013 for Rs.20,00,000 as mentioned in Annexure II of revised Form C dated 10.05.2017, was issued by the Axis Bank Limited on behalf of M/s.Arka Energy (Rameswaram) Limited in favour of The President of India, through the Commissioner Customs, Customs House, Tuticorin.
76. The said Bank Guarantee can be automatically renewed until cancelled or revoked by the custom Authorities.



77. It is stated that during the Resolution process any Resolution Plan ought to take into consideration all the debts owned by the Corporate Debtor and not only the debt which may be due and payable immediately. The Resolution Plan itself is open to challenge for not being in compliance with the Code on the ground that Axis Bank's rights were prejudiced.

78. In case Axis Bank Limited is not allowed to become a member of the CoC it would have no recourse against the Corporate Debtor.

79. The Resolution Professional filed a counter in IA 149/2018.

80. In the counter, the Resolution Professional gave a list of events leading to the rejection of the claim of Axis Bank:

S.No	Date	Event
1	08.09.2017	Applicant filed their claim with the IRP
2.	30.10.2017	Receipt of copy of order dated 18.10.2017 of the Hon'ble National Company Law Tribunal, Hyderabad Bench, (Hon'ble Tribunal appointing Mr.Ashish Rathi, the Resolution Professional of Corporate Debtor to replace the IRP.
3.	03.11.2017	Resolution Professional wrote to Applicant seeking additional documents for verification of the claim.
4.	06.11.2017	Resolution Professional sent a reminder email for the information requested on

		03.11.2017
5.	15.11.2017	Resolutions Professional wrote to Applicant seeking additional documents for verification of the claim.
6.	16.11.2017	Applicant responded to the queries of Resolution Professional and submitted the relevant documents sought.
7.	16.11.2017	Conference call between the Resolution Professional and his team and Resolution Professional's Legal Counsel and Officials of Applicant to discuss the claim submitted by the Applicant.
8.	06.12.2017	Resolution Professional wrote to the Applicant informing the Applicant that as per the verification done and in terms of the legal opinion received, the Applicant's claim does not meet the requirements provided under the Code and relevant regulations.
9.	12.12.2017	Applicant replied to Resolutions Professional's email dated 06.12.2017, expressing their discontent at not being considered as a financial creditor.
10	13.12.2017	The Resolution Professional replied to the Applicant's email dated 12.12.2017, reiterating the view in relation to the claim of the Applicant as stated in the email dated 16.12.2017. However, the Resolutions Professional assured that in the event (additional) documents/clarification/orders are

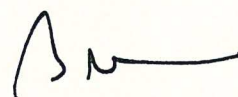
		furnished and are found to be in order he would analyse the same and convey his understanding/views to the bank.
11.	10.05.2018	Applicant sent an email to the Resolution Professional at 7 PM (i.e., <u>after the closure of the CoC meeting, wherein the only resolutions plan as received was unanimously rejected by the CoC</u>) thereby filing its claim relating t the same bank guarantee facility availed by IBPIL, which included the claim amount earlier claimed by the Applicant.
12.	11.05.2018	This Application was filed by the Applicant.
13.	13.05.2018	Resolution Professional responded to the Applicant that since the new claim was sent to the Resolution Professional after the voting on the resolution plan, thus in terms of Regulation 12(2) of the CIRP Regulations it could not be considered.

81. It is stated by the Resolution Professional that no demand letter was ever issued By the Axis Bank to the Corporate Debtor either under the corporate guarantee or under the counter indemnity. Moreover, the demand letter was issued by Axis Bank to IBPIL as it was the borrower.

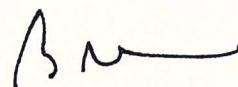
82. It is further stated that the Sanction Letter dated 15.02.2010 and the revised sanction letter dated 04.04.2016 did not stipulate any condition

requiring issuance of a corporate guarantee and counter indemnity by the corporate debtor.

83. On the other hand the sanction letter require a corporate guarantee from IBPIL in respect of guarantee limits, if any, utilized by the subsidiaries/associates of IBPIL.
84. In the counter indemnity dated 16.02.2010 executed by IBPIL show it is IBPIL which is under obligation to make payment of amounts due in relation to the bank guarantee facilities.
85. The Resolution Professional referred to the decision of the Principal Bench, New Delhi in the matter of Axis Bank Vs. Edu Smart Services Private Limited and the decision of NCLT, Allahabad Bench in the matter of Export-Import Bank of India Vs. JEKPL Private Limited.
86. It is said that in the above said decisions it is held that the corporate guarantee which has not been invoked before commencement of insolvency process cannot be considered as a debt.
87. It is further stated that the claim of the Axis Bank was received after the meeting of the COC on 10.05.2018 had been concluded, wherein, the Resolution Plan was rejected.
88. It is stated by the Resolution Professional that the corporate guarantee even if executed, was executed by the Corporate Debtor in consideration of the Axis Bank having extended the Bank Guarantee facilities to IBPIL and not to its subsidiaries or associates or the Corporate Debtor.



89. It is also stated that in terms of the corporate guarantee, the corporate debtor undertook to pay the Axis Bank the outstanding amounts in case of delay by IBPIL, instead only in the event of default of the IBPIL and on demand by Axis Bank, the Corporate Debtor undertook to pay the same.
90. Further, the Resolution Professional stated that the repayment of credit facilities was never the obligation of the Corporate Debtor.
91. The Bank guarantees issued by the Axis Bank on behalf of Ind-Barath Energy(Utkal) Limited and/or Arkay Energy (Rameswaram) Limited are neither related to the Corporate Debtor nor is the Corporate Debtor privy to such bank guarantees and hence any contention of the Axis Bank relating to such bank guarantees requires no response from the Resolution Professional.
92. The Resolution Professional stated that the claim of the Axis Bank was rejected on 06.12.2018 but Axis Bank requested for reconsideration of the claim, without submission of any additional information.
93. IT is also stated by the Resolution Professional that a person cannot be guarantor for his own liability and therefore, the Corporate Debtor executing the Corporate guarantee and indemnity is against the basic principles of Contract Law.
94. It is also stated by the Resolution Professional that after the commencement of the Insolvency Resolution Process bank guarantees cannot be invoked as it falls within the purview of



enforcement of security interest which is suspended by the Section 14 of the Code.

Facts in IA No.153/2018

95. The case of the Resolution Professional in IA No. 153/2018 is as follows:-
96. The Corporate Debtor availed loan of approximately Rs.9,47,71,00,000 Crores from the Banks and Financial Institutions for the purpose of constructing and implementing a 660 MW coal base thermal power project located near Thoothukudi, Tamil Nadu.
97. The Banks, Financial institution and the existing lenders are the members of the COC.
98. China Construction Bank Corporation Shan Dong Branch issued two bank guarantees in favour of the Corporate Debtor on the request of Runh Power Corporation Limited earlier known as Shandong Runh Power Engineering Technology Co Ltd in relation to the Supply Agreement for 1 No.660 MW BTG dated 31.08.2010 executed between the Corporate debtor and Ruhn. In terms of Supply Agreement it was required to supply boiler turbine generator with auxiliaries within 24 months from the date of signing of the supply Agreement.
99. In terms of clause 4 of the Supply Agreement, Ruhn was required to provide advance bank guarantee for getting an advance payment of 5 % of the contract price. Consequently, the bank guarantee dated 22.09.2014, for an amount of USD 4,564,000 expiring on 30.09.2018 and the bank guarantee dated 25.11.2011 for an amount

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of USD 6,846,000 expiring on 30.09.2018 were arranged to be issued in favour of the Corporate Debtor by Runh for receiving the said advance payment which was duly received by it.

100. In terms of the Bank Guarantee the Corporate Debtor could invoke the bank guarantees by sending a demand in written payment request declaring that Runh is under default of the terms of the supply Agreement. Since, the work under the Supply Agreement has not been completed in the stipulated time as mentioned above the Resolution Professional of the Corporate Debtor was desirous to invoke the both the bank guarantees provided by Runh for the benefit of the Corporate Debtor.

