

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

I.A No. 439 of 2020
u/s 30(6) of IBC, 2016 &
I.A No.500 of 2020
u/s 60(5) of IBC, 2016
C.P (IB) No.243/BB/2018
r/w Rule 11 of NCLT Rules, 2016

In the matter of:

I.A No.439/2020

Mr. Pankaj Srivastava

- Resolution Professional

Kundan Care Products Ltd

- Resolution Applicant

In the matter of:

I.A No.500/2020

Kundan Care Products Ltd.,

And

- 1. Pankaj Srivastava,
Resolution Professional**
- 2. Pridhvi Asset Reconstruction and Securitisation Company Ltd.**
- 3. Edelweiss Asset Reconstruction Co. Ltd.**

- Respondents



In the matter of:

C.P (I.B) No.243/BB/2018

**Pridhvi Asset Reconstruction and
Securitisation Company Ltd.,**

-

Financial Creditor

And

Sagar Power (Neerukatte) Pvt. Ltd.,

-

Corporate Debtor

Date of Pronouncement: 19th March, 2021

Coram:

1. Hon'ble Shri Rajeswara Rao Vittanala, Member (Judicial)
2. Hon'ble Shri Ashutosh Chandra, Member (Technical)

Parties/Counsels Present:

- For the Resolution Applicant : Sr. Counsel, Mr. V. Srinivasa Raghavan
along with Mr. Prithu Garg, Adv;
- For the Respondent Professional : Ms Amrita Jain, Adv;

ORDER

Per: Ashutosh Chandra, Member (Technical)

1. I.A.No.439 of 2020 in C.P.(IB)No.243/BB/2018 is filed by Mr.Pankaj Srivastava, Resolution Professional of the Corporate Debtor, Sagar Power (Neerukatte) Pvt Ltd., u/s 30(6) of the Insolvency and Bankruptcy Code, 2016. The Applicant has filed this application dated 26.10.2020 seeking approval of Resolution Plan of the Corporate Debtor submitted by Kundan Care Products Limited, which was approved by the CoC at their 16th meeting held on 20.10.2020.
2. Subsequently, I.A No.500 of 2020 in C.P(IB) No.243/BB/2018 was filed on 03.12.2020 by Kundan Care Products Limited, the Successful Resolution Applicant under section 60(5)(c) of Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the National Company Law Tribunal Rules, 2016 seeking an order declaring that the Resolution Plan submitted by Kundan Care Products

Limited on 22.10.2020 and approved by the CoC on 24.10.2020 stands revoked/withdrawn, and direct the cancellation/ revocation/ return/ refund of the Financial Bank Guarantee of Rs.50,00,000/- and the Performance Bank Guarantee of Rs.3,01,32,780/- submitted by the Applicant in pursuance of the Plan.

3. Brief facts of the case, as mentioned in the Application, which are relevant to the issue in question, are as follows:

- (1) It is submitted that the Applicant is aggrieved by the erroneous misleading incomplete statements and omission of material facts in the Information Memorandum as well as the email dated 01.08.2020 issued by the Ld. RP on the material aspect of description of the total project lands of the Corporate Debtor and the average annual generation capacity of the project. That the information formed the edifice of the Resolution Plan and the financial projections contained therein. Pursuant to the discovery of the said information, the entire plan has been set at naught as it does not contain any provision dealing with additional land requirement discovered subsequent to the approval of the plan. The plan does not remain commercially viable on account of the resultant failure to achieve optimum power generation due to unavailability of the total land required to operate the project.
- (2) It is submitted that the Corporate Debtor being in the business of generation of hydropower had entered into Power Purchase Agreement (PPA) with Mangalore Electricity Supply Company in 2006 which is valid until 2029 and the contractual rate per unit has been fixed at Rs.2.80.
- (3) In 2018, Pridhvi Assets Reconstruction and Securitisation Company filed the captioned petition under section 7 of the Insolvency and Bankruptcy Code, 2016 alleging a default of Rs.169,82,68,361/- against the Corporate Debtor in respect of the PNB facilities and OBC facilities as on 31.07.2018. This Bench admitted the application vide Order dated 27.09.2019 and appointed the IRP, currently the Resolution Professional.



