

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

IA No. 457 of 2018
In
CP(IB)No.150/9/HDB/2017

In the matter of:

Rohan Varma Constructions Pvt. Ltd.

...Petitioner

Versus

Ind-Barath Power (Madras) Ltd.

...Corporate Debtor

In the matter of:

Mr.AshishRathi,
(IP registration number IBBI/IPA-001-
IPP00568/2017-18/11010)

RESOLUTION PROFESSIONAL
Of Ind-BarathPower(Madras) Limited

Availabale at BDO India LLP,
Level 9, The Ruby, NW Wing, Senapati Baapt
Marg,
Dadar(W), Mumbai 400028.

...Applicant

Order pronounced on: 22.04.2019

Parties/Counsel Present:

For the Applicant:

Mr.AshishRathi, IRP

For the Resolution Applicant:

P.Anil Mukherji, Advocate



For the Ex-Management:

Mr.Yogesh Kumar Jagia, Advocate

**Per: K.ANANTHA PADMANABHA SWAMY, MEMBER
JUDICIAL**

ORDER

1. The present Application is filed by Mr.Ashish ArjunkumarRathi, the Resolution Professional of the Corporate Debtor (IRP) who was appointed under the Insolvency and Bankruptcy Code, 2016 (IB Code, 2016) by this Adjudicating Authority vide order dated 18.10.2017 made in CP (IB) No. 150/9/HDB/2017. The IRP filed this application under section 33(1) of the IB Code, 2016 seeking orders on the following prayers:
 - (a) To pass appropriate orders for liquidation of the Corporate Debtor under section 33 of the Code, in light of the voting results unanimously rejecting the Resolution Plan;
 - (b) While passing the order for liquidation under sub clause (a) above, to pass appropriate orders thereby appointing the Applicant as the liquidator of the Corporate Debtor as the Applicant hereby consents to be appointed as the Liquidator of the Corporate Debtor and consent form in this respect is annexed herewith.
 - (c) To pass an order for continuation of the Applicant to act as the RP of the Corporate Debtor till the time of

Hon'ble Tribunal passes orders under para 22(a) & (b) above;

- (d) To pass such other orders as the Hon'ble Tribunal may deem fit and appropriate in the facts and circumstances of the case.

2. The Applicant herein while reiterating the averments made in the application submitted as follows:

- (i) The 4th COC meeting of the Corporate Debtor held on 10.01.2018, and the COC duly resolved to extend the period of CIRP till 11.05.2018 and accordingly, this Adjudicating Authority extended the period of CIRP till 11.05.2018 vide Order dated 08.02.2018.
- (ii) The Applicant had initially on 05.01.2018 issued an advertisement seeking Expression of Interest (EOI) to submit resolution plans for the revival of the Corporate Debtor. Subsequently, on 29.03.2018, the Applicant again issued an advertisement seeking EOI to submit resolution plan for the Corporate Debtor. As per the invitation, the Resolution Plans were required to be submitted by 02.05.2018. On 03.05.2018, the Applicant again issued an advertisement seeking EOI to submit resolution plan for the Corporate Debtor. Pursuant to the discussion with and approval of the CoC the last date of submission of resolution plan was also extended to 07.05.2018.
- (iii) The Applicant had received 4(four) EOIs which fulfilled the eligibility criteria stipulated, however, after sharing of the Information Memorandum and other relevant

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information of the Corporate Debtor, only 1(one) Resolution plan was received from M/s.Alliance Project, a partnership firm.

- (iv) The Resolution Plan submitted by the Resolution Applicant was examined by the Applicant and the CoC in the 7th meeting of COC held on 08.05.2018. Thereafter, the Resolution Plan was put to vote by the Resolution Professional before the COC in its meeting held on 10.05.2018 in which the members of COC cast their votes on the Resolution plan and by their unanimous votes rejected the Resolution Plan.
- (v) The Resolution Applicant filed the IA No. 254 of 2018 against the rejection of the plan by the CoC,. This Adjudicating Authority disposed of IA No. 254 of 2018 by directing the CoC to consider the Resolution Plan/Revised Resolution Plan if any filed or to be filed within 30 days from the date of the Order.
- (vi) The meeting of the CoC was convened on 03.10.2018 to consider the plan received on 25.09.2018 along with amendment letter submitted by the Resolution Applicant. After deliberation, the Applicant invited the Resolution Applicant into the meeting to present their plan. After the presentation by the Resolution Applicant, the Resolution Applicant was requested to submit a revised plan.
- (vii) Pursuant to the discussion held in the 9th CoC meeting held on 03.10.2018, the Resolution Applicant submitted the revised plan on 06.10.2018 incorporating the

contents of amendment letter etc. The Final plan was shared with the members of the CoC by the RP vide an email dated 07.10.2018.