101. The Resolution Professional vide email dated 16.02.2018 had sent letter to Axis Bank for initiating the invocation for the bank guarantees and also submitted hard copies of all the document as and when requested by the Axis Bank. Pursuant to which Axis Bank sent the swift message for invocation to China Bank for the First BG on 25.02.2018.

102. The Resolution Professional requested to Axis Bank to send the invocation request to China Bank through its email dated 22.02.2018. Pursuant to which Axis Bank communicated to China Bank that the request of invocation was presented on 25.02.2018 and that china Bank has not released the payment so far.

103. China Bank did not reject or communicate any deficiency in the demand for invocation within 5 days.

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104. Axis Bank sent another reminder on 05.03.2018 for processing the credit of the bank guarantee amount into the account of the Corporate Debtor.
105. The second bank guarantee was originally advised on Bank of Baroda, Mumbai, Fort Branch. The Corporate Debtor did not have any banking transactions with Bank of Baroda, therefore the invocation of bank guarantee was take up by the corporate debtor with the Axis Bank.
106. Since the bank guarantee was not advised on their name, Axis Bank sought a set of documents as below:-
- (i) Swift Copies of the Bank Guarantees, authenticated by Bank of Baroda.
 - (ii) Indemnity cum Undertaking from the Applicant indemnifying Axis Bank against any future claims/losses.
 - (iii) Undertaking from the Applicant stating he will not approach any other bank for the invocation.
 - (iv) Letters requesting invocation sent to China Bank.
107. The Resolution Professional sent repeated communications to Axis Bank for sending request for invocation of Second BG to China Bank vide email dated 26.02.2018, 27.02.2018, 06.03.2018, 19.03.2018, 22.03.2018. The Resolution Professional also send another email dated 24.03.2018 requesting Axis Bank to

comply with the request for invocation of the Second BG despite reminders Axis Bank has not initiated the process in invocation of Second BG for an amount of USD 68,46,000.

108. Axis Bank informed Resolution Professional that injunction order was passed by the Jinan Intermediate Court which bars China Bank from remitting the amounts under the said bank guarantees to the account of the Corporate Debtor.

109. The injunction order did not put any restriction on the Corporate Debtor or Axis Bank from invoking the bank guarantees.

110. It is also stated by the Resolution Professional that a per Section 17(1)(d) of the Code, Axis Bank shall act as per his advice.

111. The Axis Bank filed counter. It is stated that the process for invocation of the second Bank Guarantee for an amount of USD 6,846,000 cannot be initiated by Axis Bank as it was not acting as the Advising Bank and as the Corporate Debtor and the Resolution Professional of the Corporate Debtor failed to produce the original copy of the bank guarantee despite a specific request by Axis Bank.

112. IT is stated by the Axis Bank that a request of Resolution Professional, Axis Bank sent a Swift message for invocation of the First Bank Guarantee on 25.02.2018. The Axis Bank sent a reminder for invocation of the First Bank Guarantee on 05.03.2018.

113. The Resolution Professional is not seeking any relief in respect of First Bank Guarantee.
114. It is stated by the Axis Bank that the Second Bank Guarantee was advised on Bank of Baroda, Mumbai, Fort Branch and not on Axis Bank.
115. It is stated by the Axis Bank that the Resolution Professional can approach Bank of Baroda for invocation of the Second Bank Guarantee.
116. It is stated by the Axis Bank that it had never agreed to invoke the Second Bank Guarantee which was originally advised on Bank Of Baroda.
117. The Resolution Professional vide email dated 27.02.2018 communicated scanned copies of the allegedly authenticated SWIFT of the aforesaid bank guarantees which were said to be obtained from Bank of Baroda.
118. The Axis Bank by its email dated 27.02.2018 clearly pointed out that they would require the original swift copies sent by China Construction Bank to Bank of Baroda and further advised by Bank of Baroda to the beneficiary in order to proceed further on the same.
119. It is stated by the Axis Bank that as per Bank of Baroda email dated 27.02.2018 the Original SWIFT copies was said to have been handed over by Corporate Debtor when they were received at the time of executing the Bank Guarantee.

120. The Axis Bank by its email dated 27.02.2018 clearly stated that they could not proceed with the invocation of the second bank guarantee without the Original Copy of the Bank Guarantee.
121. The Axis Bank only requested the Resolution Professional to give undertaking and indemnity only to take the discussion forward and to explore the possibility of accepting the request of the Resolution Professional. The Axis Bank has to accepted the indemnity and undertaking issued by the Resolution Professional as sufficient to proceed with the invocation of the Bank Guarantee.
122. The email dated 05.03.2018 issued by the Axis Bank makes it clear that on receipt of the indemnity and undertaking the Axis Bank would take up the matter internally and confirm. The Axis Bank never agreed to invoke the Bank Guarantee on the basis of the undertaking or indemnity given by the Resolution Professional.
123. It is stated by the Axis Bank that in case of fraudulent invocation of the Bank Guarantee or any other issue arising out of the invocation of the Bank Guarantee, the Axis Bank would leave itself open to potential litigation by vouching for the veracity of the Written Statement of invocation, particularly in the absence of the Original Copy of the Second Bank Guarantee.
124. The Axis Bank stated that the Resolution Professional is free to invoke the second bank guarantee through the Advising Bank-Bank of

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Baroda and cannot insist on the Axis Bank to invoke the Bank Guarantee.

Discussion in IA No.153/2018

125. The grievance of the Resolution Professional in IA 153/2018 is that, inspite of several requests, Axis Bank Limited is not invoking the second Bank Guarantee dated 25.11.2011 for USD 6,846,000.

126. The last date for invocation of the said Bank Guarantee is 30.09.2018.

127. The following are the objections that were highlighted by the Axis Bank Limited in respect of the invocation of the second Bank Guarantee 37003020000267 dated 25.11.2011.

- a. The original Bank Guarantee is not produced.
- b. Axis Bank Limited is not the Advisory Bank.

128. It is pertinent to mention here that China Construction Bank Corporation Shan Dong Branch issued two Bank Guarantees in favour of the Corporate Debtor on the request of Runh Power Corporation Limited in relation to the Supply Agreement dated 31.08.2010 executed between the Corporate Debtor and Runh.

129. The following are the two Bank Guarantees:-

Sl.No.	Guarantee No.	Amount in USD	Extended upto
1	37003020000631 dated 22-09-2014	4,564,000	30 September 2018
2	37003020000267 dated 25-11-2011	6,846,000	30 September 2018

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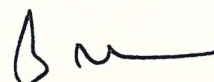
		11,410,000	
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130. On the request of the Resolution Professional the first Bank Guarantee dated 22.09.2014 was already invoked by the Axis Bank Limited.
131. It is pertinent to mention here that, Jinan Intermediate Court passed an injunction order barring China Bank from remitting amounts under the said Bank Guarantees to the account of the Corporate Debtor.
132. However, there is no injunction order issued by any Court restraining invocation of the Bank Guarantees 1 and 2.
133. In fact, Axis Bank Limited has already invoked the first Bank Guarantee.
134. The two objections raised by the Axis Bank Limited for not invoking the second Bank Guarantee dated 25.11.2011 is the non-production of original SWIFT message relating to the second Bank Guarantee and that Axis Bank Limited is not an Advisory Bank.
135. It is a fact that Axis Bank Limited is not an Advisory Bank in respect of second Bank Guarantee. The Advisory Bank is the Bank of Baroda.
136. It is stated by the Axis Bank Limited that as per Bank of Baroda's email dated 27.02.2018 the original SWIFT copies were said to have been handed over to the Corporate Debtor when they were received at the time of executing the Bank Guarantee.
137. But the Resolution Professional who is now representing the Corporate Debtor is not in a

position to produce the original SWIFT message relating to second Bank Guarantee before the Axis Bank Limited.