- (4) The IM prepared by the Resolution Professional which was made available to the Applicant at Internal page No.4 represented that the hydropower was built on 63 cents land whereas another land parcel of 10 acres (agricultural land) was transferred by the erstwhile Directors of the Company in 2018-19, by an unregistered agreement, for a total consideration of Rs.12,40,00,000/- which stood transferred by issue of shares to the said Directors. The IM further represented that the average annual capacity for power generation of the project was 20.31 million units whereas the peak capacity was stated to be 25.27 million units. It was thus represented that the aforesaid two parcels of land were the total lands sufficient to achieve the aforesaid annual generation of power.
- (5) It is submitted that the Applicant conducted its due diligence with site visits etc. Since the project as represented did produce an average of 20.31 million units annually in the past, the Applicant relied on the representation made in the IM that it was produced out of extant land as provided in IM. An Earnest Money Deposit of Rs.50,00,000/- in the form of bank guarantee bearing No.4184ILG001420 for participating in the CIR process of the Corporate Debtor was submitted.
- (6) It is submitted that after the relaxation of the lockdown the Applicant conducted further due diligence and found that the IM contained incorrect and inadequate description of the extant land that the project had been utilizing to produce average of 20.31 million units. Accordingly, the Applicant sought information from the RP. The RP issued email dated 01.08.2020 to the Applicant, wherein it was clarified that there were 3 land parcels (total admeasuring 58.07 Acres) which were being utilized for the operation of the project. The land parcels as described in the email are as follows:
- i) Land Parcel No.1 admeasuring 0.63 acres owned by the Corporate Debtor.



- ii) Land Parcel No.2 admeasuring 36.05 acres owned by the erstwhile directors/ promoters of the Corporate Debtor and mortgaged with the Resolution Professional.
 - iii) Land Parcel No.3 admeasuring 21.39 acres comprising about 40 Survey Nos. and transferred by the erstwhile directors in favour of the Corporate Debtor by an unregistered agreement.
- (7) The Applicant vide email dated 07.08.2020 categorically requested the RP to ensure that the second land parcel was transferred by the Financial Creditors/ Respondent No.2 in favour of the Resolution Applicant/ Corporate Debtor after approval of the Resolution Plan. In response, the RP vide email dated 11.08.2020 assured the Applicant as to the maintenance of status quo with respect to the possession and use of the Second land parcel for the project.
- (8) The Applicant vide emails dated 13.08.2020 and 24.08.2020 requested the RP to ensure that all three land parcels are available for free and uninterrupted use of the project since they have been represented as being essential for its successful operation. The RP further requested the Applicant to improve its financial offer to a minimum of Rs.30 Crore failing which the Resolution plan would not be considered by CoC.
- (9) The Applicant enhanced its financial offer to Rs.30,13,27,800/- and submitted a revised Resolution Plan on 22.10.2020 based on the IM provided by the Resolution Professional. To safeguard its interests, the Applicant expressly stated in the Resolution Plan at Sl. No. 5.1.1 that it reserves its right to inter alia, withdraw the plan in case of any change in the information provided in the IM or new information becoming available to the Applicant, or if there is a material adverse change. Further, clause 9 of Resolution Plan expressly provided that the free and uninterrupted use and transfer of title (without any consideration) of project lands in favour of Corporate Debtor/ Resolution Applicant, were conditions precedent for implementation of the Resolution Plan.