(viii) The Final Plan was put up for consideration before members in the Tenth meeting of the CoC, held on 09.10.2018. The Final Plan was put to the vote through e-voting by the members of the CoC which took place from 11.10.2018 (8 a.m.) to 12.10.2018 (8 a.m.). Accordingly, the members of CoC cast their votes on the Resolution Plan and by their unanimous votes rejected the Final Plan.

3. In view of the aforesaid circumstances, Applicant filed the present application and prayed this Adjudicating Authority to pass appropriate orders for liquidation of the Corporate Debtor under Section 33 of the Code, in the light of the voting results unanimously rejecting the Resolution Plan and further prayed to appoint the Resolution Professional as the Liquidator of the Corporate Debtor.
4. M/s Alliance Project whose Resolution Plan was rejected by CoC filed certain objections to the present Application as follows:
 - a) The Resolution Applicant based on the EOI published by Resolution Professional on 03.05.2018 expressed its interest to submit the Resolution Plan and finally on 06.05.2018 submitted the first Resolution Plan. The COC considered the Resolution Plan submitted by Resolution Applicant in the meeting held on 08.05.2018. Later CoC required the Resolution Applicant to make


certain modifications to the Resolution Plan. The Resolution Plan was again submitted with certain modifications on 10.05.2018. Subsequently without any reasons, the plan was rejected by simply giving their vote on the Resolution.

- b) The Respondent filed IA No.254/2018 under Section 60(5) of the IBC Code, 2016, aggrieved by rejection of the resolution plan without assigning any reasons by CoC and same was disposed of by this Adjudicating Authority vide its order dated 12.09.2018. It is contended that the Resolution Plan has been rejected only on the ground for not accepting the proposal of dropping the criminal proceedings initiated by the members of CoC against the Ex-Management.
- c) This Adjudicating Authority in order dated 12.09.2018 passed in IA 254/2018 specifically directed CoC to give reasons for approval or rejection. The relevant Paragraph is extracted hereunder.

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

After the above order made in IA No.254/2018, CoC had held meeting on 09.10.2018 and discussed regarding the revised resolution plan submitted by the Resolution Applicant. During the meeting representative of Power Finance Corporation Ltd. (PFCL) raised issues.




- d) The PFCL requested the Resolution Applicant to explain on the feasibility and viability of the plan to which Resolution Applicant gave clarification that he is starting a business of setting up a solar plant by using the existing infrastructure which is not related to the business of Corporate Debtor therefore detail projections of the solar power plant has no correlation and is not required. Another issue was raised about the compliance of regulation section 38(3) to which Resolution Applicant clarified that these regulations are not applicable. Resolution Applicant also certified that issue which is raised, has been clarified in the revised resolution plan.
- e) It is stated that PFCL raised issue regarding how the plan addresses clause 1.11.3 of the bid document to which Resolution Applicant gave clarification. M/s. Axis Bank inquired about furnishing sanction letter/letter of intent of any bank to which Resolution Applicant gave his consent for exploring the same. Considering the reply of the Resolution Applicant, Axis Bank representative requested CoC to consider giving time to Resolution Applicant to furnish necessary letters. PFCL inquired about rationale for the amounts being offered is meagre in comparison with the loans granted by them. Resolution Applicant clarified that resolution plan should not be looked from the perspective of the amounts of the claims rather from the perspective of the best use of the assets of the Corporate Debtor. PFCL asked about whether Resolution Applicant can leave the right to recover the money given by the
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Corporate Debtor to its affiliates but same was denied by the Resolution Applicant by giving justification.