138. The apprehension of the Axis Bank Limited is there is a possibility by the Corporate Debtor approaching any other Bank for the invocation of the Bank Guarantee more so Bank of Baroda.
139. Another apprehension of the Axis Bank Limited is about the authenticity of the second Bank Guarantee dated 25.11.2011.
140. The third objection of the Axis Bank Limited is the injunction order passed by the Shandong Jinan Intermediate People's Court.
141. The relevant portion of the order passed by the Shandong Jinan Intermediate People's Court is as follows:-

“China Construction Bank Co., Ltd, Shandong Branch is stayed to remit the payment of \$4,564,000 under the No.37003020000631 guarantee letter and \$6,846,000 under the No.37003020000267 guarantee letter (a total of \$ 11,410,000 under the two guarantee letters) with IND-BARATH POWER (MADRAS) LIMITED, the Respondent, as the beneficiary.”
142. The above order reads that the injunction order only relate to remittance of the amount covered by the Bank Guarantees to the account of the Corporate Debtor.
143. It does not mean that the order also restrain the invocation of the Bank Guarantees.
144. In fact the Axis Bank Limited invoked the Bank Guarantee No.1 dated 22.09.2014.
145. In the email dated 05.03.2018 the Axis Bank Limited did not agree to invoke the second Bank



Guarantee. But the Axis Bank sought the following documents in the said e-mail:-

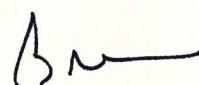
- i) Swift Copies of the Bank Guarantees, authenticated by Bank of Baroda.
- ii) Indemnity cum Undertaking from the Applicant indemnifying Axis Bank against any future claims/losses.
- iii) Undertaking from the Applicant stating he will not approach any other Bank for the invocation.
- iv) Letters requesting invocation sent to China Bank.

But now the Resolution Professional is not in a position to produce the original Bank Guarantee.

146. Considering the objections raised by the Axis Bank Limited and considering the fact that the Bank Guarantee is going to expire on 30.09.2018 this Authority is of the considered view that it is just to direct the Axis Bank Limited to invoke the second Bank Guarantee No. 37003020000267 dated 25.11.2011 on production of undertaking letter and the indemnity bond by the Resolution Professional representing the Corporate Debtor as required by the Axis Bank Limited in its email dated 05.03.2018 before 30.09.2018.

147. However, in view of the Injunction order passed by Shandong Jinan Intermediate People's Court there shall not be remittance of amount to the account of the Corporate Debtor by virtue of invocation of Bank Guarantee.

148. IA No.153/2018 is disposed of accordingly.



Discussion in IA 149/2018

149. Before going into the merits or otherwise in respect of the verification of the claim of the Axis Bank Limited it is necessary to determine a threshold objection raised by the Resolution Professional in respect of the claim made by the Axis Bank Limited.
150. According to the Resolution Professional the claim filed by the Axis Bank Limited on 10.05.2018 at 7.00 PM was received after the conclusion of the 8th meeting of the CoC wherein, the Resolution Plan was rejected unanimously and therefore the Resolution Professional was unable to consider the revised claim filed by the Axis Bank Limited as it would be a violation of the Regulation 12(2) of the CIRP Regulations.
151. In order to appreciate the above said objection raised by the Resolution Professional, it is necessary to consider Regulation 12 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons), Regulations 2016.
152. Regulation 12- Submission of proof of claims:-
- (1) Subject to sub-regulation (2), a creditor shall submit **(claim with proof)** on or before the last date mentioned in the public announcement.
 - (2) **A creditor, who fails to submit claim with proof within the time stipulated in the public announcement, may submit the claim with proof to the interim resolution**

professional or the resolution professional, as the case may be, on or before the ninetieth day of the insolvency commencement date.

- (3) Where the creditor in sub-regulation (2) is **(a financial creditor under regulation 8)**, it shall be included in the committee from the date of admission of such claim:

Provided that such inclusion shall not affect the validity of any decision taken by the committee prior to such inclusion.

Substituted by Notification No.IBBI/2018-19/GN/REG031, dated 3rd July, 2018 (w.e.f. 04-07-2018). Before substitution the words stood as –

“Proof of claim”.

Substituted by Notification No.IBBI/2018-19/GN/REG031, dated 3rd July, 2018 (w.e.f.04-07-2018). Sub regulation (2) of regulation 12, before substitution stood as-

“A creditor, who failed to submit proof of claim within the time stipulated in the public announcement, may submit such proof to the interim resolution professional or the resolution professional, as the case may be, till the approval of a resolution plan by the committee.”

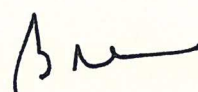
Substituted by Notification No.IBBI/2018-19/GN/REG031, dated 3rd July, 2018 (w.e.f.04-07-2018). Before substitution the words stood as-

“a financial creditor”.

153. Therefore, Regulation 12 of the CIRP Process Regulations prior to 04.07.2018 says, a Creditor may submit proof to the Resolution Professional till the approval of a Resolution Plan by the Committee.
154. In the case on hand the revised claim was submitted by the Axis Bank Limited on 10.05.2018, the date on which the Resolution Plan came up for consideration before the CoC.
155. Moreover, the Resolution Plan has not been approved by the CoC and it has been rejected.
156. Therefore, Regulation 12(2) as it stood before amendment which came into force with effect from 04.07.2018 did not debar the Resolution Professional from considering the revised claim filed by the Axis Bank Limited.
157. It is neither pleaded nor contended because the CIRP Process period came to an end by 11.05.2018. Resolution Professional was unable to consider the revised claim filed by the Axis Bank Limited.
158. The 270 days period of CIRP Process came to an end by 11.05.2018.
159. Therefore, by 10.05.2018 there is one day left for the Resolution Professional to consider the revised claim of the Axis Bank Limited.
160. On the other hand, the Resolution Professional by his email dated 13.05.2018 rejected the revised claim of the Applicant/Axis Bank Limited. On the ground that it is not in accordance with the terms of Regulation 12(2) of the CIRP Regulations.
161. This part of the action of the Resolution Professional is not at all acceptable. Moreover

the 1st claim of the Axis Bank Limited based upon the invocation of the 1st Bank Guarantee No.00300100000181 dated 19.02.2010 and 2nd Bank Guarantee No.00300100000194 dated 07.05.2010 was filed before the IRP in Form-C on 08.09.2017.

162. The IRP pursuant to the claim of the Axis Bank Limited, vide email dated 19.09.2017 informed the Axis Bank Limited about the 1st CoC meeting to be held on 25.09.2017 and shared the minutes of the 1st meeting of the CoC vide email dated 27.09.2017 with the Axis Bank Limited.
163. The RP also shared the minutes of the meeting of the 2nd CoC vide email dated 04.12.2017.
164. Subsequently, the RP by a email dated 06.12.2017 and reconfirmed by email dated 13.12.2017 rejected the 1st claim made by the Applicant/ Axis Bank Limited on 08.09.2017.
165. Subsequent to the filing and rejection of the 1st claim made by the RP, the revised claim was filed by the Axis Bank Limited on 10.05.2017 including the Bank Guarantees which form part of the 1st claim.
166. Therefore, by any stretch of logic or imagination, RP is not correct in saying that the claim filed by the Applicant/ Axis Bank Limited is a delayed claim and it is not in accordance with the Regulation of the 12(2) of the Regulations as it stood before amendment.
167. On this point, the learned counsel appearing for the Axis Bank Limited also relied upon two decisions.
168. Decision of the Hon'ble NCLT, New Delhi Bench in (IB) 204(ND)/2017 in M/s.Globe Express



Services (Overseas Group) Ltd. & Anr. **Vs.** M/s. M.M.Cargo Container Line Pvt. Ltd. & Ors.

