

NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH


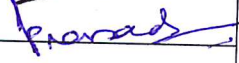
7

PRESENT: HON'BLE SHRI RATAKONDA MURALI- MEMBER JUDICIAL

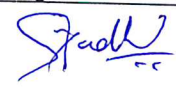
ATTENDANCE-CUM-ORDER SHEET OF THE HEARING HELD ON 28.09.2018 AT 10.30 AM

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	IA No.124,125,282 & 124/2018 in CP(IB) No.49/7/HDB/2017
NAME OF THE COMPANY	United Seamless Tubular Pvt Ltd
NAME OF THE PETITIONER(S)	Indian Bank
NAME OF THE RESPONDENT(S)	United Seamless Tubular Pvt Ltd
UNDER SECTION	7 of IBC

Counsel for Petitioner(s):

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature
Challa Gnanarajan M. Sridhar	Adv/s.	9603488093	
DVAS Ravi Prasad			

Counsel for Respondent(s):

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature
SANTOSH JADHAV	Adv.	9866605055	

Common order passed in IAs 125/2018 and 282 of 2018. List IA 124 of 2018 on
04.10.2018.


Member (J)

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

IA No. 125 of 2018

& IA 282 of 2018

In

CP (IB) No.49/7/HDB/2017

U/s 30 (6) and 31(1) of IBC, 2016
R/w Regulations 39 of IBBI (Insolvency Resolution Process
for Corporate Persons) Regulations, 2016

IN THE MATTER OF

**Indian Bank Vs United Seamless Tubulaar Private
Limited**

In the matter of IA 125/2018

Shri V. Venkatachalam
Resolution Professional of
M/s United Seamless Tubulaar Private Limited
Sy. No,. 309, NH-654, Sripuram
Narketpalli Nalgonda
Telangana – 508252

... Applicant/
Resolution Professional

VERSUS

1. M/s Indian Bank
66 Rajaji Salai, Royapettah
Chennai -600014

...Respondent/
Financial Creditor

2. M/s United Seamless Tubulaar Private Limited
Sy. No,. 309, NH-654, Sripuram
Narketpalli Nalgonda
Telangana – 508252

...Respondent/
Corporate Debtor

3. Padmanabhan Venkatesh
R/o Flat No. C-203, Sri Sai Rajendra Prestige Apts
St. No.5, West Marredpally
Secunderabad - 500026

...Respondent /
Suspended Director

4. Shri K.K. Lakshminarayana
R/o 1-1-364/33, St. 230, Jawahar Nagar
Musheerabad, Hyderabad – 500020 ...Respondent/
Suspended Director

In the matter of IA 282 of 2018

- Padmanabhan Venkatesh
R/o Flat No. C-203, Sri Sai Rajendra Prestige Apts
St. No.5, West Marredpally
Secunderabad - 500026 ...Applicant/
Suspended Director

VERSUS

1. Shri V. Venkatachalam
Resolution Professional of
M/s United Seamless Tubulaar Private Limited
Sy. No,. 309, NH-654, Sripuram
Narketpalli Nalgonda
Telangana – 508252 ... Respondent/
Resolution Professional
2. M/s Indian Bank
66 Rajaji Salai, Royapettah
Chennai -600014 ...Respondent/
Financial Creditor
3. M/s United Seamless Tubulaar Private Limited
Sy. No,. 309, NH-654, Sripuram
Narketpalli Nalgonda
Telangana – 508252 ...Respondent/
Corporate Debtor
4. Shri K.K. Lakshminarayana
R/o 1-1-364/33, St. 230, Jawahar Nagar
Musheerabad, Hyderabad – 500020 ..Respondent/
Suspended Director

DATE OF ORDER: 28.09.2018

Coram:

Hon'ble Shri RatakondaMurali, Member (Judicial)

Parties/ Counsels Present

For the Resolution Professional:	Shri R. Raghunandan Rao, Senior Advocate, Shri CH Gunaranjan, Shri D.V.A.S. Ravi Prasad, Shri M. Sridhar and Shri G. Bhupesh, Advocates and Shri V. Venkatachalam, Resolution Professional (in person)
For Indian Bank:	Shri V.K. Sajith, Advocate
For Directors	Shri Santosh Jadhav, Advocate
For DB (International) (Asia) Ltd	Shri S. Ravi, Senior Advocate along with Shri H. Rajesh Kumar and Varghese Thomas, Advocates
For Corporate Debtor	Shri E. Ajay Reddy, Advocate

Per: Hon'ble Shri Ratakonda Murali, Member (Judicial)

Heard on: 06.07.2018, 13.07.2018, 20.07.2018, 27.07.2018,
01.08.2018, 09.08.2018, 20.08.2018,
24.08.2018, 04.09.2018, 10.09.2018,
12.09.2018, 19.09.2018 & 27.09.2018

COMMON ORDER

1. Ia 125 OF 2018 is filed by the Resolution Professional (RP) under Section 30 (6) and Sec.31 of the Insolvency and Bankruptcy Code, 2016 R/w Regulation 39 of Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (herein after referred to as Regulations, 2016) seeking approval of the Resolution Plan.
2. IA No. 282 of 2018 is filed by Respondent No.3. The averments made in IA 282 of 2018 are similar to the averments in the counter filed by the same Director being Respondent No.3 in IA 125 of 2018. The prayer of Director in

IA 282 of 2018 is to reject the Resolution Plan and to permit him to participate in the CoC meeting whenever Resolution Plan comes up for discussion. So this Application can be decided along with Application filed by the Resolution Professional. So common order is passed in these two Applications.

3. The averments made in brief in IA 125 of 2018 are:
 - (1) This Tribunal vide order dated 12.06.2017 admitted the Petition bearing CP (IB) No. 47/7/HDB/2017 filed by Indian Bank (Financial Creditor) and vide order dated 20.07.2017 passed an order of moratorium under Section 14 of the Code.
 - (2) At the first instance, this Adjudicating Authority appointed Mr. Ahalada Rao Vummenthala as Interim Resolution Professional who was subsequently replaced by Mr V. Venkatachalam as Resolution Professional vide order dated 10.10.2017.
 - (3) Subsequently, the Resolution Professional moved IA 209 of 2017 seeking extension of 90 days' time beyond 180 days to complete the Resolution Process which was approved by the Tribunal vide order dated 06.12.2017.
 - (4) It is stated that the IRP constituted Committee of Creditors and also issued public announcement in the newspapers. He has also appointed two registered Valuers. The valuation report from one valuer was placed before the CoC in its 2nd meeting held on 10.11.2017. It is the case of Resolution Professional that the first valuer Mr P. Madhu had valued only immovable property and other tangible assets and other assets like inventory, advances, receivables and deposits were not valued in accordance with the Regulation 35(2)(a) of the IBBI (IRPCP) Regulations, 2016 (herein after referred to as Regulations, 2016). Since the valuation report from Mr.

K. Vijay Bhaskar Reddy, the second valuer was not received by the Resolution Professional, as it was directly sent to Indian Bank (Petitioner/Financial Creditor), instead of to Resolution Professional, he requested the 2nd Valuer to send the same to the Resolution Professional directly. On receipt of the Valuation Report, the Applicant/Resolution Professional observed that the valuer had not valued inventory, advances, receivables and deposits in accordance with Regulation 35(2) (a) of IBBI (IRPCP) Regulations, 2016.

- (5) It is the case of Resolution Professional that after receiving both the valuation reports he observed substantial differences in the two estimates of value, valuation methodologies and principles between the two valuers appointed by IRP. The Applicant / Resolution Professional thus, appointed a third valuer in accordance with Regulations 2016 to determine liquidation value of the Corporate Debtor.
- (6) In an endeavour to find out a promoter for taking over the Company under Resolution Process, RP has convened eight Committee of Creditors (CoC) meetings. Out of 04 Expression of Interest (EOI) received only four Resolution Plans were discussed in the 6th CoC meeting held on 04.04.2018. The details of Resolution Applicants who submitted their resolution plans were:-
 - (i) Maharashtra Seamless Limited
 - (ii) Mertex UK Limited
 - (iii) Ratnamani Pipes and Steel Private Limited along with Kirtanlal Steel Private Limited
 - (iv) Area Projects Consultants Private Limited
- (7) It is submitted that the RP had been updating the list of creditors from time to time and had uploaded the same on the website of the Corporate Debtor on 15/11/2017,

10/12/2017, 05/01/2018 and lastly on 20/02/2018. The latest list is as follows :

(a) List of Financial Creditors

S No.	Name of the Financial Creditor	Amount Claimed	Amount Verified	Security Interest
1	DB International (Asia) Limited	1391,72,01,404	1391,72,01,404	1006,50,00,000
2	Deutsche Bank AG, Singapore	259,86,56,081	259,82,96,081	392,86,25,100
3	Indian Bank	245,76,95,828	244,58,20,661	195,00,00,000
4	UMW Holdings Berhad	110,60,63,753	110,60,63,753	-
5	UMW India Ventures (L) Ltd	49,60,11,783	23,78,24,268	-
6	UMW Corporation SDN BHD	2,25,83,972	2,25,83,972	-
7	UMW Oilfield International (L) Ltd	47,31,912	-	-

It is submitted that DB International (Asia) Limited, Deutsche Bank AG, Singapore and Indian Bank are members of the CoC having voting rights and other financial creditors mentioned in the above list being related party, to whom Corporate Debtor owes financial debt did not have any right of representation, participation and voting in the meeting of the Committee of creditors in accordance with Section 21(2) of the Code.