- (10) In terms of Clause 11 (dd) of the Resolution Plan, the applicant sought a direction from this Bench to the erstwhile owners/promoters to transfer the title in respect of the third land parcel in favour of Resolution Applicant/ Corporate Debtor.
- (11) The Applicant committed to infuse Rs.4.5 Cr towards capital expenditure required for operation of the project. The resolution plan was approved by the CoC and its approval was communicated to the Applicant and Letter of Intent was issued by the RP to the Applicant. The Applicant issued conditional acceptance to the LOI, the condition being that the project shall be handed over to the Applicant within the first week of December 2020 so as to enable it to conduct the repairs and rehabilitation in the lean season (October to April). Appendix -1 of financial projections specifically stipulates that the same were inter alia based on the key assumption that the project would deliver 20 million saleable units annually. In this regard the Applicant submitted Performance Bank Guarantee bearing No. 1588-BG-13-2020 dated 26.10.2020 of Rs.3,01,32,780/- with the RP.
- (12) In November 2020, the Applicant was informed by representative of erstwhile director/promoter of the Corporate Debtor, that there were major misrepresentations, incomplete statements and omissions in the information given to the Applicant in respect of the status and total requirement of project lands. It was revealed that there was a 4th land parcel in use, on the left and the right side of the river, admeasuring about 42 acres which was owned by persons belonging to Scheduled Castes/Tribes and was being used for the project under an informal arrangement between the said owners and the erstwhile directors/promoters of the Corporate Debtor. Thus, it was informed that the total land requirement for the project was 100 acres as opposed to 58 acres represented to the Applicant. A sum of Rs.7.5 Cr was demanded by the representative of the erstwhile director of CD from the Applicant to ensure that the 4th land parcel was available for the project.

- (13) The Applicant was also informed that 2nd Land parcel admeasuring 36.05 acres comprising of agricultural land and therefore, the same was excluded from the purview of SARFAESI Act, 2002. The fact of any land parcel being classified as agricultural land was not stated anywhere, either in the IM or the subsequent correspondences between the Applicant and the RP. The Resolution plan becomes unviable as the contemplated transfer of said land parcel by private sale under SARFAESI as a "condition precedent" to the implementation of the plan.
- (14) On 09.11.2020 the Applicant addressed letter to RP asserting that the availability of all project lands was essential to operate the project at its average annual capacity and that the discovery of the 4th land parcel had put the project in jeopardy and rendered the plan unfeasible, unviable and incapable of implementation.
- (15) To verify the information received from erstwhile director/promoter the Applicant engaged an independent power-sector consultant to ascertain: (a) The total land requirement for achieving the average annual generation capacity of 20 million units of the project,
(b) The details of the ownership/title of the project lands,
(c) The present generational capacity of the project with the three land parcels described in the email dated 01.08.2020.
- (16) The consultant carried out physical survey of project site with specialized workmen and equipment, and submitted a detailed investigation report dated 09.11.2020 which inter alia contains following findings:
- (i) The 2nd land parcel admeasuring 35.42 acres as opposed to 36.05 acres stated in email dated 01.08.2020. Entire land parcel is agricultural.
 - (ii) The 3rd land parcel admeasuring about 21.39 acres also comprises of agricultural land.
 - (iii) The 4th land parcel admeasuring about 42 acres, not mentioned in the IM or subsequent correspondences, is essential for the operation of the



project at its average capacity. Further, this land parcel belongs to multiple local persons.

- (iv) Without use of 4th parcel, project will be capable of generating 3 to 4 million units of power annually as opposed to its average capacity of 20.31 million units represented in the IM and stipulated as Applicant as precondition.
- (v) Meanwhile, the RP denied knowledge of 4th parcel vide letter dated 12.11.2020 despite being aware of it. The RP being supervisor of operations of project ought to be aware of it.
- (17) While the Applicant awaited positive remedial steps from the RP/CoC, a memo dated 18.11.2020 was filed by RP in the captioned IA for placing on record the correspondence dated 09.11.2020, 12.11.2020 and 17.11.2020. Surprisingly, the RP sought approval of Applicant's Resolution plan. Left with no other option, the Applicant withdrew its plan vide letter dated 28.11.2020 addressed to RP and the CoC members. The Applicant further requested for release of the performance bank guarantee of Rs.3,01,32,780/- and EMD of Rs.50,00,000/-. The RP responded vide letter dated 30.11.2020 stating that the withdrawal letter shall be placed before this Bench.
- (18) It is submitted that generation of 20 million units annually is imperative to sustain the financial projections which form the substratum of resolution plan. If the project generates 4 million units annually as stated in the investigation report, the project will incur an annual generation loss of Rs.4,48,00,000/- (1,60,00,000 units Rs.2.80) per year. In the alternative, retaining the 4th land parcel, the Applicant would have to immediately bear an additional sum of Rs.7.5 Cr over and above resolution amount which is way beyond the total capital expenditure of Rs.4.95 Cr envisaged in the plan. Even after bearing huge costs there is no certainty that the 4th land parcel can be made legally available to the project. For the above stated reasons the resolution plan becomes commercially unviable and the Applicant should