169. In that decision it is held by the Hon'ble NCLT, New Delhi Bench that, till the period of liquidation assets are distributed, non-inclusion of verified claim should not be summarily rejected.
170. The said decision relates to considering the claim which has been verified during Insolvency Resolution Process and rejected summarily during liquidation process.
171. The underlying principle is that all claims has to be finally adjudicated upon at the time of liquidation in case if the Company goes for liquidation.
172. What is to be done during the CIRP Process is only verification of claims for the purpose of constitution of CoC.
173. Another decision relied upon by the Axis Bank Limited is the decision of the Hon'ble NCLT, Kolkata Bench in CA(IB) No.31/KB/2018 in CP(IB)No.03/KB/2017 in UCO Bank **Vs.** Nicco Corporation Limited.
174. In that Judgement the Tribunal condoned the delay in filing the claim. In the instant case the 1st claim was filed by the Axis Bank Limited immediately after the public announcement within time.
175. The 2nd claim also includes the 1st claim. By the time 2nd claim is filed another Bank Guarantee was also invoked.
176. Therefore, the claims filed by the Axis Bank Limited cannot be said to be delayed claims and

are not in accordance with 12(2) of the Resolution Process Regulations.

177. The 2nd issue that needs determination is whether the RP can verify the claims even though Bank Guarantees are invoked after the commencement of the Corporate Resolution Process Period or not?
178. On this aspect the learned counsel appearing for the Resolution Professional relied upon the decision of the NCLT, New Delhi Principal Bench in (IB)-102(PB)/2017 in-

Axis Bank Limited	...Applicant
Vs.	
DBS Bank Limited	...Financial Creditor
Edu Smart Services Private Limited	...Corporate Debtor

179. The issue that came up for consideration in that decision is whether the Axis Bank Limited is entitled to make a claim by invoking the Corporate Guarantee after the date of commencement of Insolvency Process.
180. The Hon'ble Principle Bench held that, the Axis Bank Limited cannot qualify to the consideration of its claim as it has become due and payable after the Insolvency commencement date.
181. Almost on the same lines the Judgement of the Hon'ble NCLT, Allahabad Bench in CANo.159/2017 in CP No.24/ALD/2017 in the matter of Export-Import Bank of India **Vs.** JEKPL Private Limited.
182. On the other hand the learned counsel appearing for the Axis Bank Limited relied upon the

any person to whom 'Financial Debt' is owed.

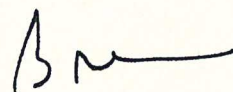
- (ii) The claim has not been matured, cannot be a ground to reject the claim.

185. In Para 56 of the Judgement it is held as follows:-

"Therefore, we hold that maturity of claim or default of claim or invocation of guarantee for claiming the amount has no nexus with filings of claim pursuant to public announcement made under Section 13(1)(b) r/w Section 15(1)(c) or for collating the claim under Section 18(1)(b) or for updating claim under Section 25(2)(e). For the purpose of collating information relating to assets, finances and operations of Corporate Debtor or financial position of the Corporate Debtor, including the liabilities as on the date of initiation of the Resolution Process as per Section 18(1), it is the duty of the Resolution Professional to collate all the claims and to verify the same from the records of assets and liabilities maintained by the Corporate Debtor.

186. In that Judgement the Hon'ble NCLAT held that, Export Import Bank of India is a Financial Creditor in relation to JEKPL Private Limited and Axis Bank Limited is a Financial Creditor in relation to Edu Smart Services Private Limited.

187. Another decision relied upon by the learned counsel appearing for the Axis Bank Limited is the decision rendered by Hon'ble NCLAT, New Delhi in Company Appeal(AT)(Insolvency) No.61 of 2018 in the matter of Andhra Bank Vs. M/s. F.M.Hammerle Textile Ltd.



188. In that Judgement the Hon'ble NCLAT held as follows:-

“The Resolution Professional cannot reject one or other claim on the ground that only the person whose claim has been matured can be looked into and other claim not matured cannot be entertained”.

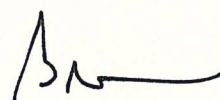
189. In that Judgement it is also held as follows:-

“From Clause (8) of Section 5, we find that any indemnity obligation in respect of a guarantee also come within the meaning of Financial Debt as defined under the said provision”.

190. In view of the above said two Judgements of the Hon'ble NCLAT, the claim cannot be rejected on the ground that the Corporate Guarantee was not invoked or not matured as on the date of commencement of CIRP Process.

191. Therefore, the contention of the learned counsel appearing for the Resolution Professional that, no claim can be verified on the basis of the uninvoked Bank Guarantees as on the date of commencement of CIRP Process do not merit acceptance in view of the above said Judgements of the Hon'ble NCLAT.

192. In the case on hand a perusal of the sanction Letter dated 05.02.2010 and the Sanction Letter dated 04.04.2016 goes to show that, the credit facility extended by the Axis Bank Limited is not only in respect of Holding Company IBPIL but it can be utilized by its subsidiaries and Associate Companies including IBPIL i.e., Corporate Debtor herein.



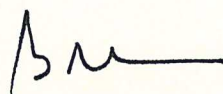
193. The documents reveal that the Corporate Debtor is the Subsidiary of IBPIL and the special purpose vehicle for the IBPIL.
194. The Corporate debtor executed the following documents:-
- (i) Deed of Guarantee dated 16.02.2010 for Rs.200 Crores.
 - (ii) Undertaking in favour of Axis Bank Limited dated 16.02.2010 creating subservient charge.
 - (iii) The Corporate Debtor also executed counter indemnity for guarantee limit on 16.02.2010.
195. In the sanction letter in the column purpose it is clearly mentioned the guarantee limits can be utilized by the Subsidiaries/Associate Companies subject to the Company being the primary obligor for the same and providing corporate guarantee for the limits utilized by the subsidiaries/associates.
196. The deed of guarantee dated 16.02.2010 executed in favour of Axis Bank Limited by the Corporate Debtor undertakes the liability in respect of the Bank Guarantee.
197. The undertaking letter dated 16.02.2010 executed by the Corporate Debtor clearly state that they are availing Bank Guarantee as SPV and they undertake to create subservient charge on the assets and cash flows for the limit of Rs.200Crores.
198. The counter indemnity for guarantee dated 16.02.2010 was also executed by the Corporate Debtor in favour of the Axis Bank Limited.



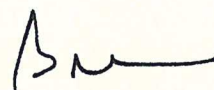
199. In the case on hand the Bank Guarantee No.1 dated 19.02.2010 was invoked on 28.08.2017 by PGCIL and Axis Bank Limited made payment on 30.08.2017. The Bank Guarantee No.3 dated 19.02.2010 was invoked on 24.10.2010. The Bank Guarantee No.2 dated 07.05.2010 and Bank Guarantee No.4 dated 18.02.2013 are not yet invoked.
200. In view of the terms and conditions mentioned in the deed of guarantee, undertaking letter and counter indemnity executed by the Corporate Debtor in favour of the Axis Bank Limited, Axis Bank Limited is entitled to file a claim as well as a revised claim before the RP and the RP is directed to verify and include those claims in the list.
201. In view of the counter indemnity for guarantee the Axis Bank Limited can only be treated as a Financial Creditor in relation to the Corporate Debtor.
202. Therefore, the Axis Bank Limited is entitled to be a member of the CoC.
203. In view of the above discussion the RP is directed to include the Axis Bank Limited in CoC treating the Axis Bank Limited as the Financial Creditor in respect of the Corporate Debtor.
204. IA 149/2018 is disposed of accordingly.

Discussion in 254/2018

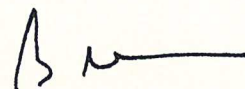
205. The request in IA No.254/2018 is to approve the Resolution Plan submitted by the Resolution Applicant which is rejected by the CoC.



