IN THE NATIONAL COMPANY LAW TRIBUNAL, DIVISION BENCH – I, CHENNAI

IA/507(CHE)/2022 in IA/288(CHE)/2022 in CA/1/IB/2017

(filed under Section 60(5) read with Section 30(2) of the Insolvency And Bankruptcy Code, 2016)

In the matter of ***Vasan Health Care Private Limited***

M.K. Rajagopalan,
Balaji Villa
No. 30A, Beach Road,
Kapaleeswarar Nagar,
Neelangarai,
Chennai - 600115

... Applicant

-Vs-

Rajendran Shanmugam
Resolution Professional,
Vasan Health Care Pvt. Limited (VHCPL),
No. 71/1, Mc Nichols Road,
Hari Krupa,
2nd Floor, Chetpet,
Chennai – 600031

ASG Hospital Private Ltd.
Represented by its Director Priyanka Singhvi
Having its Registered Office at - Plot No.1,
Shyam Nagar Pal Link Road, Jodhpur,
Rajasthan – 342001

(Impleaded in IA(IBC)/893/2022 vide order dated 15.09.2022)

... Respondent

Order pronounced on ***28th September 2022***

CORAM:

Justice (Retd.) RAMALINGAM SUDHAKAR, PRESIDENT
SAMEER KAKAR, MEMBER (TECHNICAL)

For Applicant : *Om Prakash, Senior Advocate,*
For A. Selvaraj, Advocate

For Respondent: : *Krishnan Venugopal, Senior Advocate*
For Savitha Devi, Advocate for R1

M.S. Krishnan, Senior Advocate
For Kaushik Ramasamy, Advocate for R2

ORDER

This Application has been filed by one of the unsuccessful Resolution Applicant in respect of Corporate Debtor viz. Vasan Health Care Pvt Ltd. under section 60(5) read with 30(2) of IBC 2016 Seeking relief as follows:

a) Reject the resolution plan submitted by ASG Hospital Private Limited and approved by the COC since it is in flagrant violation of the IBC Regulations, and direct the Respondent herein to conduct the process afresh by issue of fresh Form G;

b) Not to permit the Successful Resolution Applicant to participate in the CIRP Process with respect to this Corporate Debtor, in view of the material breach of the Non-Disclosure Agreement in violation of Regulation 36(4) and 36A(7)(g);

c) Alternatively and without prejudice to the (1) above, direct the COC to consider the Second Resolution Plan submitted by the PRAs other than the Successful Resolution Applicant on 04.01.2022 which was submitted prior to the approved Resolution Plan that was revised more than once which is not permissible under the provisions of the I&B Code and

d) Grant such other reliefs which are deemed fit and necessary in the nature and circumstances of the case, and thus render justice.

2. FACTS AND SUBMISSIONS OF APPLICANT:

2.1. In an Application filed under Section 9 of IBC 2016, this Adjudicating Authority (AA) has initiated Corporate Insolvency Resolution Process (CIRP) in respect of the Corporate Debtor viz. Vasan Health Care Pvt Ltd. and one Mr. V. Mahesh was appointed as the Interim Resolution Professional (IRP).

2.2. Thereafter, the Madras High Court of Madras has stayed the CIRP in respect of the Corporate Debtor and subsequently the said stay was vacated by the order of the Hon'ble Madras High Court vide its order dated 05.09.2019.

2.3. The CIRP in respect of Corporate Debtor was once against started afresh from 03.10.2019. The 1st Respondent herein was appointed as the Resolution Professional (RP) of the Corporate Debtor at 11th COC meeting held on 12.03.2021 in discharge of his functions under the provisions of the IBC, 2016 the RP has published the Form-G on 28.06.2021 inviting claims from the Prospective Resolution Applicant (PRA)

2.4. Thereafter, the Applicant has submitted his Expression of Interest (EoI) in Form-G and the RP has also issued the Request for Resolution Plan (RFRP) to the Applicant herein as contemplated under Regulation 36B of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016).

2.5. Apart from the Applicant one (i) ASG Hospital Pvt Ltd, (ii) Dr. Agrawal Health Care Ltd., (iii) Maxivison Eye Hospitals Pvt Ltd., (iv) UV Stressed Assets Management Pvt Ltd., (v) GVPR Engineers Ltd. and (vi) Ilabs special situations fund were in the list of PRAs.