not be compelled to perform its obligation as the RP has misrepresented facts in IM.

- (19) The Applicant has placed reliance on the decision passed by NCLT Mumbai Bench, in *Deccan Value Investors L.P & Anr. V. Deutsche Bank AG, MA No.1272/2018 & MA No.956/2018 in CP 1555 (IB)/MB/2017*, allowed withdrawal of the Resolution Plan on account of misrepresentation of facts in the IM and assertions of unviability by the Resolution Applicant in that case. The said decision has been upheld by the Hon'ble NCLAT in *Committee of Creditors of Metalyst Forging Ltd. V. Deccan Value Investors L.P & Ors., Company Appeal (AT) No.1276/2019*, decided on 27.09.2019.
- (20) In respect of return of performance guarantee and earnest money, it is submitted that the Code provides for different kinds of deposits and guarantees with specific purposes and intent. The RP is bound by the Code and CIRP Regulations:
- (i) A bank guarantee for withdrawal under section 12A of the Code-this is for the actual expenses incurred for the CIRP initiated by an applicant;
 - (ii) A refundable deposit by a prospective resolution applicant under regulation 36A (4(d) of CIRP regulations during Expression of interest –this has penal purposes and becomes non-refundable only when the information provided by the prospective RA is discovered to be false (36A (4f);
 - (iii) Similarly, No non-refundable deposit is required by the prospective RA under regulation 36B (4) for submission of resolution plan, and the deposit made under 36A(4d) continues to serve its aforementioned purpose;
 - (iv) A performance security under regulation 46B(4A) which is to ensure that RA does not “fail to implement the Plan or contribute to the failure of the implementation of the plan in accordance with the terms of the

Plan and its implementation schedule . . . which shall stand forfeited .. after its approval by the Adjudicating Authority”.

- (21) The argument of the RP that the withdrawal of plan of RA has caused loss to the CoC/CD is incorrect because the undisclosed liquidation value of the CD was almost equivalent to the offer of RA's plan (30.13 Cr). Assuming that the liquidation value of the Corporate Debtor is 30 Cr, the CoC would suffer a loss of only 13 Lakh because of withdrawal, as there were only 2 bidders who submitted bids below 30 Cr, out of which only the present RA revised its bid over 30 Cr.
4. The Resolution Professional to the Corporate Debtor has filed written arguments in respect of I.A No.439/2020 and I.A No.500/2020 with the below stated submissions:
- (1) It is submitted that the Resolution Applicant upon being declared eligible bidders were provided bid process document by way of request for resolution plan (RFRP) detailing all the requirement and conditions to be fulfilled before submitting the resolution plan along with necessary templates etc. The Successful Resolution Applicant then based on its own due diligence presented their Resolution Plan to the Resolution Professional on 14.03.2020 for a bid value of Rs.15 Cr only.
 - (2) During the negotiation process, based on the offered resolution plan value when the CoC sought improvement in the bid, the Applicant demanded that the land measuring about 36.05 Acres (2nd Land parcel) belonging to Erstwhile Promoters mortgaged (mortgage included 0.63 Acres held in name of Corporate Debtor) to lenders, be transferred to Successful Resolution Applicant by way of private treaty under SARFAESI. This land parcel was subsequently agreed to be transferred by the CoC members to whom the mortgages were assigned.
 - (3) However, the CoC set a condition of minimum threshold value of Resolution Plan to be considered for approval to be above Rs.30 Cr and directed the Resolution Professional to communicate the same to all potential Resolution

Applicants. The Applicant therefore increased resolution plan bid value to Rs.30,12,27,800/- while increasing the repayment period to 6 years and submitted a final revised plan on 22.10.2020.