206. The main ground on which this Application is filed is that CoC did not assign any reason for rejection of the Resolution Plan submitted by the Resolution Applicant.
207. It is the contention of the learned Senior Counsel appearing for the Resolution Applicant that the CoC while discharging its functions under the provisions of the Insolvency and Bankruptcy Code is bound to give reasons either for approval of the Resolution Plan or for rejection of the Resolution Plan.
208. He further contended that in the absence of reasons while approving or rejecting the Resolution Plan, it is not possible for this Adjudicating Authority to sit over on the decision of the CoC either in approving or in rejecting the Resolution Plan.
209. It is also contended by the learned Senior Counsel appearing for the Applicant that in the absence of the reasons in the Order, the same cannot be supplemented in the proceedings filed before this Authority by the CoC.
210. In support of those contentions, learned Senior Counsel appearing for the Applicant relied upon the decision of Hon'ble NCLAT, New Delhi in IA No.594 of 2018 in Company Appeal(AT)(Insolvency) No.188 of 2018 in the matter of Rajputana Properties Pvt. Ltd. Vs Ultra Tech Cement Ltd. &Ors. and the decision of the Hon'ble Supreme Court reported in AIR1978SC851 in Civil Appeal No.1297 of 1977 decided on 02.12.1977 in the matter of Mohinder Singh Gill and Ors. **Vs.** The Chief Election Commissioner, New Delhi and Ors.

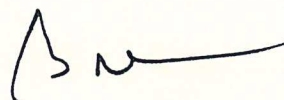


211. Learned Senior Counsel appearing for the Applicant also contended that on the pretext of pendency of criminal case, the Resolution Plan has been rejected by the CoC.
212. He further contended that the practice of misuse of criminal process to put undue pressure in civil disputes deprecated by Hon'ble Supreme Court in the matter of INDIAN OIL CORPN. **Vs.** NEPC INDIA LTD. AND OTHERS reported in (2006) 6 Supreme Court Cases 736.
213. On the other hand, the learned Senior Counsel appearing for the CoC firstly contended that CoC not being an Adjudicating Authority need not give any reasons either for acceptance or rejection of the Resolution Plan.
214. He further contended that it is the prerogative of the CoC to find out the viability and feasibility of the Resolution Plan and the matrix.
215. In support of the said contention, learned Senior Counsel appearing for the CoC relied upon the decision of the Hon'ble NCLAT, New Delhi in Company Appeal (AT)(Insolvency)No.380 of 2018 in Bhaskara Agro Agencies **Vs.** Super Agri Seeds Pvt. Ltd.
216. He further contended that even if it is held that the reasons are necessary, the same can be supplemented where no prejudice has been caused to the affected party.
217. It is also contended by the learned Senior Counsel appearing for the CoC that this Adjudicating Authority cannot sit over the Order rejecting the Resolution Plan passed by the CoC.
218. It is contended that Sec.31 (1) of the Code only gives authority to this Adjudicating Authority to



approve or reject the Resolution Plan approved by the CoC.

219. First of all, it is necessary to address the issue relating to the jurisdiction of this Authority to sit over the rejection of a Resolution Plan by the CoC.
220. No doubt, Sec.31(1) of the IB Code says that the Resolution Plan approved by the CoC is subject to the approval of the Adjudicating Authority.
221. It is not specifically stated in Sec.31(1) of the IB Code that the Adjudicating Authority can even consider the rejection of the Resolution Plan by the CoC is validly done or not?
222. When this Authority is given jurisdiction to approve the Resolution Plan, it impliedly goes to show that it has got jurisdiction to decide whether the rejection of the Resolution Plan is properly done or not?
223. In fact, the law on this aspect is now settled. It is decided by several Benches of Hon'ble NCLT and as well as Hon'ble NCLAT that improper rejection of the Resolution Plan by the CoC or CoC rejecting the Resolution Plan without giving reasons is subject to the jurisdiction of Hon'ble NCLT u/s.31(1) of the Code.
224. Therefore, basing on the latest legal position, this Adjudicating Authority is of the view that this Authority has got jurisdiction to decide whether the Resolution Plan is properly rejected or not by the CoC and whether reasons were given for rejection of the Resolution Plan.
225. The argument of the learned Senior Counsel appearing for the CoC is that since CoC not being an Adjudicating Authority, need not give reasons



in support of its decision either in approving or rejecting the Resolution Plan is against the Constitution of fundamentals, administrative norms and jurisdictional limitations.

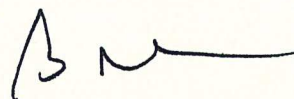
226. The CoC is a body, constituted under the provisions of the IB Code by the IRP appointed by this Authority under the provisions of the IB Code. Certain functions are given to the CoC in the CIRP Process.
227. The mandate of the CoC is by a majority vote, as prescribed in the provisions of the IB Code, previously 90% now 66% for certain actions.
228. Simply because the decisions are taken by a majority vote, it is not correct to contend that the decisions need not be supported by reasons.
229. If this analogy is accepted, where any Authority that constitutes more than one person, takes a decision by the majority view, it can be said that no reasons need be given.
230. That every Order given by a statutory body or Authority must be supported by reasons. In the absence of reasons, the Orders are liable to be set aside.
231. In fact, the Hon'ble NCLAT, New Delhi in IA No.594 of 2018 in Company Appeal(AT)(Insolvency) No.188 of 2018 in the matter of Rajputana Properties Pvt. Ltd. **Vs.** Ultra Tech Cement Ltd. &Ors clearly held as follows:-

“For the reason aforesaid we are of the view that the Committee of Creditors should record reasons (in short) while approving or rejecting one or other Resolution Plan.

Views, if any, are expressed by the (suspended) Board of Directors or it's Partners;

Operational Creditors or its representatives and Resolution Applicant(s), are also required to be taken into consideration by the Committee of Creditors before approving or rejecting one or other resolution plan. The views so expressed by any of those who are watching the proceeding should also be recorded (in short).”

232. The learned Senior Counsel appearing for the CoC relying upon the Judgement of the Hon'ble NCLAT, New Delhi in Company Appeal (AT)(Insolvency)No.380 of 2018 in Bhaskara Agro Agencies **Vs.** Super Agri Seeds Pvt. Ltd., contended that the viability and feasibility of the Resolution Plan must be left over to the decision of the CoC and this Appellate Tribunal cannot sit in appeal over the decision of the CoC.
233. There is no dispute about the proposition of the law laid down by the Hon'ble NCLAT in the above said decision relied upon by the learned Senior Counsel appearing for the CoC.
234. Where there is more than one Resolution Plan that came up for consideration of the CoC, then it is for the CoC in their wisdom to examine the Resolution Plan, its viability and feasibility.
235. In such a case, if a decision is taken by the CoC about the viability or feasibility of a plan, then this Tribunal cannot sit over and decide whether the wisdom exercised by the CoC is correct or not.
236. In the case on hand, only one Resolution Plan submitted by the Resolution Applicant in IA 254/2018 came up for consideration before the CoC.



237. The contention put forward by the learned Senior Counsel appearing for the Applicant is that the rejection of the Resolution Plan is not supported by reasons and much less valid reasons.
238. Therefore, in these facts and circumstances, this Adjudicating Authority is also not going into the aspect of viability and feasibility of the plan.
239. But this Authority is bound to see whether there are reasons to reject the Resolution Plan or not?
240. In this context, it is necessary to refer to the resolutions passed by the CoC on 08.05.2018 and 10.05.2018.
241. The relevant portion of the resolution dated 08.05.2018 is as follows:-

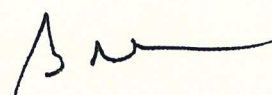
NOTING ON THE EXPRESSION OF INTERESTS (EOI) RECEIVED PURSUANT TO ADVERTISEMENT FOR EOI ISSUED ON 3RD MAY 2018 AND TO NOTE AND DISCUSS THE RESOLUTION PLAN(S) RECEIVED, IF ANY:

The Chairman invited the Resolution Applicant ("RA") and his team to discuss and present their resolution plan to the members.

The following persons represented the Resolution Applicant

1. Kodali Siva Kumar-VP Operations-Alliance Projects.
2. Anand Bhageria-Partner-Singhi Advisors.
3. Ashish Parwani-Partner-Rajani Associates

The Chairman informed the members that Information Memorandum ('IM') and other information of Corporate Debtor available with the RP and sought by the RA was also provided.

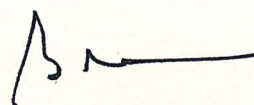


The RA thanked the Chairman and the members for inviting them to the meeting.