- f) The members of the CoC rejected the resolution plan believing that they can recover better amount by pursuing legal actions against the corporate borrower and its group companies ignoring the fact that Axis bank questioned such reasoning by stating that affiliates from whom amount is to be recovered are also under CIRP and therefore CoC may require the Resolution Applicant to increase their offer. The said suggestion was ignored and not considered by CoC. Therefore CoC has further rejected the Resolution Plan arbitrarily based on surmises and premises and such rejection is liable to be set aside in the interest of justice.

5. The Ex-Management /Promoter filed its objections along with written synopsis, inter alia, stated as follows:

- i. The Ex-Management being the Promoters of the company conveyed their intention to resolve the outstanding debt of the lenders by proposing a settlement on 08.10.2018, 15.10.2018, 17.10.2018 and 12.11.2018 by offering to pay Rs.300 crores to the senior secured lenders against Resolution Applicant's offer to pay Rs.211 crores and further Ex-management intends to settle the dues of the subservient secured financial creditors by paying Rs.8 crores and is willing to pay CIRP Cost, however, the same has not even been considered by the Committee of Creditors.

- ii. Beside the Resolution Plan, Promoter/Ex-Management under Section 12A of Code made an offer of one time settlement of Rs.300 crore by letter dated 15.10.2018 but Power Finance Corporation (PFC) by letter dated 25.10.2018 directed them to address all letters to RP only which is contrary to provisions of section 12A of Code. The Hon'ble Supreme Court in "Brilliant Alloys Private Limited vs S Raj Gopal" decided on 14.12.2018 holding that time line prescribed for section 12A is only directory in nature.
 - iii. During the 8th CoC meeting, the revised Resolution Plan was discussed among the CoC and RA and CoC without providing any detail or having any discussion or assigning any reasons, rejected the plan by simply casting vote on the resolution.
 - iv. During the said meeting representative of Power Finance Corporation Ltd. raised exactly the issues which were agitated at the time of adjudication IA NO.254/2018 and all were duly replied by the representative of the Resolution Applicant. The members of the CoC rejected the resolution plan by stating that lenders can recover better amount by pursuing legal remedies/civil suits against the corporate borrower and other group companies, despite of the fact that Axis Bank questioned such reasoning by stating that affiliates from whom amount is to be recovered are also under CIRP therefore CoC may ask resolution applicant to increase their offer, however same was ignored. COC finally rejected the resolution plan.
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The learned Counsel for Ex-Management further submitted that interest of justice coupled with object of IBC Code, 2016, warrant consideration of the offer of the Ex-management herein. The instant Application if allowed by this Adjudicating Authority would prejudice the interest of all the stakeholders, employees, workmen of the Corporate Debtor.

6. Heard all the parties and perused the records.
7. The point for consideration is whether the present Application filed for Liquidation of the Corporate Debtor Company is to be allowed and the objections raised to the present Application deserves any merit.
8. It is a matter of fact that this Adjudicating Authority vide its order in IA 254/2018 on 12.09.2018, directed as follows;

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

Such an order came to be passed on the objections raised by M/s Alliance Projects and in the interest of the Respondent Company and all its stakeholders.

9. In pursuance of such directions, the RP has duly placed the Resolution Plan submitted by the M/s Alliance projects before the CoC for its due consideration. From the documents that are submitted along with the Instant Application, it is observed

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that the Members of CoC has taken a commercial decision and in their wisdom has chosen to reject the revised Resolution Plan submitted by M/s Alliance projects. It is also noted that CoC has taken a conscious decision after hearing to the explanations offered by M/s. Alliance projects to the queries put by the members of the CoC.

10. The Hon'ble NCLAT in the matter of M/s. Bhaskara Agro Agencies Vs. M/s. Super Agri Seeds Pvt. Ltd. has held that

"7. So far as viability or feasibility of 'Resolution Plan' is concerned, the Adjudicating Authority or this Appellate Tribunal cannot sit in appeal over the decision of the 'Committee of Creditors'....."

The judgement rendered by Hon'ble Apex Court in the matter of K.Sashidhar Vs Indian Overseas Bank & ors. is germane to the issue in hand. The relevant portion of the Judgement is quoted below;

" 48.