(b) List of Operational Creditors



S No.	Name of the Operational Creditor	Amount Claimed	Amount Verified
1	UMW Oilfield International (L) Ltd	2,09,22,456	1,79,44,354
2	SBI CAP Trustee Company Limited	6,90,000	6,90,000
3	UMW Holdings Berhad	2,49,710	-
4	UMW Petropipe (L) Ltd	7,229	-
5	M/s Asian Bearings & Tools Corporation	12,67,591	11,21,427
6	M/s Bearing Age	5,33,167	5,33,167

- (8) It is averred for further discussion and evaluate the Resolution Plans by the CoC, 7th CoC meeting was held on 13.04.2018, in which only two Resolution Applicants attended and the Resolution Plans submitted by two Resolution Applicants and their credential were discussed and evaluated by the members of the CoC. The Resolution Applicants were informed by the RP/CoC regarding deviations noticed in the Resolution Plans submitted by the Resolution Applicants.
- (9) It is averred that for further discussion on the Resolution Plan, CoC suggested RP to convene 8th CoC meeting on 20.04.2018 with the agenda to vote on the Resolution Plans. The RP also apprised the CoC that Area Projects Consultants Private Limited, one of the Resolution Applicants filed a revised resolution plan but majority of the members rejected the revised resolution plan.



(10) It is the case of the Resolution Professional that Two members of CoC i.e. DB International (Asia) Ltd constituting 73.40% of the voting rights and Deutsche Bank AG, Singapore constituting 13.70% of voting rights aggregating to a total of 87.10% of voting rights voted in favour of the Resolution Plan submitted by M/s Maharashtra Seamless Limited (MSL). The third member of CoC i.e. Indian Bank constituting 12.90% of voting rights voted in favour of resolution Plan submitted by Area Projects Consultants Private Limited. As the majority of CoC members voted in favour of Resolution Plan submitted by MSL, the same was approved by the CoC considering its feasibility and viability for the Corporate Debtor in accordance with Section 30(4) of the Code.

4. Counters are filed by Respondent No.1 (Indian Bank) and Respondent No.3 (Suspended Director) Mr. P. Venkatesh.

Reply/counter by Respondent No.1

- (1) Respondent No.1 would contend that it is the case of Resolution Professional that he has noticed substantial differences in the two estimates of value, valuation methodologies and principles between the two value's appointed by IRP and therefore, the RP appointed the third valuer.
- (2) Respondent No.1/Indian Bank would contend that IRP already obtained valuation reports of Mr. K. Vijaybhaskar Reddy and M/s Intech for the fixed and current asset valuation and the fee claimed by the first two valuers was Rs.2.50 lakhs only per assignment. However the RP engaged the services of the third valuer for Rs.23.65 lakhs which is 10 times higher than the valuation of the previous valuers.

- (3) It is the case of Respondent No.1/Indian Bank that they objected for the third valuation stating that Adjudicating Authority needs only two valuations to arrive at the Liquidation value and the same was presented to Respondent No.1 in the CoC meeting held on 04.04.2018.
- (4) It is the case of Respondent NO.1 that even in the third valuation report there is more substantial differences between the third valuation and the first two valuation reports in some aspects of the assets valued and the RP never invited the valuers to attend the CoC to discuss the wide variations. Instead the Resolution Professional arrived at the Distress value of 2 & 3, which is contrary to the Code.
- (5) It is also the case of Respondent NO.1 that SBI CAPS is the security trustee for the Deutsche Bank and they valued the fixed assets of USTPL/Corporate Debtor on 03.10.2016 which shows much higher market value and for calculation of distress value it is much more higher than the third valuation.
- (6) It is contended by Respondent No.1 that in all the CoC meetings the share of Indian Bank was arrived at 13% whereas in the Resolution Plan it mentioned as 12.90%, which causes difference of Rs.0.48 crores in terms of amount.
- (7) The Respondent No.1 also alleges appointment of Brahmaiah & Co. as illegal as the Indian Bank has not given consent for the same and also objected for payment of IRP cost of Rs.4.50 Crores.
- (8) It is the contention of Indian Bank/Respondent No.1 that distress value ought to have been calculated as on average of 1 & 2 as the difference between them is Rs.157.26 crores and the difference between 2 & 3 is

Rs. 162.05 crores and as per the Code, lower difference valuation average is to be taken to arrive the distress value of the Company and the average of 1 & 2 valuation is Rs.600.14 crores and pro rate share is to be calculated on Rs.600.14 crores and not on distress value of Rs.432.93 crores.

- (9) The Respondent No.1 further contended that some of the points which were not discussed in the 8th CoC meeting held on 20.04.2018 were not at all discussed and the objection raised by Respondent No.1 with regard to calculation of distress value did not find place in the minutes of the meeting. It is averred despite requests made to the Resolution Professional to revise the minutes and circulate the final minutes of the meetings the same was not done by the Resolution Professional and placed the resolution plan for approval of this Tribunal, which is against the Code.
- (10) The Respondent No.1 would further contend that they have not signed the voting form regarding appointment of M/s Brahmayya & Co as Facilitator as it involves conflict of interest and they are all party to all the proceedings of CIRP. It is the case of Respondent No.1 that when the entire information and data of the Corporate Debtor and CIRP are not provided even to the CoC before the stipulated deadline under the cover of confidentiality, it is not understood how the entire CIRP proceedings and information was known to M/s Brahmayya & Co.
- (11) It is contended that in the last three CoC meetings the Financial Creditor/Indian Bank had been asking the authorized representative of the Bank and also Resolution Professional whether Corporate Guarantee

is available to the bonds issue of DB but the same is not yet clarified by the RP.

- (12) It is also contended that as per Financial Statements of UMW Holdings Malaysia, provision was made towards contingent liability for the Financial years 2016 & 2017 for the corporate guarantee to the tune of RM 899 million (equivalent to 1400 crores). It is thus clear that Deutsche Bank is having Corporate Guarantee of UMW holdings, Malaysia for the NCDs of Rs.1006 crore and the same is acknowledged by UMW by providing RM 899 million which is reflected in their balance sheets. It is the contention of Indian Bank to reduce the claim to the extent of NCDs or share the amount to be received, at the same share of 13%.

**Counter by Respondent No.3/Suspended Director
Mr. P. Venkatesh**

- (13) It is contended that the table containing various values mentioned at Page 20 of the Resolution Plan, the liquidation value is mentioned as @ Rs.432.92 crores without giving any basis or valuation methodologies and principles adopted and Fair Value is not mentioned in the table. Respondent NO.3 would contend that the Resolution Professional failed to file copies of 03 (three) Engineer's valuation report to arrive at the correct position of the valuations.
- (14) Respondent No.3 would contend that if the Corporate Debtor goes into liquidation, the "liquidation value" has to be adopted as per Regulation 35 of Regulations, 2016 and if it goes for implementation of a Resolution Plan under CIRP, the "Fair Value" has to be adopted as per Regulation 2 (1) (hb) of Regulations, 2016 and that in the interest of all stake holders, the best optimum value

as the "fair value" has to be taken/arrived while finalizing the Resolution Plan as per the amended Regulations.

- (15) It is further contended that the fixed assets of the Corporate Debtor were valued on the request of SBI Cap Trustee Company Limited appointed by Deutsche Bank as Security Trustee, as the fixed assets are charged to Deutsche Bank for their debt portion and the valuation report dated 29.09.2016 is just before the date of valuations obtained by the IRP/RP during September/November 2017 under CIRP. The details of valuation done through SBI Cap Trustee Limited and submitted to deutsche Bank and Indian Bank are as under:-

Date of valuation report	Value (in crores)
12.03.2013	1144.18 crores
01.10.2014	1324.60 crores
29.09.2016	1265.57 crores

In addition to the fixed assets, the value of stock is to the extent of about Rs. 187.28 crores which are hypothecated to Indian Bank as per the stock statement submitted by the corporate Debtor as on 31.01.2018. Thus, the total value of the assets was Rs.1450.98 crores. Respondent No.3 would further contend that there cannot be such a drastic change in the fair value/liquidation value obtained by the lenders on 29.09.2017 and the IRP/RP in September/November 2017.