The RA then gave a presentation on their Group(Alliance Group) followed by a brief on the Resolution Plan. They stated that they are looking to acquire the Corporate Debtor against a total consideration of Rs.202 Crores, as detailed in the Resolution Plan; and expressed their interest in building a solar power project at the factory site of the Corporate Debtor. After the presentation, the RA invited comments/observations from the members. The members put forward their queries and sought clarifications on certain key aspects of the Resolution Plan from the RA inter alia including treatment of recoveries to be made from the affiliates and other parties, extinguishment of criminal proceedings proposed in the plan, identification of the exact sources of funds as more particularly detailed in Annexure B:

The CoC members expressed their serious concern on the proposed extinguishment of criminal proceedings against Corporate Debtor and various other persons and further conveyed to the RA that they would not want to lose the right of recovery of loans and advances given to the affiliates of the Corporate Debtor and to other parties.

The RA stated that they are proposing to acquire the company as a whole, hence all assets and liabilities, including the right of recovery of loans and advances given to the affiliates of the Corporate Debtor and to other parties would be



transferred to the RA and that they had proposed an exception in relation to the recovery, if any, from the invocation of the Bank Guarantee given on behalf of Runh Power Corporation Limited.

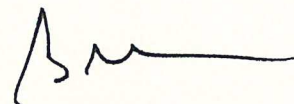
The Resolution Applicant was asked to consider the modifications suggested by the Members in relation to the right of recovery of loans and advances and this being a non-negotiable condition, the members would find it difficult to consider/accept the plan. The members then requested the RA to come back with a revised plan.

The Chairman thanked the RA and his team for their presentation on the Resolution Plan. The RA and his team then excused themselves from the meeting. There were no further comments on the said matter and the same was considered as noted.

242. The relevant portion of the minutes of the CoC meeting dated 10.05.2018 is as follows:-

**TO APPROVE THE RESOLUTION PLAN
SUBMITTED BY THE RESOLUTION
APPLICANT FOR IND BARATH POWER
(MADRAS) LIMITED:**

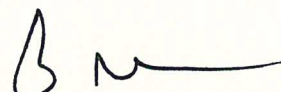
The Chairman informed the members that in the 7th meeting of CoC held on 8th May 2018, the Resolution Applicant ('RA') had presented their Resolution Plan on which the RP including its legal counsel had given their observations and the CoC members had also stated their observations/reservations on the proposal, and had asked the RA to consider the changes and submit a modified Resolution Plan. The



Chairman also informed the members that all the observations/queries/remarks of RP and the members were sent to RA and his team via email on 8th May 2018 and 9th May 2018. He then informed the members that the RA had submitted revised Resolution Plan after incorporating the changes, and other documents, including a note on alternate mechanism for payment of consideration, which was already circulated by him to the members for their perusal. The members took note of the same.

The Chairman informed the members that Resolution Plan was in compliance with the mandatory provisions listed under Section 30(2) and Section 29A of the Insolvency and Bankruptcy Code ("The Code"). He then handed over the signed copies of this confirmation letter for the said compliance to all the members for their information and records. The RP had already submitted the Report under Section 43, 45, 50, 66 to the CoC Members and had also shared the order of NCLT, Hyderabad in this regard.

The members asked the Chairman whether the compliance check done by the RP was in respect of both version of Resolution Plan (Original and modified) submitted by the RA and whether the RP while doing the compliance check has also considered the alternate consideration payment mechanism which was suggested by the Resolution Applicant. The Chairman stated that the alternate payment mechanism neither affects nor forms part of the compliance check under the Code, because it is only the consideration

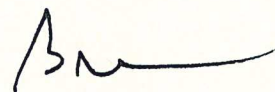


element which was to be decided by the members whether they want to consider the alternate payment mechanism which was suggested by the RA and the said point was also clarified by the legal counsel of RP, who stated that the alternate payment mechanism provided by the RA is not a plan, however, in the event that CoC was willing to consider the alternate payment mechanism, the RA may incorporate the said terms and present the final plan, wherein other terms, which are relevant from the compliance perspective under the Code, would remain unchanged. The members took note of the same.

The Chairman invited the Resolution Applicant and his team to discuss and present their Resolution Plan to the members. The following persons represented the RA:

1. Mr.Kodali Siva Kumar-VP Operations-Alliance Projects;
2. Mr.Anand Bhageria-Partner-Singhi Advisors;
and
3. Mr.Ashish Parwani-Partner-Rajani Associates

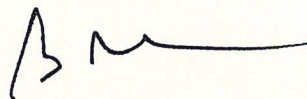
The representative of RA thanked the members for having them at the meeting. He then explained the revised Resolution Plan to the members. The representative of Ra stated that they had taken all necessary steps to redress the concerns of the members. The representative of RA confirmed to the members that all the legal compliances have been ensured in the revised Resolution Plan. The members took note of the same.



The revised Resolution Plan was discussed among members of CoC and RA, and the discussion mainly included the payment to lenders of the money which may be recovered from the group companies of Corporate Debtor and from Sokeo Power, alternate payment plan proposed by the Ra, source of funds and issues relating to the continuity of criminal proceedings initiated by members of CoC. Regarding the issue of payment to lenders from recoveries from group companies, etc., the RA clarified that in this regard it proposes an alternative payment mechanism in which the fixed consideration offered by it is lesser, but any recovery by the RA would be shared in a ratio of 50:50 between the RA and the members until a specified period. On the issue of continuity of criminal proceedings against the Corporate Debtor, the RA clarified that it is not willing to accept the position that once the Corporate Debtor is acquired by the Ram such proceedings can be continued against the Corporate Debtor by the members.

This matter was discussed and deliberated at length and the members opined that as far as the issue of removal of criminal proceeding against the Corporate Debtor is concerned, it is a matter of constraint for them. They then informed that they would then further discuss this among themselves. The Chairman thanked the RA and his team for their presentation on the Resolution Plan. The RA and his team then excused themselves from the meeting.

There were no further comments on the same by the members and accordingly the resolution was

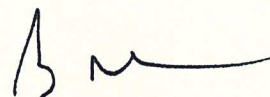


put to vote without modifications. The Chairman explained the members that since all members were present at the meeting, the voting can be undertaken at the meeting itself and accordingly requested all the members to cast their votes in writing.

Mr.Ashish Rathi read the resolution to be voted upon.

“RESOLVED THAT pursuant to Section 30(4) and other applicable provisions of the Insolvency and Bankruptcy Code, 2016 read with Regulation 39(3) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulation, 2016, and in accordance with any other rules and regulations made thereunder, approval of the members of the Committee of Creditors be and is hereby accorded to the Resolution Plan submitted by the Resolution Applicant i.e. Alliance Projects.

RESOLVED FURTHER THAT the Resolution Professional be and is hereby authorised to file application before Hon’ble National Company Law Tribunal, Hyderabad Bench seeking its approval on the Resolution Plan as approved and to take such steps as may be necessary, in relation to the above if required and to settle all matters arising out of and incidental thereto and sign and execute all applications, documents and writings that may be required and generally to do all acts, deeds and things that may be necessary proper, expedient or incidental for the

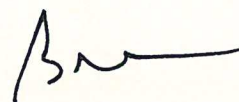


purpose of giving effect to the aforesaid Resolution.”

243. A perusal of the minutes of the CoC meeting dated 08.05.2018 show that CoC expressed their serious concern on the proposed extinguishment of criminal proceedings against Corporate Debtor and various other persons. The CoC also conveyed to the Resolution Applicant that they would not want to lose the right of recovery of loans and advances given to the affiliates of the Corporate Debtor and other parties.
244. In fact, in CoC held on 08.05.2018, the Resolution Applicant requested to come back with a revised plan. It is also recorded in the meeting dated 08.05.2018 that, there were no further comments on the Resolution Plan.
245. In the CoC meeting held on 10.05.2018 a revised plan was filed by the Resolution Applicant came up for consideration.
246. It is mentioned in the minutes dated 10.05.2018 that the Resolution Plan was in compliance with the mandatory provisions U/s. 30(2) and 29A of the IB Code.
247. It is also mentioned in the minutes that the Resolution Professional had already submitted the report U/s.43, 45, 50, 66 to the CoC members and had also shared the order of the Adjudicating Authority, Hyderabad in this regard.
248. It is also mentioned that the Resolution Professional while doing the compliance check had also considered the alternate payment mechanism which was suggested by the Resolution Applicant.