2.6. The Ld. Senior Counsel for the Applicant submitted that as per clause of 3.4.4 of RFRP, the RP may at the directions of the COC without assigning any reasons amend modify or supplement the RFRP.

2.7. It is submitted by the Ld. Senior Counsel for the Applicant that out of the Prospective Resolution Application referred above (i) UV stressed Assert Management Pvt Ltd. and (ii) GVPR Engineers Ltd., did not submit the Resolution Plan and the Resolution Plan submitted by (i) ASG Hospital (ii) Dr. Agarwal Health Care Ltd, (iii) Maxvision Eye Hospital Pvt Ltd. (iv) iLabs Special Situation Fund and (v) the Applicant was placed before the COC. All the plans were opened on 29.11.2021.

2.8. It is submitted that the COC requested RP to negotiate with the prospective Resolution Applicant for submission of an improved Resolution Plan on or before 04.01.2022. However, it was submitted that one Maxvision Eye Hospital Pvt Ltd., withdrew its Resolution Plan and iLabs special situations fund requested that the Resolution Plan submitted by them earlier to be considered as final.

2.9. It is submitted that pursuant to the directions of the COC ASG Hospital Pvt Ltd., and Dr Agarwal Healthcare Ltd and the Applicant herein submitted their improved resolution plan before 04.01.2022. Further, it is submitted that the revised resolution plan submitted by the PRAs were opened in the 18th meeting of COC held on 07.01.2022. It was submitted by the Applicant that they reliably understood that the resolution plan submitted by them was the highest in terms of value.

2.10. The Ld. Senior Counsel for Applicant submitted that on the basis of the record, it appeared that in the 18th COC meeting some of the members discussed an option for going for one more round of improvement in the plan and in respect of which the decision of the members of the COC were divided. Further it was submitted that the all the members of the COC were of the view that it would be improper to negotiate further as the PRA's were informed that the second resolution plan was the final opportunity to improve upon the plan.

2.11 It is submitted that the COC members present were of the unanimous view that no further opportunity needs to be provided for the PRA's for revising the Resolution Plan. While this being the case, it was submitted that in the 19th COC meeting held on 28.01.2022, one of the Resolution Applicant, who is incidentally the successful Resolution Applicant has sent an e-mail expressing its intention to significantly improve the Resolution Plan if one more opportunity is given. Further it was alleged that the PRA who is the successful Resolution Applicant

has also sent their Resolution Plan not only to the RP but also to the all the members of the COC, which influenced the members of the COC to consider one more round of improvement of the revised Resolution Plan. It was also submitted that the Applicant has opposed the said stand during the COC meeting.

2.12. The Ld. Senior Counsel for the Applicant submitted that the pursuant to the decision taken by the COC, the RP has sent an e-mail on 28.01.2022 requesting the Applicant to submit the final resolution plan by 02.02.2022 in a password protective PDF file or in a sealed envelope containing physical copy. It was submitted that the Applicant has sent a reply to the RP stating *inter alia* that the plan value has already been revised once and that any further revision of the plan amount should not affect the viability or future of the company. However, by saying so, **ultimately the Applicant has submitted his final resolution plan on 02.02.2022**.

2.13. The Ld. Senior counsel for the Applicant submitted that thereafter they received an e-mail on 31.01.2022 at 10:34PM from the RP seeking a 10-point clarification on the Resolution Plan submitted earlier which also introduced a clause about the payments of interest, in case of delay in payments under the Resolution Plan amount due to events other than the stay order imposed by Hon'ble NCLAT and High Court and Supreme Court.

2.14. It is submitted that this was not part of the RFRP or any previous e-mail communication and this was not even approved by the COC and it is a unilateral act of the RP. Further, it is submitted that the final Resolution Plan submitted by the PRA's on 02.02.2022 was considered by COC. The COC approved the Resolution Plan submitted by ASG hospital Pvt Ltd which was communicated by the RP vide e-mail dated on 22.02.2022.