- (16) Respondent No.3 would further contend that Information memorandum did not contain details of Corporate Guarantee given by UMW Holdings Berhad (holding

Company of UMW India ventures (L) Ltd, the shareholder of the Corporate Debtor) to the Loan/Debt of Deutsche Bank who has 86% voting share in the CoC as per Regulation 36(2) of Regulations, 2016. It is the case of Respondent NO.3 that Resolution Professional should have obtained necessary confirmation from Deutsche Bank which is the lender and also the recipient of the Corporate Guarantee from UMW and comply with Regulations, 2016 and that CIRP process was conducted in deviation of IBC to benefit MSL and therefore, the Resolution Plan to be set aside.

- (17) Respondent No.3 would further contend that Resolution Professional has treated Compulsory Convertible Preference Shares (CCPS) worth Rs. 309 crores which is equity in nature as debt and included it in the claims statement, to be excluded in the claim statement.
- (18) It is the case of Respondent No.3 that DB International (Asia) Limited is the lender for the Bonds. The CCPS came from DB Hong Kong. The RP has not brought this fact while verifying the claims and added the CCPS to the Bond to arrive at a higher voting share, ignoring the fact the CCPS was invested by DB Hong Kong and it is in the nature of equity and cannot be considered as a debt.
- (19) Respondent No.3 would further contend that RP has totally outsourced the entire CIRP from the beginning to the end to an outside agency i.e M/s Brahmayya & Co which is against IBBI Circular No.3/2018 dated 03.01.2018 and that three employees of M/s Brahmayya & Co. have participated in all the CoC meetings and CIRP proceedings.
- (20) Respondent No.3 would contend when the vital information like Fair Value / Liquidation value of the assets were not provided even to the CoC before the

stipulated dead line for submission of the bids by the Resolution Applicants or to the Adjudicating Authority under the cover of confidentiality, the RP has allowed the entire CIRP and information to the employees of M/s Brahmayya & Co and that RP has also engaged M/s Brahmayya & Co, as Resolution Applicant Facilitators (RAF), scout for Resolution Applicants and for scrutiny and vetting of the Resolution Plans submitted by the Resolution Applicants for a huge fees of about Rs. 4 crores.

- (21) It is the case of Respondent No.3 that there is no purpose for RP to engage M/s Brahmayya & Co. as RAF on 14.03.2018/23.03.2018 when the last date for submission of EOI is mentioned as 14.03.2018 and the last date for submission of Resolution Plans was 30.03.2018. He would further contend that there is conflict of interest in engaging M/s Brahmayya & Co. and that RP has shared vital information including the valuation part to MSL in advance to facilitate MSL to submit its bids for an amount slightly higher than the liquidation value.
- (22) Respondent No.3 would further contend that MSL cannot meet the funding requirement of the Resolution Plan amount in a stipulated time schedule as mentioned in the Resolution Plan. He would further contend that the suspended Board of Directors were not invited and they are not party to the proceedings of the CoC meeting held on 20.04.2018, when the Resolution Plan was approved and that they were not allowed to attend the meeting on 20.04.2018. He further contended that though they received notice to attend CoC meeting but they were asked to excuse themselves during specific agenda items were discussed. He also relied on Hon'ble Appellate



Tribunal observations in the matter of Rajputana Properties Limited Vs Ultra Tech Cement Limited & Others, wherein Hon'ble Appellate Tribunal held that **"CoC while approving or rejecting one or other Resolution Plan should follow such procedure which is transparent. Those who are watching the proceedings such as (suspended) Board of Directors or its Partners, Operational Creditors or its representatives and the Resolution Applicant(s) are not mere spectator but may express their views to the CoC for coming to a conclusion in one or other way"**.

- (23) It is the case of Respondent NO.3 that no reasons were provided/recorded by the CoC for accepting or rejecting all the Resolution Plans received by the RP, which is against the Code.
- (24) Respondent No.3 contends that MSL (Resolution Applicant) informed the stock exchanges, NSE & BSE immediately after CoC meeting held on 20.04.2018 that they are the successful bidder of USTPL, even before the Resolution Plan is approved by the Adjudicating Authority.
- (25) Respondent No.3 further contends that sources of funds for payment of Resolution Plan amount which HDFC Bank letter dated 30.03.2018 cannot be considered as confirming funding requirement. Hence, prays this tribunal to dismiss the Application and set aside the Resolution Plan.
5. A rejoinder is filed by Resolution Professional/Applicant to the reply / objections filed by Respondent No.3
- (1) Applicant would contend Respondent No.3 at this belated stage with malafide intent sought to raise very same



contentions with sole intension to disrupt and delay the CIRP.

- (2) It is the case of Applicant / Resolution Professional that though Fair Value and Liquidation Value are key factors, there are several other factors to be considered while approving a resolution plan. Therefore, only after considering the same, the CoC has thought it fit to approve the resolution plan submitted by MSL.
- (3) The Resolution Professional would further contend that there is no requirement for a resolution plan to contain the basis of valuation or the principles adopted therein, or the fair value and the Resolution Professional has duly complied the requirements of law in relation to the valuation exercise. It is only in compliance with Regulation 35 (1) (b), the Resolution Professional appointed a third valuer to determine the Liquidation value by emphasizing the need to include value of other assets like inventory, advances, receivables and deposits as part of valuation.
- (4) Resolution Professional would further contend that the 3rd Respondent is not a member of CoC, but only a participant as per law and thus, there is no legal requirement to share the valuation report other than to CoC as per Regulation 35 (2) and (3) of Regulations, 2016.
- (5) Resolution Professional would contend that there is no existence of Corporate Guarantee as per latest audited Balance Sheet of the Corporate Debtor as well as the documents available with the Corporate Debtor and hence, no disclosure was required to be made in the Information Memorandum. It is further submitted that there is no corporate guarantee extended by UMW Holdings in favour of any of the members of the CoC.

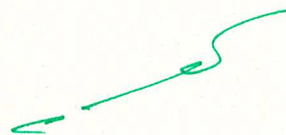
The said question came up for consideration before this Tribunal in IA No. 123 of 2018 and the same was dismissed on the ground that there is no corporate guarantee extended by UMW Holdings to Deutsche Bank International (Asia) Limited.

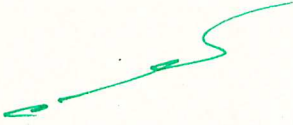
- (6) RP would further clarify that the value of CCPS has not been claimed by DB International (Asia) Limited in its proof of claim and the allegation that the value of CCPS has been added to the bond amount claimed by DB International (Asia) Limited is incorrect.
- (7) It is further submitted by the Resolution Professional that as per Section 25 (2) (d) of the Code, the Resolution Professional is duly empowered to engage professional services for the purpose of conducting the CIRP. The same was also informed to the CoC in the meeting held on 10.11.2017.
- (8) Resolution Professional further stated that M/s Brahmayya & Co was appointed as Resolution Applicant Facilitator after the same was discussed in three consecutive meetings of the CoC. Therefore, the allegations of conflict of interest is untenable.
- (9) It is further submitted in the 7th meeting of CoC , the plan submitted by Area Projects was deliberated in the presence of its representative. Since no satisfactory answers were provided by the representatives of Area Projects and multifarious inconsistencies noted, the same was rejected by the CoC. Further, majority of CoC had clearly set out the reasons for rejecting the Resolution Plan submitted by Area Projects Consultants Private Limited.
- (10) It is averred by Resolution Professional that MSL (Resolution Applicant) has stated that the upfront payment shall be made within 30 days of order of this



Tribunal. All the Resolution Plans were tabled before the CoC and CoC had taken decision in considering and approving most viable Resolution Plan. The letter issued by HDFC Bank reflects a source of funding the proposed financial infusion by MSL. Therefore, the allegations made by Respondent No.3 that MSL cannot meet the funding requirement of the Resolution Plan amount in stipulated time schedule is untenable.