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249. The Resolution Professional informed the CoC that alternate payment mechanism is only relating to consideration element that has to be decided by the members of the CoC.
250. It is also mentioned in the agenda in the minutes that the alternate payment mechanism provided by the Resolution Applicant is not a plan and it is only alternate payment mechanism and that has to be considered by the CoC.
251. It is further stated in the agenda that the revised plan was discussed among the members of the CoC.
252. There is no adverse comment from the members of the CoC regarding the alternate payment mechanism provided by the Resolution Applicant in the minutes of the meeting held on 10.05.2018.
253. On the other hand, it is mentioned only about the issue of continuity of criminal proceedings against the Corporate Debtor.
254. It is noted in the agenda that the Resolution Applicant is not willing to accept the position that once the Corporate Debtor is acquired by the Resolution Applicant, criminal proceedings can be continued against the Corporate Debtor by the members of the CoC.
255. In the agenda, it is also mentioned that the issue of removal of criminal proceedings against the Corporate Debtor is a matter of constraint for them. It is further mentioned in the minutes that the members of the CoC would discuss among themselves.
256. Thereafter, there was no further discussion among the members of the CoC. It is clearly



mentioned in the minutes of the CoC that there were no further comments on the same by the members and Resolution was put to vote.

257. The CoC rejected the Resolution. Therefore, the only constraint that is there for the CoC as it appears from the minutes is the removal of criminal proceedings against the Corporate Debtor.

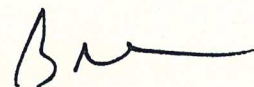
258. In this Application, the Resolution Applicant itself, in Page No.2, stated as follows:-

“That the instant Company Application is being filed by Resolution Applicant of the Corporate Debtor under Section 60(5) of the Insolvency and Bankruptcy Code, 2016, in short “Code” with the prayer to pass an order for approval of proposed resolution plan submitted by the Applicant herein which was rejected by the Committee of Creditors (Respondents No.2 to No.4) in its meeting held on 10.05.2018 on the sole ground for not accepting the proposal of dropping the criminal proceedings being initiated by the Financial Creditors against the Corporate Debtor though the Applicant herein has no objection to continuation of such proceeding against the erstwhile management.”

259. The above said statement made by the Resolution Applicant clearly goes to show that it has no objection for continuation of proceedings against the erstwhile management.

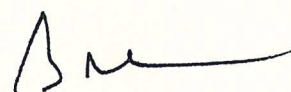
260. It appears that CoC wants to proceed against the Corporate Debtor also.

261. Even if, we refer to Sections 44, 48 and 51 of the IB Code, they only say that an Order can be passed against any person including the



Directors, Guarantors etc., but not against the Corporate Debtor.

262. The Resolution Applicant has no objection to proceed against the erstwhile management of the Corporate Debtor in relation to the preferential transactions, undervalued transactions and fraudulent transactions if any, then it may not be a ground for the CoC to reject the Resolution Plan.
263. In fact, as can be seen from the minutes of the CoC held on 10.05.2018, no view was expressed by the CoC on the payment offered by the Resolution Applicant or on the mode of payment or on the alternate mode of payment.
264. The entire thinking of the CoC is only on the criminal prosecution against the Corporate Debtor.
265. This Adjudicating Authority in its Common Order dated 08.05.2018, passed in IA No's 12/2018, 40/2018 and 41/2018 clearly held that sufficient material has not been placed on record to invoke Sec.49 of the Code.
266. Therefore, on the ground that Resolution Applicant is not agreeable for continuation of criminal prosecution against the Corporate Debtor, which is not even contemplated U/s.49 of the Code, the Resolution Plan was rejected by the CoC.
267. The CoC is expected to record its reasons on the viability of the Resolution Plan by taking into consideration all the facts and circumstances i.e., debt value, liquidation value and the prospects of recovery of money by any Civil proceeding, but not by invoking criminal prosecutions.



268. However, if any element of criminality is there, the Creditors are entitled to invoke the criminal proceedings also. But that may not come in the way of acceptance of Resolution Plan filed by the Resolution Applicant.
269. Therefore, this Authority is of the considered view that no reasons were assigned by the CoC for rejection of the Resolution Plan or the revised Resolution Plan or even if it is called as alternate payment plan suggested by the Resolution Applicant.
270. It appears that the CoC rejected the Resolution Plan only on the issue of criminal prosecution of the Corporate Debtor. Therefore, it can only be said that the CoC failed to give reasons for the rejection of the Resolution Plan except referring to the issue of continuation of criminal prosecution.
271. In fact, the Resolution Applicant has no authority either to agree or disagree on the continuation of criminal prosecution against the Corporate Debtor.
272. It is for the Investigating Authorities to decide after investigation whether there is an element of criminality and if so against whom action has to be taken. It can never form part of a Resolution Plan.
273. One cannot visualize a situation where debts can be recovered in the criminal prosecution that too during Corporate Insolvency Resolution Process. The mode of recovery, in case of fraudulent transactions, is provided under the provisions of the IB Code. It is always open to the Creditors to

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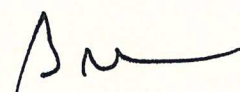
invoke the provisions of the IB Code if there is material to substantiate their allegations.

274. Therefore, viewing in any manner, the rejection of the Resolution Plan is without assigning reasons. This Authority is of the considered view that reasons are necessary either for approval or for rejection of the Resolution Plan.
275. The contention of the learned Senior Counsel appearing for the CoC is that the reasons can be supplemented later also. In support of his contention, he relied upon the decision of the Hon'ble Supreme Court in Union of India and Others **Vs.** E.G.Nambudiri reported in (1991) 3 Supreme Court Cases 38.
276. In that Judgement, the Hon'ble Supreme Court held that where the Order does not adversely affect any right or involves civil consequences, administrative authority is not required to record his reasons in the absence of any statutory provision requiring communications of reasons.
277. The learned Senior Counsel appearing for the Resolution Applicant relying upon the Judgement of the Hon'ble Supreme Court of India reporter in AIR1978SC851 in Civil Appeal No.1297 of 1977 in the matter of Mohinder Singh Gill and Ors. **Vs.** The Chief Election Commissioner, New Delhi and Ors., contended that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise.
278. It is further held in that decision that otherwise an order bad in the beginning may, by the time it

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comes to Curt on account of a challenge, get validated by additional grounds later brought out.

279. In the case on hand, no reasons are given for rejection of the Resolution Plan. But, in the counter, it is stated that the Resolution Plan has been examined from the commercial point of view and it has been rejected. But the said reason is not there in the minutes of the CoC held on 08.05.2018 and 10.05.2018.
280. On the other hand, the minutes only revolves around in respect of continuation of the criminal prosecution.
281. Now, in the counter, certain reasons were given in support of the rejection of the Resolution Plan. But that is not permissible in view of the Judgement of the Hon'ble Supreme Court in AIR1978SC851.
282. In the case on hand, the rejection of the Resolution Plan certainly causes prejudice to the Resolution Applicant. Therefore, in such a case, the reasons that are not there in the order cannot be supplemented.
283. The Hon'ble Supreme Court in the decision in (1991) 3 Supreme Court Cases 38 also held that reasons can be supplemented only where there is no adverse effect to the rights of the party affected by the order.
284. In the case on hand, the rejection of the Resolution Plan adversely affects the right of the Resolution Applicant.
285. Therefore, on the ground that certain reasons were given in the counter affidavit filed by the



CoC, it cannot be said that the Resolution Plan was rejected by the CoC giving reasons.

286. Moreover, this Authority in the Order in IA No. 149/2018 clearly held that Axis Bank Limited is entitled to file a claim as well as revised claim before the Resolution Professional and the Resolution Professional is directed to verify those claims and include them in the list of Creditors treating the Axis Bank Limited as Financial Creditors.