- (4) The CoC in the limited time available to it as per the CIRP timelines, considered revised offer of Successful Resolution Applicant and approved the same by majority voting share of 88.43% held by Pridhvi Asset Reconstruction and Securitisation Company Ltd. The Successful resolution Applicant was required to make an RTGS Deposit of Rs.3,01,32,780/- equivalent of 10% of the Resolution Plan value. This was in addition to Bank Guarantee of Rs.50 Lakh towards EMD submitted along with the resolution plan.
- (5) The RP after receiving confirmation of the Successful Resolution Applicant along with Bank Guarantee of Rs3,01,32,780/- submitted the Resolution Plan as per I.A No.439/2020 for approval with this Bench.
- (6) The Applicant filed I.A No.500/2020 seeking withdrawal of the Resolution Plan after the plan being approved by the CoC and pending before this Bench for approval. It is submitted that there is no provision for withdrawal of the Resolution Plan after the same has been approved by CoC.
- (7) It is further submitted that the Applicant was provided with the Audited financials as on 31.03.2019 which specified the value of land in the fixed asset schedule of the CD as Rs.17,69,32,506/-. It was never stated nor intended that there are only two parcels of land associated with the project of CD. The descriptions of the land parcels as was known to Resolution Professional at the time of issuance of IM was specified therein with necessary disclaimers which among others stated that:

"This Information Memorandum has been prepared for private circulation to the Committee of Creditors and potential Resolution Applicants to provide basic information about Sagar Power (Neerukatte) Private Limited and to comply with the information requirements under the Insolvency and Bankruptcy Code, 2016

hereinafter referred to as "Code". This Information Memorandum has been prepared on the basis of the information submitted by and discussions held with the Company officials, industry norms, and other information/ documents obtained by the RP from various sources/ available publicly, which the RP believes to be reliable. The RP has not carried out any independent verification for the accuracy of the same. All the figures mentioned in this note are based on preliminary discussions and information obtained from the Company."

This Information Memorandum constitutes an opinion expressed by the RP and hence, he shall not be held liable for any misrepresentation or financial loss caused to anyone based on this information Memorandum. The Information Memorandum should not be construed as a commitment from RP for providing any assistance for the transaction except as prescribed by the Code. This Information Memorandum is for information only. The opinions expressed may not be suitable to all recipients. Recipients must make their own investigations and judgements before acting on the contents of this Information Memorandum".

- (8) It is recorded fact that during negotiation meetings held with Successful Resolution Applicant on 30.06.2020 (10th CoC meeting) and 17.08.2020 (12th CoC meeting), the issue of land was discussed in detail and facts as ascertained were brought to the attention of the Successful Resolution Applicant including the unsubstantiated claim of Erstwhile Promoter that nearly 100 Acres of land was used in the project.
- (9) The Applicant had insisted that the lands held under mortgage by the CoC members (Land Parcel 2) be offered to them as sale under Private Treaty in SARFAESI to enable them to improve the bid amount. All discussions regarding submitted Resolution Plan were made during negotiation phase only for improvement in the bid amount with clear understanding that Successful Resolution Applicant had made his bid for the Corporate Debtor

on “As is where is basis” after conducting its own due diligence on the viability of the project at a Resolution Plan value submitted to CoC for approval. Consequently, the Applicant has enhanced the plan value which was then approved by COC. Therefore withdrawal of plan is mere abuse of process of CIRP as the Applicant had conducted due diligence and had verified all the documents available on record.