- (11) The Applicant further avers that he has duly complied with the procedures laid down under the Code and Regulations, maintaining utmost transparency in CIRP. The note mentioned in the notice was a general note of caution and not an explicit bar on attending or participation of Directors of the Suspended Board who were duly served notice in accordance with the provisions of the Code. The Applicant states that the 3rd Respondent was not refused or stopped from attending the meeting as claimed by him in his counter.
- (12) The Resolution Professional further avers that the minutes of 8th CoC meeting would reveal the reasons for rejection of the Resolution Plan submitted by M/s Area Projects. The Applicant has intimated the acceptance/rejection of Resolution Plans to the respective Resolution Applicants by way of letter dated 21.04.2018 and 23.04.2018.
- (13) The Applicant further alleges that thought Respondent No.3 had sufficient opportunity on various occasions in the past, but he chooses to raise these issues at the fag end of CIRP.
- (14) The Applicant further alleges that no reasons are put forth by Respondent No.3 that calls for reconsideration of the resolution plans.




- (15) The Applicant further submits that entire process has been carried out in accordance with the Code and Regulations made thereunder and with utmost transparency. It is also submitted by the Applicant that the entire gamut of allegations levelled by 3rd Respondent already have been decided in appropriate applications by this Tribunal. A separate meeting was convened on 22.03.2018 wherein the suspended Directors and shareholders were called upon to put forth their concerns. Since there was no confirmation of participation from the shareholders or the suspended Directors, the meeting was cancelled. Thus, Resolution Professional prayed in the best interest of the Corporate Debtor and its stakeholders the Application may be allowed since the Resolution Plan submitted to this Tribunal for approval, has been approved by the CoC and the stand taken by the 3rd Respondent in his counter does not merit indulgence of this Tribunal.
5. The Applicant is Resolution Professional. I have heard the Counsel appearing for Resolution Professional. I have heard the Counsel appearing for 1st Respondent/Financial creditor and also the counsel appearing for 3rd Respondent who is the Director (suspended Board) of Corporate Debtor.
6. The Application is filed by Applicant/Resolution Professional under Section 30 & 31 of IBC, 2016, with a prayer for approval of Resolution Plan submitted by Resolution Applicant i.e. Maharashtra Seamless Limited (MSL). It is the case of Applicant that the members of CoC having voting share of 86% have approved the Resolution Plan of MSL in the 8th CoC meeting held on 20.04.2018. However, 1st Respondent/ Financial Creditor dissented and voted in favour of other
- 

Resolution Applicant i.e. Area Projects Consultants Private Limited.

7. It is the case of Applicant that Resolution Plan meets all the requirements of Law. It is the case of Applicant that members of CoC with majority voting share considered the Resolution Plan as feasible and viable and therefore approved the same. It is the case of Learned Counsel for Applicant that it is in the wisdom of CoC in approving the resolution plan and that 3rd Respondent, Director (Suspended Board) cannot raise any objection to the Resolution Plan. The Counsel contended majority of the objections raised by the 3rd Respondent in the counter were subject matter of various Applications filed separately and that all those Applications were dismissed and again 3rd Respondent is raising same objections and that no credence can be given to those objections since earlier orders operate as "res judicata". Counsel contended the counter is filed just to delay CIRP and objections are raised at the fag end when resolution plan is sought to be approved by the Adjudicating Authority. Counsel contended Resolution Professional has followed the provisions of the Act and Regulations and that the Resolution Plan is in conformity with Section 30 (2) of the Code and relevant Regulations.
8. The next contention of the Learned Counsel that Resolution Professional has followed Regulation 35 and the Liquidation Value was fixed in accordance with Regulation 35 of IBBI (IRPCP) Regulations. The Counsel contended there is no irregularity or deviation in the matter of fixing Liquidation Value. The Learned Counsel further contended, the 3rd Respondent / Director (suspended Board) was never prevented from attending the CoC meetings and the note appended to the notice does not bar or prevent 3rd Respondent from attending the CoC meetings. He never raised any protest at any time alleging he was prevented from



- attending CoC meeting. He has raised this issue at the fag end of the CIRP only with a view to delay the same. He never raised any objection to the resolution plan and he never offered any suggestions when resolution plan came up for discussion in the 7th CoC meeting held on 13.04.2018. Therefore, objections raised by 3rd Respondent cannot be countenanced and resolution plan be approved as per provisions of Section 31 of the Code.
9. On the other hand Counsel appearing for 3rd Respondent/ Director (suspended Board) of the Corporate Debtor would contend that there are so many deviations committed by the Applicant. The Learned Counsel would contend that Applicant/RP has not followed mandatory provisions of the Code and Regulations. Counsel contended there is no Fair Value ascertainment for the Corporate Debtor Company. The details of Fair Value are not furnished by the Applicant. The reports of the Valuation Engineers are not furnished. The Learned Counsel contended Regulation 35 of Regulations, 2016 is not followed in ascertaining the Liquidation Value of the Corporate Debtor. The contention of the Learned Counsel there is total deviation of Regulation 35 of Regulations, 2016 in ascertaining the Liquidation Value for the Corporate Debtor.
 10. The next contention of the Learned Counsel that 3rd Respondent / Director (suspended Board) was not able to attend the CoC meetings as there is a note appended to the notice issued that 3rd Respondent to excuse himself from attending the CoC meetings. Counsel contended issuing notice to the Director not to attend CoC is in contravention of Section 24 (3) (b) of the Code. The Counsel relied on the decision of Hon'ble NCLAT in Rajputana Properties Limited Vs Ultra Tech Cement Limited & Others, wherein Hon'ble Appellate Tribunal has observed that Directors (suspended Board) or its Partners, Operational Creditors or its
- 

representatives and the Resolution Applicant(s) are not mere spectators but to associate in the discussion and to suggest their views or opinion for consideration. Now the contention of the Learned Counsel in the 7th CoC meeting, the Director was asked to leave the meeting when the resolution plan came up for consideration. Counsel contended in the Agenda of the 8th CoC meeting, one of the items for discussion is to consider the Resolution Plan. However, the note to the notice issued by the Applicant/Resolution Professional that the Director (suspended Board) to excuse himself from attending the meeting. Thus, Counsel for Respondent No.3 contended there is violation of provisions of Section 24(3) (b) of the Code. 3rd Respondent has a right to participate in the discussions though he may not have voting right. The Learned Counsel contended the Resolution Professional has not followed the provisions of Section 24 (3) (b) and in the light of objections raised by 3rd Respondent, Resolution Plan cannot be approved.


11. Two important points to be answered in this Application. Serious objections with regard to ascertainment of Liquidation value. The main contention of objector/3rd Respondent that procedure prescribed in Regulation 35 of Regulations 2016 was not followed and that there is deviation which is apparent on the face of the record. On the other hand, the contention of Counsel for Applicant that there is no deviation and the Liquidation Value was ascertained basing on the procedure prescribed under Regulation 35. For convenience, Regulation 35 is as follows:-

Fair value and liquidation value shall be determined in the following manner:-

"35. Liquidation value.

- (1) Liquidation value shall be determined in the following manner:

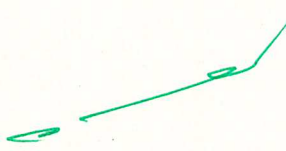


- (a) the two registered valuers appointed under Regulation 27 shall submit to the interim resolution professional or the resolution professional, as the case may be, an estimate of the liquidation value computed in accordance with internationally accepted valuation standards, after physical verification of the inventory and fixed assets of the corporate debtor;
 - (b) if in the opinion of the interim resolution professional or the resolution professional, as the case may be, the two estimates are significantly different, he may appoint another registered valuer who shall submit an estimate computed in the same manner; and
 - (c) the average of the two closest estimates shall be considered the liquidation value.
- (2) After the receipt of resolution plans in accordance with the Code and these regulations, the resolution professional shall provide the liquidation value to every member of the committee in electronic form, on receiving an undertaking from the member to the effect that such member shall maintain confidentiality of the liquidation value and shall not use such value to cause an undue gain or undue loss to itself or any other person and comply with the requirements under sub-section (2) of section 29.
- (3) The resolution professional and registered valuers shall maintain confidentiality of the fair value and the liquidation value.”.]
12. The question whether Liquidation Value in this case was ascertained in accordance with Regulation 35. If it is not done what type of direction to be given for the same. It is an
- 

admitted fact that prior to appointment of Applicant as Resolution Professional, Mr. Ahalada Rao Vummenthala was appointed as IRP. It is not in dispute that IRP has appointed two registered valuers for ascertaining the value of the assets of the Corporate Debtor. The Applicant became Resolution Professional on 10.10.2017 by order of this Tribunal. What is clear from the minutes of 2nd CoC meeting that only one valuation report was received and 2nd Valuation report was not placed before the Applicant or before the CoC. The second valuation report was stated to have been sent to Indian Bank/Financial Creditor directly.