287. The Hon'ble NCLAT, New Delhi in Company Appeal (AT)(Insolvency)No.304 of 2017 in the matter of-

Export Import Bank of India

...Appellant

V/s.

Resolution Professional

JEKPL Private Limited

...Respondent

In Company Appeal (AT)(Insolvency) No.16 of 2018 in the matter of-

Export Import Bank of India

...Appellant

V/s.

Resolution Professional

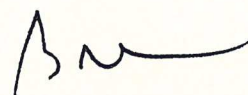
JEKPL Private Limited

...Respondent

In Company Appeal (AT)(Insolvency) No.302 of 2017 in the matter of Axis Bank Limited Vs. Edu Smart Services Private Limited and DBS Bank Limited in Common Order decided on 14.08.2018 held as follows:-

“Having held that the ‘Export Import Bank of India’ is ‘Financial Creditor’ in relation to ‘JEKPL Pvt. Ltd.’ (Corporate Debtor) and ‘Axis Bank Limited’ is ‘Financial Creditor’ in relation to ‘Edu Smart Services Pvt. Ltd.’ (Corporate Debtor), we hold and direct respective ‘Resolution Professionals’ and ‘Adjudicating Authorities’ to treat the Appellant Banks as members of their respective Committee of Creditors, who in their turn are directed to hold meeting of Committee of Creditors in accordance with law and reconsider/consider the Resolution Plan(s), submitted in each Corporate Insolvency Resolution Process which are in accordance with Section 30(2) of the I&B Code.”

288. In the case on hand also, the Axis Bank Limited now has to be treated as Financial Creditor and the Resolution Professional is directed to include the Axis Bank Limited in the CoC.
289. Therefore, it is necessary to place the Resolution Plan before the CoC again for consideration of the same by the Axis Bank Limited also as one of the Financial Creditors along with other Financial Creditors in the CoC.
290. In that view of the matter also, it is necessary to place the Resolution Plan/Revised Plan/Alternate payment mechanism before the CoC by the Resolution Professional and the CoC shall consider the same by giving reasons either for approval or rejection of the same within a period of 30 days.
291. In this context, it is contended by the learned Senior Counsel appearing for the CoC that the CIRP Process period expired on 11.05.2018 and



therefore, it cannot be extended beyond 270 days.

292. In the case on hand, the CoC filed IA No.176/2017 on 17.10.2017 for replacement of IRP by RP.

293. The said Application was disposed of by this Authority on 18.10.2017. But it appears that the Resolution Professional took charge of the CIRP proceedings only on 31.10.2017 on the ground that he received copy of the order only on 30.10.2017.

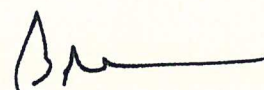
294. Therefore, no proceedings were undertaken by the CoC or by the Resolution Professional during the period from 17.10.2017 to 31.10.2017 i.e., for a period of 15 days.

295. In the case on hand, from the material available on record, the Expression of Interest was issued on 03.05.2018 and pursuant to the same, the Resolution Applicant filed the Resolution Plan.

296. In this case, the CIRP Process commenced on 14.08.2017 but the Resolution Plan was submitted by the Resolution Applicant in pursuant to the Expression of Interest issued on 03.05.2018.

297. In the case on hand, the Resolution Plan came up for consideration only a few days before the expiry of the CIRP Process period. It appears that the entire process of issuance of EOI and the consideration of the Resolution Plan take place between 03.05.2018 and 10.05.2018 in a very hasty manner.

298. Further, in the case on hand, the Resolution Professional by filing IA Nos. 12/2018, 40/2018 and 41/2018 consumed lot of CIRP Process



Period without proceeding with the calling for Expression of Interest and consequently calling for Resolution Plans.

299. IA No.40/2018 was filed before this Authority on 01.02.2018 whereas IA No.41/2018 is filed before this Authority on 19.02.2018. IA No.12/2018 for Forensic Audit was filed on 16.01.2018. All those Applications are disposed of by this Authority on 08.05.2018.

300. Therefore, more than 4 months consumed in disposal of IA Nos. 12/2018, 40/2018 and 41/2018.

301. The Hon'ble NCLAT, New Delhi, in Company Appeal(AT)(Insolvency) No.185 of 2018 decided on 08.05.2018 in the matter of-

Quinn Logistics India Pvt. Ltd. ...Appellant
Vs

1. Mack Soft Tech Pvt. Ltd.

2. Mohd.Sabir Parvez

3. Mr.M.L.Jain ...Respondents

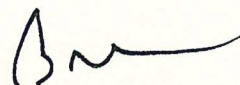
held what are the grounds that could be excluded for counting the total period of 270 days of Resolution Process. They are as follows:-

- (i) If the Corporate Insolvency Resolution Process is stayed by 'a court of law or the Adjudicating Authority or the Appellate Tribunal or the Hon'ble Supreme Court.
- (ii) If no 'Resolution Professional' is functioning for one or other reason during the Corporate Insolvency Resolution Process, such as removal.

- (iii) The period between the date of order of admission/moratorium is passed and the actual date on which the 'Resolution Professional' takes charge for completing the Corporate Insolvency Resolution Process.
- (iv) On hearing a case, if order is reserved by the Adjudicating Authority or the Appellate Tribunal or the Hon'ble Supreme Court and finally pass order enabling the 'Resolution Professional' to complete the Corporate Insolvency Resolution Process.
- (v) If the Corporate Insolvency Resolution Process is set aside by the Appellate Tribunal or order of the Appellate Tribunal is reversed by the Hon'ble Supreme Court and Corporate Insolvency Resolution Process is restored.
- (vi) Any other circumstances which justifies exclusion of certain period.

However, after exclusion of the period, if further period is allowed the total number of days cannot exceed 270 days which is the maximum time limit prescribed under the Code.

302. Therefore, although there is no request by the CoC to extend CIRP Process period, considering the above said facts and circumstances and considering the period spent for disposal of the Applications during the CIRP Process period, this Authority is of the considered view that at least 30 days can be excluded from the 270 days



period so as to enable the CoC to consider the resolution/Revised Resolution Plan/Alternate payment mechanism filed by the Resolution Applicant

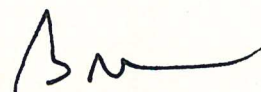
303. In the result, IA No.153/2018 is allowed directing the Axis Bank Limited to invoke the second Bank Guarantee No. 37003020000267, dated 25.11.2011, on production of undertaking letter and the indemnity bond by the Resolution Professional representing the Corporate Debtor, as required by the Axis Bank Limited in its email, dated 05.03.2018, before 30.09.2018.

However, in view of the Injunction order passed by Shandong Jinan Intermediate People's Court there shall not be remittance of amount to the account of the Corporate Debtor by virtue of invocation of Bank Guarantee.

304. IA No.149/2018 is allowed directing the Resolution Professional to include the Axis Bank Limited as member of the CoC treating it as Financial Creditor with immediate effect and the Resolution Professional is further directed to verify the claims of the Axis Bank Limited based on the claim dated 08.09.2017 and as well as the revised claim dated 10.05.2018 filed before the Resolution Professional.

305. IA No.254/2018 is disposed of with the following directions:-

- 1) CoC to consider the Resolution Plan/Revised Resolution Plan/Alternate payment mechanism if any filed or to be filed by the Resolution Applicant within a period of 30 days from this day by giving reasons either for rejection or approval of the Resolution Plan



following the relevant provisions of the IB Code and relevant regulations.

- 2) 30 days period is excluded for the purpose of counting the CIRP Process period of 270 days so as to enable the CoC to consider the Resolution Plan/Revised Resolution Plan/Alternate payment mechanism if any filed or to be filed by the Resolution Applicant and thereby allow the Resolution Professional/CoC further 30 days with immediate effect (i.e., 12.09.2018) to complete Corporate Insolvency Resolution Process.



BIKKI RAVEENDRA BABU

MEMBER JUDICIAL