- (10) **It is submitted that the erstwhile Promoter Mr. M. N Reddy failed to provide any information with respect to the details included in the Information Memorandum and refused to cooperate with the Resolution Professional for reasons best known to him.**
- (11) During the audit undertaken by the Resolution Professional, it came to light that 76 individual ledgers were grouped under “Land Compensation” as disclosed in the Fixed Assets Schedule of the Corporate Debtor and these 76 individual accounts amounted to enormous total of Rs.5,19,87,506/- compensated by Corporate Debtor for acquiring land parcel no.4, as compensation for the said land parcel of the Corporate Debtor. Copy of Ledger extract evidencing payment of Rs.5,19,87,506/- as land compensation standing in 76 individual accounts is produced as Annexure –B.
- (12) After the audit undertaken by the Resolution Professional, it was clear that there are four land parcels associated with the project:
- Land Parcel No.1 admeasuring 0.63 Acres converted land as per ledger accounts of CD. Amount paid to acquire this land parcel being Rs.9,45,000/- recorded in books as “Land D Surendra Nath Reddy”. The said land parcel is in the possession of CD and used for installation of the plant and equipment for 15MW Power Project;
- Land Parcel No.2 admeasuring 12.77 Acres (of 35.42 Acres), Agricultural land used for water storage, total 6 survey numbers in the name of Shri. D. Surendranath Reddy, and is mortgaged to banks, held as collateral security

by CoC members). In the possession of the CD. It is used for storage of water for hydro-power generation.

22.65 Acres (of 35.42 Acres) Agricultural land used for water storage comprising 25 survey numbers in the name of Erstwhile Promoter, Shri N. Manohar Reddy. This land parcel has been mortgaged to banks (held as collateral security by CoC members)

Land parcel No.3 admeasuring 21.39 Acres. An agreement for vesting of land parcel in favour of CD comprising of 40 Survey Nos. As per the ledger accounts of the CD an amount of Rs.12,40,00,000/- appears as "Land Uppinangadi" in the ledger maintained for this land parcel. The land is in possession of CD and is used for storage of water for hydro-power generation.

Land Parcel No.4 about 42 acres allegedly claimed by Erstwhile Promoter to be as his personal property. Identifiable to "Land" included in fixed asset schedule of the CD as per audited balance sheet as on 31.03.2019.

Recorded in the books of accounts of the CD in 76 individual ledgers under the Group "Land Compensation" total amount of Rs.5,19,87,506/-. The land is in possession of CD and is used for storage of water for hydro-power generation.

- (13) All the loan agreements between lenders and CD specify that first charge shall be created in favour of the lenders in all the immovable properties of CD. Shockingly, after Resolution Plan has been approved by the CoC in its meeting, the erstwhile Promoter made vague and baseless demand from Applicant of Rs. 7.5 Cr towards Land Parcel 4 in the vicinity of the project of the CD alleging that the payment of the same was made by him at the time of acquisition. The same is incorrect as CD has already compensated these 76 individuals and hence owns the right of this land parcel 4 for the purpose of water storage for generating power.
- (14) As per the DPR obtained in 2006 by promoters of CD, it is stated that the land requirement for running the project is 14 Hectares (36.43 Acres) of land.

The project has been approved by the Government of Karnataka on the basis of the same. Copy of DPR extract is produced before the bench.