13. I have gone through the minutes of 2nd CoC meeting held on 10.11.2017, which is marked as Annexure-4 at page 43-45 in Volume-I of the Application. Agenda A-12 deals with to review and discuss the status of valuation reports submitted/to be submitted by the Valuers engaged in accordance with Regulations / Code. On reading of the minutes it goes to show the 2nd Valuation is sought as the first valuer Shri P. Madhu appointed by IRP has failed to take into account the value of assets like inventory, Trade receivables, advances and deposits. Further the minutes goes to show that second valuation report from Shri K. Vijay Bhaskar Reddy was not received. Even without receiving the 2nd Valuation report, the Resolution Professional proposed appointment of 3rd Valuer M/s Duff & Phelps to reevaluate parts of assets of Corporate Debtor. The Indian Bank/Financial Creditor requested the Applicant/Resolution Professional to meet 1st and 2nd Valuers, obtain their report and further to request the valuers to amend reports suitably if required. Thus, it is very patent from the minutes of 2nd CoC that the reason for going for 3rd Valuation was not because of significant difference between valuation reports of the first two valuers. The reason for going for 3rd valuation that certain items of assets of Corporate




- debtor were not valued by first Valuer Mr. P. Madhu, namely inventory, trade receivables, advances and deposits. The 3rd valuation is not sought on the ground of significant difference between the two valuations, since 2nd valuation report was not available with Application before the CoC. Yet, Resolution Professional had sought for 3rd Valuation. This is not in line with Regulation 35. I have already reproduced Regulation 35. The Regulation say, the necessity for 3rd Valuation arises where there is a significant difference in the valuation reports of the first two valuers appointed by IRP/RP. Interestingly, the 2nd valuation report was not before the Resolution Professional. However it is stated 2nd valuation report was directly sent to Indian Bank. But minutes go to show the 2nd valuation was not at all looked into. On the other hand, resolution was passed for appointing 3rd valuer. Regulation 35 says that valuation by the 3rd valuer is required only when there is significant difference between the two valuations. Going for 3rd valuation without examining the first two valuation reports is not in accordance with Regulation 35. Interestingly, the minutes goes to show that the 3rd valuation is sought not on the ground of significant difference between two valuations but on the grounds that first valuation report did not properly value the assets of the Corporate Debtor. In other words first valuer has not included the value of certain items of Corporate Debtor such as inventory, trade receivables, deposits and advances. RP cannot go for 3rd valuation on this ground under Regulation 35. The RP must find difference which must be significant between the two valuations and then go for 3rd valuation.
14. The Indian Bank/Financial Creditor has raised objections for 3rd valuation and requested Resolution Professional to consolidate two valuations and submit the amended reports
- 

after assessing the valuation of left out items of the Corporate Debtor.

15. The contention of the Learned Counsel for 3rd Respondent/Director (suspended Board), the Resolution Professional has taken into consideration the valuation of the 3rd valuer. Regulation 35 says the valuation is to be done by Registered Valuer. The contention of the Learned Counsel the first two valuers appointed by IRP are registered valuers whereas the 3rd valuer who is appointed by Applicant/Resolution Professional is not a registered valuer. The contention of the Learned Counsel, the main reason for going for 3rd valuation that the first valuer has not valued certain assets like inventory, trade receivables, advances and deposits. If this is the reason, then the valuation of the assets of the Corporate Debtor by the 3rd valuer must be more than the valuation given by the first registered valuer. The contention of the Learned Counsel that it is surprising to note the valuation done by 3rd valuer shows the valuation of assets of Corporate Debtor is far lesser than the valuation given by the first valuer. It is true that 3rd valuation is sought on the ground that first valuer has not taken into account certain assets of Corporate Debtor and in the normal course, the 3rd valuation shall be more than the first valuation because certain items of Corporate Debtor are being added. But surprisingly there is a huge variation between the valuation done by the first Registered Valuer Shri P. Madhu and the 3rd valuation which was done by Duff & Phelps.
16. The Learned Counsel for Applicant/Resolution Professional would contend earlier the Corporate Debtor Company represented by its Director filed CA 89 of 2018 questioning among others, the valuation. The Learned Counsel contended this Adjudicating Authority had upheld the procedure adopted

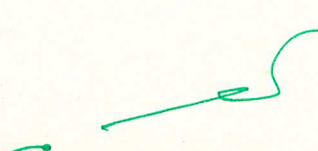


- by Resolution Professional in terms of Regulation 35 for ascertaining Fair Value and Liquidation Value. The Learned Counsel would contend that Respondent No.3/Director (Suspended Board) cannot re-agitate the same issue which attained finality. On the other hand the Learned Counsel for R-3 / Director (Suspended Board) would contend that the Resolution Professional has taken objection in CA 89 of 2018 that there was confidentiality to be maintained about valuation. The 3rd Respondent had no information about valuation as the same was under confidentiality. Further, since Resolution Plan is being coming for approval by the Adjudicating Authority now it has come to the notice that valuation was not done in accordance with Regulation 35. Counsel for Respondent-3 contended that the Director had no access to the valuation because of confidentiality.
17. It is true Director of Corporate Debtor Company had filed CA 89/2018 questioning among others the procedure adopted for valuation. The Resolution Professional took objection about maintainability of the said Application by the Director (suspended Board) on behalf of Corporate Debtor Company and further took objection regarding liquidation value on the ground of confidentiality. The Resolution Professional had pleaded that Liquidation Value was ascertained in terms of Regulation 35. So it was observed that Resolution Professional had proceeded for ascertaining liquidation value in terms of Regulation 35. Now the Resolution Plan has come up for approval. The minutes of 2nd CoC meeting was also placed on record. The Resolution Professional has furnished the valuation given by three Valuers. In the earlier Application such an information cannot be furnished to the Tribunal on the grounds of confidentiality. The limited question for consideration in the earlier Application whether procedure prescribed in Regulation 35 was followed for ascertaining
- 

Liquidation Value. However, the values given by the three valuers were not before the Adjudicating Authority at that time. Earlier in IA 89/2018 the Resolution Professional informed that he had followed Regulation 35 and obtained three valuations. Relying on the contention of Resolution Professional it was held that Resolution Professional has followed Regulation 35 of CIRP Regulations, 2016. Resolution Professional simply stated in the earlier Application that he had gone for third valuation as there was significant difference between two valuations of the Registered Valuers appointed by IRP. However, it is now brought to the notice that Regulation 35 was not strictly adhered to and there was deviation. I have already discussed supra that there was no need to go for 3rd valuation at the time when 2nd CoC was held on 10.11.2017. The second valuation report was not before CoC or Resolution Professional. The third valuation was sought solely on the ground first valuer had not included valuation of certain items like inventory, trade receivables, deposits and advances. Regulation 35 does not permit for 3rd Valuation unless there is significant difference in the two valuations of the two Valuers appointed by IRP. Going for 3rd Valuation without looking into the two valuations and without finding a significant difference is strictly not in accordance with Regulation 35 of Regulations, 2016.

18. It is very interesting to note that 3rd valuation by Valuer who is not a registered valuer is far below the values given by the two registered valuers. The valuation given by the three valuers as furnished by the Resolution Professional in his written submissions is as follows:-

The first two valuers valued the assets of the Corporate Debtor at Rs.681.12 crores and Rs. 513.85 crores respectively, whereas the third valuer given valuation report at Rs.352 crores.