Indubitably, the legislature has consciously not provided for a ground to challenge the justness of the "commercial decision" expressed by the financial creditors – be it to approve or reject the resolution plan. The opinion so expressed by voting is non-justiciable..... "

In view of the abovediscussions and on the strength on the Citations referred to above, This Adjudicating Authority finds that the objections raised by M/s Alliance projects are to be rejected.

11. With regard to the settlement proposal that was alleged to have been offered by erstwhile management/ promoter, the Code is very clear to the effect that such a proposal received from the promoter ex-directors is to be placed before the CoC and the same has to be approved by a majority of 90% of


Voting. This Adjudicating Authority is not in receipt of any such proposal conforming to Regulation 30A received and approved by the CoC and placed before this Adjudicating Authority for consideration U/s 12A of the Code. Therefore, the objections the Ex-Directors and Promoters of the CD are untenable in terms of the Code and are liable to be rejected.

12. This Adjudicating Authority having neither received any Resolution Plan under Sub-Section (6) of Section 30 nor received any Application U/s. 12A of the IB Code conforming to Regulations 30A, and in view of the unanimous recommendation of the CoC to Liquidate the Respondent Company, this Adjudicating Authority is left with no option but to Liquidate the Corporate Debtor. Therefore, in exercise of powers conferred under Sub-Clauses (i), (ii) and (iii) of Clause (b) of Sub-Section (1) of Section 33 of the I&B Code, 2016, I proceed to pass Order as follows:—

I. This Adjudicating Authority hereby order for Liquidation of the Corporate Debtor viz., M/s. Ind Bharat Power(Madras) Ltd , which shall be conducted in the manner as laid down in Chapter III of part II of the I&B Code, 2016;

II. The Resolution Professional has filed his written consent to act as Liquidator. In view of the written consent, this Adjudicating Authority here by Appoint Mr. Ashish Arjunkumar Rathi as Liquidator in the Present Case who shall issue a public announcement stating therein that the Corporate Debtor is in Liquidation;



- III. The moratorium declared under Section 14 of the I&B Code, 2016, shall cease to have effect from the date of the order of Liquidation;
- IV. Subject to Section 52 of the I&B Code, 2016, no suit or other legal proceedings shall be instituted by/or against the Corporate Debtor. However, a suit and other legal proceedings may be instituted by the Liquidator, on behalf of the Corporate Debtor, with the prior approval of this Authority.
- V. I make it clear that para (IV) hereinabove shall not apply to legal proceedings in relation to such transactions as notified by the Central Government in consultation with any financial sector regulator.
- VI. This Order shall be deemed to be a notice of discharge to the officers, employees and workmen of the Corporate Debtor, except when the business of the Corporate Debtor is continued during the Liquidation process by the Liquidator.
- VII. All the powers of the Board of Directors, Key Managerial Personnel and the Partners of the Corporate Debtor, as the case may be, shall cease to have effect and shall be vested in the Company Liquidator viz., Mr. Ashish Arjunkumar Rathi In addition to this, the Company Liquidator shall exercise the powers and duties as enumerated in Sections 35 to 50, 52 to 54 of the I&B Code, 2016, r/w Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016.
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- VIII. The personnel of the Corporate Debtor shall extend all assistance and co-operation to the Company Liquidator as may be required by him in managing the affairs of the Corporate Debtor.
- IX. The Company Liquidator shall be entitled to charge such fee for the conduct of the Liquidation proceedings in such a proportion to the value of the Liquidation estate assets as may be specified by the Board. Accordingly, the fees of the conduct of the Liquidation proceedings shall be paid to the Company Liquidator from the proceeds of the Liquidation estate.
- X. Copy of this Order shall be sent to the concerned Registrar of Companies, RD, OL, Registered Office of the Corporate Debtor and Company Liquidator viz., Mr. Ashish Arjunkumar Rathi for information and compliance.
- XI. Registry is directed to furnish a copy of this order to IBBI for confirmation of appointment of Liquidator
13. In terms of the above, IA 457 of 2018 filed in CP(IB) No. 150/9/HDB/2017 by the RP under Section 33(2) of the I&B Code, 2016, for initiation of the Liquidation Proceedings against the Corporate Debtor viz., Ind Bharat (Madras) Ltd, stands **disposed off**.



K.ANANTHA PADMANABHA SWAMY
MEMBER JUDICAL