- (15) Erstwhile Promoter during 19th COC meeting dated 28.12.2020 reiterated that the land requirement for running the project is 125 acres. Shockingly, Resolution Professional does not know how the land requirement of running the same project can be increased. This makes it clear that the Erstwhile Promoter is creating hurdles in CIRP with *mala-fide* intention.
- (16) It is submitted that the reasoning given for withdrawing the Resolution Plan for inadequate disclosure of the land parcels of CD is wholly incorrect in lieu of recent audit undertaken by Resolution Professional and hence I.A No.500 is liable to be dismissed.
5. Heard Mr. V. Srinivasa Raghavan, learned Senior Counsel along with Mr. Prithu Garg for the Resolution Applicant and Ms Amrita Jain, Learned Counsel for Resolution Professional of the Corporate Debtor **through Video Conference**. We have carefully perused the pleadings of the party and also extant provisions of the Code, and Rules made thereunder.
6. The main issues that arise before us for examination in this application are:
- (i) Whether the Resolution Applicant can be allowed to withdraw the resolution plan after approval of the plan by CoC and pending approval by this Tribunal? If yes, under what circumstances?
- (ii) Whether the EMD and the Performance Bank Guarantee deposited by the Resolution Applicant to participate in the resolution process of the Corporate Debtor, be returned to the Resolution Applicant or forfeited due to loss caused for withdrawing from the process at this juncture?
7. At the outset it is made clear that the Resolution Applicant prepares a plan mainly based on the information provided in the information memorandum prepared by the Resolution Professional. The Resolution Professional is required to prepare the Information Memorandum very diligently ensuring that

all the information necessary for the Resolution Applicant to prepare a commercially viable and feasible resolution plan suitable to the Corporate Debtor be made available in the information memorandum. Therefore, although due diligence is also conducted by the Applicant on its own and the plan prepared is on an "as is where is" basis, unless the information provided in the IM is accurate and up to date, a true and fair evaluation of the status of the Corporate Debtor cannot be made by the Resolution Applicant and he cannot prepare a commercially viable Resolution plan. For this reason the Applicant has kept an option to exit in the Plan itself at sl. No. 5.1.1, reserving a right to withdraw from the Plan. That free and uninterrupted use of all the land parcels would be allowed to him was also made a condition precedent as per Clause 9 of the Plan.

8. It is seen in the case at hand that the Resolution Applicant proposed a resolution plan on an understanding that the land required for generating 20 million saleable units annually was as mentioned in the IM. However, he was informed by the erstwhile Promoters that there was an additional 4th parcel of land, covering 42 acres, in use for the project and which was essential for generating 20 million saleable units. He was informed that 100 acres of land was required for this level of production and 58 acres was not sufficient. The erstwhile CD demanded Rs 7.50 crore to hand over the 4th parcel of land. This was not brought to his notice earlier in the IM or otherwise. He found that only 3 to 4 million saleable units of power could be generated annually with the land mentioned in the IM, and hence the Resolution Applicant had to reconsider investing in the Corporate Debtor. As stated by the Applicant, as per the IM it was represented that two parcels of land were sufficient to achieve the aforesaid annual generation of power. Further, the Applicant's own assessment of the requirement, done through an independent Consultant also confirmed that part of the 2nd parcel of land was only for agricultural use, the 3rd parcel was also for agricultural use, the 4th parcel was not mentioned in the IM, and that without the



4th parcel only 3 to 4 million units of power could be generated annually. On the basis of these fresh pieces of information, he made a request for all available parcels of land. Without these 4 parcels he apprehended huge losses as the generation would be too low, and further the erstwhile Promoter demanded Rs 7.50 crore to hand over the 4th parcel. This request was denied and on the next meeting of the CoC the Plan was proposed for voting. At this point the Applicant opted to withdraw the Plan.

9. The Resolution plan being based on the details made available to the Applicant under the Information Memorandum, any new discovery that would affect the interests of the Applicant adversely, and entitles the Applicant to decide his participation afresh, bearing in mind the changed situation and the possibility of future losses. The Resolution Applicant cannot be compelled to participate in resolution plan jeopardising its own interest. Even if the information provided by the erstwhile Promoter is incorrect, as mentioned by the RP in his objections, if a doubt is created in the mind of the Applicant with regard to the possibility of losses from the project, backed by an independent consultant's report, we are of the view that he would justifiably not be inclined to carry on as a Resolution Applicant. In this regard, the decision of the Hon'ble NCLAT in *Committee of Creditors of Metalyst Forgings Ltd., v. Deccan Value Investors LP. & Ors, Company Appeal (AT)(Insolvency No.1276/2019* is relevant as the Hon'ble NCLAT upheld the order dated 27.09.2019 of the Adjudicating Authority, Mumbai Bench stating that the Applicant cannot be forced to perform its obligations. The relevant portion of the order is extracted herein below for ready reference:

"38. The Adjudicating Authority observed that the Resolution Professional's disassociation with the '2016 MM Report', in fact, constitutes an acceptance of the position that the '2016 MM Report' and the contents thereof are misleading and unreliable. Having made it available on VDR is contrary to the Resolution Professional's obligations under the I&B Code and the Regulations thereunder. The Adjudicating Authority further observed that:



“The Applicants were entitled to rely on the data provided in the VDR and to proceed on the basis that the said data was accurate in its representation of the Corporate Debtor, especially since the Applicants were only afforded a 2-2.5 hour walk-through site visit at the plants of the Corporate Debtor prior to submission of the resolution plan. The said site visit in no manner would enable the Applicants to assess the technical capacity of the Corporate Debtor correctly, and this visit does not give/afford any basis to the Resolution Professional and the CoC to assert that there was either full knowledge or awareness on the part of the Applicants, considering that the Resolution Professional himself states that even a six month period was insufficient to conduct due diligence.”

In the aforesaid background, the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench rightly observed that the ‘Insolvency and Bankruptcy Code’ do not confer any power and jurisdiction on the Adjudicating Authority to compel specific performance of a plan by an unwilling resolution applicant.”

10. The Resolution Professional admits in his objections that the erstwhile Promoter had not provided accurate information, as mentioned in the IM and had refused to cooperate, and that he was interested in blocking his efforts to complete the CIRP. In fact it is seen from his objections that in all parcels of land, the information provided is at variance, though he contests the contentions of the erstwhile Promoter. Whatever may have been the reason, either lacuna in estimating the requirement as well as availability of land for generation of power in a manner that is beneficial to the Applicant, or the lack of full and correct information provided by the erstwhile Promoters to the RP, the fact remains that there was a considerable disparity in what was represented to the Applicant regarding the area of land required for generating 20 million saleable units of power, which is required to maintain the Corporate Debtor as a going concern and what is actually required/made available. In view of these facts and circumstances, we are of the considered view that the Resolution Applicant cannot be compelled to perform and execute the Resolution Plan when he apprehends huge losses, and should be permitted to withdraw the Plan



submitted by him for approval of this Adjudicating Authority. The IA therefore merits to be allowed, subject to the directions mentioned below.

11. I.A No.499/2020 has been filed by the Resolution Professional and others against the Corporate Debtor and its erstwhile directors seeking an order declaring certain transactions as preferential transactions and to repay the monies under preferential transactions back into the Corporate Debtor. The Interlocutory application does not come in the way of the present applications, and hence shall be decided on merits separately.
12. In respect of the EMD amounting to Rs 50 lakh in the form of Bank Guarantee, and the Performance Bank Guarantee of Rs 3,01,32,780/- deposited by the Resolution Applicant with the RP, we are of the view that with the withdrawal of the Plan by the Applicant and the entire CIRP coming to nought, the Applicant should bear a part of the burden of expenses incurred during the CIRP. Also some amount may be lost as the liquidation value of the project may be very low, though however the Applicant has submitted that there is a small gap between what was offered in the Plan and the estimated liquidation value, ie of about Rs 13 lakh only. It is our considered view that it would meet the interests of justice if an amount of Rs 75,00,000/- (Rupees seventy five lakh only) is forfeited in total and the balance amount of Rs 2,76,32,780 (Rupees Two crore, seventy six lakh, thirty two thousand seven hundred and eighty only), is refunded to the Resolution Applicant. It is ordered accordingly.
13. The I.A No.439/2020 is disposed as dismissed as infructuous, and I.A No.500/2020 is allowed as above.

ASHUTOSH CHANDRA
MEMBER, TECHNICAL

RAJESWARA RAO VITTANALA
MEMBER, JUDICIAL