19. Here the question is why 3rd valuation was sought. According to the Resolution Professional, the third valuation was sought as first valuer has not valued certain items of Corporate Debtor like inventory, trade receivables, deposits and advances. If such is the case, the 3rd valuation should have been higher than the first valuation or even it should have been higher than the 2nd valuation. On the other hand, the 3rd valuation is far less than the first two valuations, even though 3rd valuation is sought on the ground certain items of Corporate Debtor Company were not valued by the first valuer. The difference between first valuation and 2nd valuation over the assets of Corporate Debtor is Rs.167.27 crores. The difference between second valuation and third valuation is Rs. 161.85 crores. The Resolution Professional arrived at the liquidation value by taking into account the average of two closet valuations which are - 2nd valuation at Rs. 513.85 crores and the 3rd valuation at Rs. 352 crores. The average valuation of the 2nd and 3rd valuation is Rs. 432.92 crores, whereas the average valuation between 1st and 2nd valuations is Rs. 597 crores.
20. The contention of the Learned Counsel CoC accepted the liquidation value therefore the 3rd Respondent cannot question the same. It is true CoC has accepted the Liquidation value arrived at by taking into account average of 2nd and 3rd valuations. However, the 3rd Respondent being a participant since he is the Director (suspended Board) is entitled to raise the same before the CoC when Resolution Plan came up for discussion. The grievance of the 3rd Respondent that he was not allowed to participate in the CoC meeting to express his views and that the Resolution Professional issued notice directing him not to participate in the meeting. The contention of the Counsel for Respondent NO.3 that refusing permission to the Director (suspended
- 

Board) to participate in the CoC meeting is against to the provisions of Section 24 (3) (b) of IBC. In this connection the Learned Counsel relied on the decision of Hon'ble NCLAT in Rajputana Properties Limited Vs Ultra Tech Cement Limited & Others. On the other hand, the contention of the Learned Counsel for Resolution Professional that Respondent NO.3 was never prevented from attending the CoC meeting. The contention of the Learned Counsel for RP is that 3rd Respondent did not offer any comments at the time of CoC meetings. In other words contention of the Learned Counsel for RP that Respondent No.3 has never offered any comments on the Resolution Plan when it came up for discussion in the 7th CoC meeting. Counsel contended R-3 was present in the 7th CoC meeting and he did not offer his views. Counsel contended R-3 did not attend 8th CoC meeting on 20.04.2018. Nobody prevented him to attend the meeting. He had not chosen to come to the meeting. It is his mere apprehension that he would not be allowed to participate in the 8th CoC meeting. The counsel contended the 3rd Respondent raised this objection at a highly belated stage when the plan came up before the Tribunal for approval. He was silent all these days and raised this objection only with an intention to delay the CIRP or approval of the Resolution Plan. Counsel contended RP had issued notice of every meeting to the Directors of the suspended Board of Corporate Debtor. Counsel for RP contended that there is no violation of Section 24 (3) (b) of the Code.

21. The 3rd Respondent had filed separate Application bearing IA 282 of 2018. The contention of Respondent NO.3 that he was not allowed to participate in the CoC to express his views on the Resolution Plan. This IA 282 of 2018 is also taken up along with this Application for disposal. The contention of Respondent No.3 who is also Applicant in IA 282 of 2018 that

he was not given an opportunity to express his views on the Resolution Plan. In this connection the Counsel for R-3 has relied upon the minutes of 7th CoC dated 13.04.2018 and 8th CoC meeting dated 20.04.2018. The contention of 3rd Respondent that the last CoC meeting was held on 20.04.2018 in which Resolution Plan was finalized. The contention of 3rd Respondent that Resolution Professional sent a notice to the Director (suspended Board) with a note below that "Director to excuse themselves from the meeting as the meeting is convened to discuss and vote on the Resolution Plan". So the contention of Respondent No.3 that Resolution Professional wanted the absence of R-3/Director (suspended Board) at 8th CoC meeting. In this connection, Learned Counsel for R-3 relied on the decision of Hon'ble NCLAT in Rajputana Properties Limited Vs Ultra Tech Cement Limited & Others. The Respondent No.3 has prayed in IA No.282 of 2018 for setting aside the resolution plan and for giving an opportunity to participate in the meeting to consider the resolution plan and to take the views and suggestions of the 3rd Respondent at the time of consideration of the resolution plan. The contention of 3rd Respondent that he was not allowed to participate in the 8th CoC meeting and the note to the notice clearly directed the Directors not to attend the meeting. The Resolution Professional has relied upon copy of notice issued for 7th and 8th CoC meeting. The same are filed along with written submission marked as Annexure-B page nos 20-31. Copy of notice is at page 21 issued to the Directors and to the members of CoC . The note below the notice at page no.22 describes as follows:

Note: Since the 7th CoC meeting, considers evaluation of resolution plans, owing to confidentiality, members of suspended Board or Directors, being related parties/connected persons of the Corporate Debtor,



may requested to excuse themselves during specific agenda items.

The note discloses that members of Suspended Board of Directors are requested to excuse themselves during specific Agenda of items. Item 5 of the Agenda is as follows:

Agenda A5:- To consider and evaluate the Resolution plan submitted by the Resolution Applicants pursuant to the directions of the Hon'ble NCLT, through discussions with Resolution Applicants, as deemed appropriate by CoC.


22. So one of the items of Agenda is to consider and evaluate the resolution plan submitted by Resolution Applicant. For 7th meeting Shri P. Venkatesh appeared under the category of suspended Board of Directors. The minutes of meeting of the 7th CoC dated 13.04.2018 is filed. In agenda A-7 which is for discussion and review of the Application proposed to be filed by one of the Directors of the suspended Board of the Corporate Debtor before Hon'ble NCLT. This Director has expressed his views regarding valuation. His views were recorded in the minutes and he was asked to leave from the meeting. The 3rd Respondent is very particular about 8th CoC meeting wherein the resolution plan was finalized in which he was asked not to attend the meeting.
23. It is an undisputed fact none of the Directors (suspended Board) attended the 8th CoC meeting held on 20.04.2018. Some important matters were discussed in the meeting. The valuation report submitted by the 3 valuers are taken up for discussion. As seen from the minutes of COC, Agenda A-5 is also to consider, evaluate and approve the resolution plan. This is a very crucial and important meeting. This is the last CoC meeting. In this meeting the resolution plan given by MSL was approved. It is not as if the 8th meeting was convened only for the purpose of voting on the resolution plan

given by MSL. The agenda of the meeting discloses that meeting was called to consider, evaluate and approve the resolution plan submitted by Resolution Applicant. The Director (suspended Board) should have been permitted to attend the 8th CoC meeting and to express his views. The meeting also discussed the valuation reports. However, the notice issued by Resolution Professional for the meetings is filed by RP along with written submissions. Notice Form is at page No.28 of written submissions. The note to notice is as follows:

Note: Since, the 8th CoC meeting, considers evaluation and approval of resolution plans, owing to confidentiality, members of suspended Board or Director, being related parties/connected persons of the Corporate Debtor, may be requested to excuse themselves for the entire proceedings of the 8th CoC.


24. It is very interesting to note Resolution Professional directed the members of Suspended Board to excuse themselves in the entire proceedings of 8th CoC. What is clear from the note appended to the notice that members of suspended Board to excuse themselves for the entire proceedings. One of the agenda of the meeting A-5 is to consider and evaluate the Resolution Plan submitted by Resolution Applicants. Can a Director be asked not to attend this meeting? Certainly not. He should have been invited for the meeting. Giving directions to the Directors of the suspended board not to attend the entire meeting is clearly in violation of Section 24 (3) (b) of the Code. For better explanation Section 24 (3) (b) is as follows.

**24 (3) The resolution professional shall give notice of each meeting of the committee /
(b) members of the suspended Board of Directors or the partners of the corporate persons, as the case may be;**



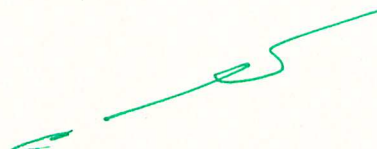
25. It is true Director of the suspended board has no voting right. The director can be excused from the meeting at the time when resolution plan is put up for voting. However the Director (suspended Board) is entitled to offer his views and suggestions when discussion on an important items of the agenda namely approval of the resolution plan. Relying on the decision of Hon'ble NCLAT in Rajputana Properties Limited Vs Ultra Tech Cement Limited & Others the Directors of the suspended Board and others covered under Section 24 (3) (b) are not mere spectators. They have to associate themselves and offer their views and suggestions, if any. Here Resolution Professional clearly stated in the note appended to the notice that members of the suspended board to excuse themselves for the entire 8th CoC meeting in which one of the items of the agenda is to consider, evaluate the resolution plan. Therefore, the 3rd Respondent was denied his right to express his views and suggestions in respect of resolution plan. Further valuation reports given by three valuers were also discussed in the meeting. One of the contentions raised by 3rd Respondent is regarding valuation of the assets of the Corporate Debtor Company. Therefore, the 3rd Respondent being a Director (suspended board) of the Corporate Debtor Company should have been allowed to take part in the CoC meeting at the time of discussion of relevant subject and, he should have been allowed to express his views on the Resolution Plan and for this purpose, the Resolution Plan is to be reverted back to the CoC.
26. The Learned Counsel for Respondent No.3 mainly relied on the decision of Hon'ble NCLAT in Rajputana Properties Limited Vs Ultra Tech Cement Limited & Others and contended the Resolution Professional should have allowed the Director (Suspended Board) to attend the meeting. The Counsel contended, there is no doubt CoC in its wisdom either to

accept or reject the Resolution Plan. It is purely in the domain of CoC to consider the viability of the Resolution Plan. However, CoC has to allow the Director (Suspended Board) being a participant to express his views and suggestions and to offer comments over the Resolution Plan. The CoC has to give reasons why the suggestions/ views were not considered. The minutes should have contained the views and suggestions of the participants / Director (Suspended Board) and the reasons given by the CoC for not accepting the views and suggestions. The contention of the Learned Counsel in the 7th CoC meeting held on 13.04.2018, when Agenda Item-5 came up for discussion, the Respondent No.3 was directed to leave the CoC meeting. The Director was unable to express his views and suggestions when Resolution Plans came up for discussion. The Counsel contended Respondent No.3 wrote in the attendance sheet that he was not allowed to participate at the time when Resolution plan came up for discussion/ scrutiny. The Learned Counsel contended that the Counsel appearing for Indian Bank has given Affidavit to the same effect that Resolution Professional did not allow the Director (Suspended Board)/R-3 to express his views and suggestions if any on the Resolution Plans. Thus, the contention of the Learned Counsel that Resolution professional and CoC failed to act according to the provisions of Section 24 (3)(b) of the Code. On the other hand the contention of the Learned Counsel for Resolution Professional that Respondent No.3 has given his views in the 7th CoC meeting and the same is also noted in the minutes. The Learned Counsel further contended that Hon'ble NCLAT has subsequently held in Company Appeal (AT) (Insolvency) No. 442 of 2018 in the matter of Vijay Kumar Jain Vs Standard Chartered Bank Ltd & ors_ that the Director (Suspended Board) are not entitled for copy of Resolution Plans. The Board of Directors have no voting right.



Therefore, the Resolution Plan copies need not be sent to the Board of Directors. Further, it is also held by the Hon'ble NCLAT that Board of Directors cannot decide the viability and feasibility of the Resolution Plans nor is competent to restructure their debt in order to make the Corporate Debtor a going concern. It is only in the domain of CoC who are expert in the field to decide the viability, feasibility and financial matrix between one or other Resolution Plans by majority share of voting rights.

27. It is true that it is purely in the domain of CoC to decide the viability and feasibility of any resolution plan. However, Board of Directors have a right to express their views or give suggestions to the Resolution Plan and it is for the CoC to consider or reject them. The contention of Respondent No.3 that he was not allowed to express his views and give suggestions. Therefore, Section 24 (3) (b) was not followed and Hon'ble NCLAT has held in Rajputana Properties Limited Vs Ultra Tech Cement Limited & Others that Board of Directors (Suspended Board) are not invited to be as mere spectators but they are entitled to offer their comments on the Resolution Plans but they have no voting rights. I have discussed supra that material is placed to come to conclusion that Respondent No.3 was not allowed to attend the 8th CoC meeting held on 20.04.2018 where Resolution Plan of MSL was approved. The meeting was not strictly convened for the purpose of voting. The Agenda of 8th CoC meeting provides for consideration of Resolution Plan. Therefore, the notice issued by Resolution Professional for 8th CoC meeting with appended note is not in accordance with Section 24 (3) (b). So, in the light of my discussion, the Resolution Plan filed before the Adjudicating Authority can not be approved since opportunity is not given to the Board of Directors (Suspended Board) particularly to Respondent No.3 to express views or give suggestions.



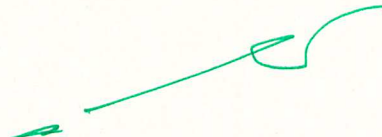
Therefore, the resolution plan is to be sent back to the CoC for re-consideration after giving opportunity to suspended Board of Directors, particularly to Respondent No.3 to permit him to offer his views and give suggestions to be recorded in the minutes and the reasons of CoC is also to be noted in the minutes. For this purpose Resolution Professional is directed to convene the CoC meeting.

28. The contention of Respondent NO.3 that constitution of CoC is not in accordance with the provisions of the Code. The Learned Counsel would contend that UMWH, Malaysia gave guarantee in respect of the loan sanctioned to the Corporate Debtor. The Deutsche Bank (AG) Bangalore recalled the guarantee and as a result UMWH cleared the loan liability. The contention of the Learned Counsel is that the CoC has not been properly constituted by the Resolution Professional. The contention of the Counsel for Resolution Professional that Respondent No.3 cannot raise same objection which was once decided by this Tribunal and it operates as res judicata holding that there was no guarantee given by IMWH in respect of any of the Financial creditors of CoC. The Counsel for Resolution Professional has mainly relied on the order passed by this Tribunal in IA 123/2018. I have seen the order passed by this Tribunal in IA No.123/2018. The said Application was filed by Financial Creditor/Indian Bank raising the same plea. This question was dealt in IA 123/2018. It was held that there is no corporate guarantee given by UMWH to DB International (Asia) Ltd who is a member of CoC. The Corporate Guarantee was extended to DB (AG) Bangalore. Now Respondent No.3 enclosed to the counter the Annual Report of UMWH Berhad, Malaysia as Annexure-2 for the year 2016. The recall notice dated 22.11.2016 is also marked as Annexure-3. The question whether UMWH Malaysia extended any Corporate Guarantee for DB International (Asia) Limited which is a



member of COC. The Guarantee extended to DB (AG) Bangalore which extended a loan to the Corporate Debtor and Guarantee was recalled. The claim of UMWH, Malaysia was filed before the Resolution Professional and claim is included in the list of creditors. Therefore, it is not again open to Respondent No.3 to raise the same issue which was finally decided by the Tribunal in IA No.123/2018.

29. The contention of the Learned Counsel for Financial Creditor/Indian Bank that there is violation of Regulation 35 in arriving at the liquidation value. Indian Bank is one of the members of the CoC. The Indian Bank has initiated CIR Process against the Corporate Debtor. The main contention of Financial Creditor that the determination of liquidation value of the Corporate Debtor is not in accordance with Regulation 35. The contention of the Learned Counsel for Financial Creditor that Deutsche Bank, the Financial Creditor of Corporate Debtor has obtained valuation of the assets of the Corporate Debtor prior to commencement of CIRP Process. The valuation given by SBI CAP, Security Trustee of Deutsche Bank, gave valuation certificate and valued the assets of Corporate Debtor at Rs.1265.58 crores. The contention of the Learned Counsel, post admission of the Petition, the IRP appointed two valuers in pursuance of Regulation 35 who have valued the assets of the Corporate Debtor Company and gave Fair Value and Liquidation value.
30. The contention of the Learned Counsel for Indian Bank, the valuation for the Corporate Debtor Company prior to admission was done by H. Jayasurya & Associates , Bangalore in respect of assets of Corporate Debtor. This was sometime prior to valuation by Duff & Phelps. The contention of the Counsel for Indian Bank there is lot of difference in respect of valuations between the valuation done by SBI CAP Security Trustee of Deutsche Bank and Duff & Phelps and the gap



between the two valuations is around two years and six months, but difference between two valuations is very wide. The contention of the Learned Counsel, the Liquidation valuations is not in accordance with Regulation 35 and that Indian Bank being the Financial Creditor in the CoC raised objection for going for 3rd Valuation.

31. On the other hand Learned Counsel for Resolution Professional contended that it was unanimous decision of CoC to go for 3rd valuation. The Learned Counsel for Resolution Professional pointed out that it is not open to the Indian Bank to question Liquidation value as Indian Bank voted in favour of Resolution Plan given for Rs.145 crores as against the higher value quoted by Resolution Applicant/MSL.
32. The Counsel for Respondent No.3 also raised same objection regarding ascertaining liquidation value. At the cost of repetition, the decision to go for 3rd valuation was taken in the 2nd meeting of CoC dated 10.11.2017. The Minutes of the 2nd CoC is filed along with counter in IA 125 of 2018 shown as Annexure-7 at page 348-359. It is dated 10.11.2017. The Agenda A-12 of the meeting is with reference to review and discuss the status of valuation reports submitted/ to be submitted by valuers engaged. The minutes go to show only first report of Registered Valuer P. Madhu was available with the Resolution Professional and the coC as on the date of 2nd CoC meeting. The copy of 2nd Valuation report was said to have been tabled before the CoC on that day. However, there was no comparison of the two valuations to find out significant variance. As per the minutes, the 3rd valuation was sought on the ground that certain assets like inventory, trade receivables, advances and deposits were not valued. I already stated, Resolution Professional has to go for third valuation only if he find significant variance between two valuers appointed by the IRP. However, that is not the



reasons for seeking 3rd valuation. It is on different ground. Going for 3rd Valuation is strictly not in accordance with Regulation 35 of Regulations, 2016. There are three valuation reports before the Resolution Professional and CoC for determining the Liquidation Value. Of course it is one of the contentions that third Valuation given by Duff & Phelps is not a Registered Valuer. For this the contention of the Learned Counsel for Resolution Professional that Duff & Phelps though not a registered valuer, is authorised to execute the valuation work in view of Rule 11 of Companies (Registered Valuers & Valuation) Amendment Rules 2018. It is true, even though Duff & Phelps is not a registered valuer but by virtue of Rule 11 of Companies (Registered Valuers & Valuation) Amendment Rules 2018, it is authorised to assess the valuation.

33. Regulation 35 no doubt provides that average of two closet valuations be taken for determining the liquidation value. There is no dispute regarding valuation arrived at by each of the valuers. The IRP appointed two Registered valuers. The first Registered valuer P. Madhu valued the assets of Corporate Debtor at Rs.681.12 crores. The 2nd Registered Valuer Mr. K. Vijay Bhaskar Reddy valued the assets of Corporate Debtor at Rs. 513.85 crores. The difference between the two valuations is Rs.167.27 crores. The third valuer valued the assets at Rs. 353 crores. Thus, the three valuers have given three different values of the assets of the Corporate Debtor. The difference between the 2nd and 3rd valuations is around Rs.161.85 crores. There is a slight difference of Rs.5.42 crores between the valuations of first and second on one hand and the second and third valuations on the other hand. In other words to make it clear, the difference between first and Second valuations is Rs.167.27 crores and between second and third is Rs. 161.85 crores.



The difference between them is Rs.5.42 crores. Now, the Resolution Professional had taken into consideration for fixing Liquidation value, the second and the third valuations on the ground they are two closet valuations. I already stated, the difference between first and second valuations and second and third valuations is Rs.5.42 crores. If average value is taken, then the difference between first and second valuations and second and third valuations is Rs.164.57 crores. To make it clear, the average valuation between first and second valuations reports for determining liquidation value comes to Rs.597.49 crores. The average valuation between second and third valuation comes to Rs.432.92 crores. Thus, the difference between the average valuations is Rs.164.57 crores, whereas the difference in the valuations as I already pointed out, is Rs.5.42 crores. The Resolution Professional has taken into consideration the valuation of second and third valuations on the ground that they are two closet valuations, but difference is only about Rs.5.42 crores. It is very clear there is a lot of difference in the average valuations between first and second and second and third valuations. The third valuation was sought only on the ground that first Valuer has not included certain items in the valuation report. It is not known whether second valuer has taken into account and valued those items which the first valuer allegedly failed to value. The 3rd valuation is far below the valuation of the 1st and 2nd valuations. The Liquidation Value should have been determined by taking into account average valuations of first and second valuations because Liquidation value of the assets of the Corporate Debtor will be more than the Liquidation value if second and third valuations are taken into considerations. It is more advantageous if average value between first and second valuations is taken for determining the Liquidation value. There is no wide difference in the



valuations between first and second when compared with the difference between the valuations of second and third. When there is no significant difference, the Resolution Professional ought to have taken into consideration for determining the Liquidation value, the average of 1st and 2nd valuations. The Liquidation Value shall always be very nearer to the assets value. The Resolution Professional should have determined Liquidation Value by taking into account the average of first and second valuations, instead of taking the average of second and third valuations for slight marginal difference of Rs.5.42 crores because the difference in the Liquidation value between first and second on one hand and between second and third on the other hand is Rs.164.57 crores. Therefore, it is a fit case to direct the Resolution Professional to re-determine the Liquidation Value by taking into consideration the valuation reports of 1st and 2nd valuers i.e. valuation reports furnished by the Registered Valuers P. Madhu and K.Vijay Bhaskar Reddy. The Resolution Plan submitted by MSL/Resolution Applicant shall be examined or reconsidered by the CoC in the light of redetermination of Liquidation Value.

34. In this connection, Learned Counsel for Resolution Professional has relied on the decisions of NCLT Mumbai in Monnet Ispat & Energy Limited in MA 346/2018 in CP (IB) 1139 (MB)/2017 and also NCLT Chandigarh in Amtek Auto Limited in CP (IB) No.42/chd/Hry/2017 dated 25.07.2018. The contention of the Learned Counsel that NCLT Mumbai Bench approved the Resolution Plan even though there is a wide difference in the Fair Value and Liquidation Value. The Learned Counsel for Resolution Professional relied on para (6) of the judgement. It is held in the decision cited above that even though there is difference between Fair Value and Liquidation Value, CoC approved the Resolution Plan considering upfront payment coming from Resolution

Applicant. Whereas in the case before me it is not the difference between the Fair Value and Liquidation Value which is for consideration. Therefore, decision cited has no application of the facts to this case. The second decision cited is of Hon'ble NCLT Chandigarh. The contention of the counsel that Hon'ble NCLT Chandigarh bench has approved a Resolution Plan which is slightly below the Liquidation Value. Counsel referred to para 64 of the judgement. I have seen para 64 of the Judgement. Hon'ble NCLT Chandigarh has clearly held that the benefit likely to get from the Resolution Plan by the creditors is above the Liquidation Value. In other words, the total potential recovery is more than the Liquidation Value. So in that connection, the Resolution Plan was accepted.

35. It is therefore necessary to re-determine the Liquidation Value before considering the Resolution Plan filed by MSL. After re-determining the Liquidation Value as directed, the CoC has to examine the Resolution Plan of MSL. Hon'ble NCLAT has held in the Company Appeal (AT) (Insolvency) No.185 of 2018 dated 08.05.2018 (2018 SCC Online NCLAT 243) that If the facts and circumstances justify exclusion in unforeseen circumstances, Hon'ble NCLAT says some circumstances wherein the period involved can be excluded in computing the period of total 270 days.
- (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 CIRP.

- (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 CIRP.
- (v) If the CIRP is set aside by the Appellate Tribunal or order of the Appellate Tribunal is reversed by the Hon'ble Supreme Court and CIRP is restored.
- (vi) Any other circumstances which justifies exclusion of certain period.

It is clear in ground No. (vi), the Adjudicating Authority can exclude certain period for the purpose of counting total period of CIRP is circumstances justify such exclusion. In this case, Resolution Plan of MSL is ordered to be placed before CoC for consideration after redetermination of Liquidation Value. Further, in view of re-determination of liquidation value and on the other grounds that Directors of the Suspended Board were not allowed to participate in the discussion in the 7th & 8th CoC meetings. Therefore, the Resolution Plans which were found to be qualified along with the Resolution Plan submitted by MSL to be placed before the CoC again for consideration and Directors (Suspended Board) be permitted at the time that time when Resolution Plans come up for discussion and they be allowed to express their views and suggestions and the same to be recorded in the minutes along with views of CoC.

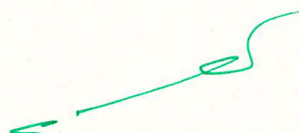
- 36. For this purpose, Resolution Professional has to convene the CoC to comply the directions of the Tribunal. The last date after extension for submission of Resolution Plan was 30.03.2018. Thereafter 6th CoC meeting was held on 04.04.2018, the 7th CoC meeting was held on 13.04.2018 and

8th CoC meeting held on 20.04.2018. The Resolution Plan came up for scrutiny in 7th & 8th CoC meeting. For this a minimum of 30 days is required for the CoC and Resolution Professional to comply the direction. Therefore, 30 days is required to be excluded from the CIRP period of 270 days with effect from today so that the entire process can be completed.

37. In the result, IA 125 of 2018 and IA 282 of 2018 are disposed off with the following directions:-

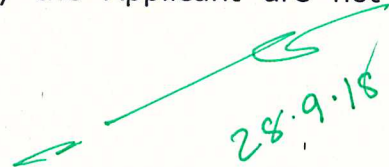
IA 125/2018

- (1) The Resolution Professional is directed to re-determine the liquidation value of the Corporate Debtor by taking into consideration the first and the second valuations of P. Madhu, and K. Vijaybhaskar Reddy, Registered Valuers as stated in the order.
- (2) The Resolution Professional shall convene a meeting of CoC to place the qualified Resolution Plans along with Resolution Plan of MSL before CoC for reconsideration, in the light of revised liquidation value of the Corporate Debtor Company.
- (3) 30 days' time is excluded from the CIRP period with effect from today for completing the above direction.
- (4) The Resolution Professional is directed to allow Directors / Suspended Board to participate in the CoC meetings and permit them to express their views and suggestions and record the same in the Minutes of the meeting of the CoC.



IA 282/2018

- (1) IA 282 of 2018 is allowed to the extent that Applicant be permitted to participate in the CoC meeting and express views and give suggestions if any and the same to be recorded in the minutes.
- (2) The other reliefs prayed by the Applicant are not granted.


28.9.18

(RATAKONDA MURALI)
MEMBER (JUDICIAL)

BINNU