2.15. The Ld. Senior Counsel for the Applicant submit that the conduct with the RP and the COC in conducting and concluding the CIRP is against the provisions of IBC, 2016 and the Regulations framed thereunder. Therefore, it was submitted that the Resolution Plan deserves to be rejected as opposed to law based on pleadings and also for reasons and facts stated as above.

2.16. The Ld. Senior Counsel for the Applicant by placing reliance of on Regulation 39(1A) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 has submitted that the plan offer can be revised only once. However, in the instant case the PRA's have been directed to revise the plan more than once and in the instance case twice, which is against the Regulation 39(1A). Further, it is submitted that the other option could have been a Swiss Challenge for improvement on the Plan. Thus, it is submitted since the RP and COC acted against the provisions of the Regulation 39(1-A), the Resolution Plan is liable to be rejected solely on this ground.

2.17. Further, it is submitted that when the statue prescribes anything has to be done in a particular manner, the same shall be done only in that manner and not in any other manner and the said legal principle is settled by the number of judgments on the Hon'ble Apex Court.

2.18. Further, the Ld. Senior Counsel for the Applicant submitted that the successful Resolution Applicant has violated Regulation 36(4) and 36(A) 7G of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. In this context it is submitted that the RP has directed all the PRA's to submit the Non-Disclosure Agreements and the same was executed by the Applicant also and as per clause III(3) of the Non - Disclosure Agreements and more specifically sub clauses E & F which states as follows:-

> e. Without limiting the generality of the foregoing, the Receiving Party further agrees that, without the prior written consent of the Disclosing Party, the Receiving Party will not, directly or indirectly, enter into any agreement, arrangement or understanding, or any discussions which might lead to such agreement, arrangement or understanding, with any other person regarding the Resolution Plan.
>
> f. Without the prior written consent of the Disclosing Party, the Receiving Party further agrees that all communications (both written and oral) regarding the Confidential Information, and/or the proposed Resolution Plan, requests for additional information, and discussions or questions regarding procedures related to the Resolution Plan, will be sent only to the Disclosing Party through the RP and/or authorized representatives of RP.

2.19. It is submitted that the Successful Resolution Applicant has acted in total disregard of the confidential obligations and unlawfully enriched themselves by sending an unsolicited e-mail to the members of the COC bringing to the notice that it will significantly improve the Resolution Plan. Thus, it was submitted when there is conscious breach of Clause III (e) & (f) of the Non - Disclosure Agreements by the successful Resolution Applicant. Further, it is submitted that the action on the part of the successful Resolution Applicant in sharing the revised Resolution Plan to all the COC members is against the Regulation 36(4) and sub clause G of Sub regulation (7) of Regulation 36(A) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. Hence it is submitted that the act of the successful Resolution Applicant in disclosing / sending an improved Resolution Plan after submission of the second revised resolution plan to the COC members, influenced the decision of the COC to go for another round of improvement of plan. Thus, it was submitted that there is a material breach of Regulation as well as non-disclosure agreements and hence it is fit case for rejection of the Resolution Plan submitted by the successful Resolution Applicant.

2.20. The Ld. Senior Counsel for the Applicant submitted that the RP vide e-mail dated 31.01.2022 had *inter alia* requested the Applicant to consider various points set out there in while submitting the Resolution Plan and the same includes provision of interest payment for delay in payment of the Resolution Plan amount by the Resolution Applicant due to events other than the stay orders passed

by NCLAT, High Court or Supreme Court. Thus, it was submitted that this action was on the part of the RP to change the RFRP conditions after the submission of the plan is also against the provisions of the Regulations 36(B)(5) IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. Hence, on these grounds the Ld. Senior Counsel for the Applicant sought for the rejection of the Resolution Plan submitted by the successful Resolution Applicant namely ASG Hospital Pvt Ltd. since it is in flagrant violation of the provisions of the IBC and Regulations framed there under.

3. REPLY OF THE RP AND SUBMISSION MADE THEREOF:

3.1. The RP has filed his reply before this Tribunal on 25.07.2022 and it was submitted by the Ld. Senior Counsel Mr. Krishnan Venugopal appearing for the RP that in the 16th COC meeting held on 29.11.2021 the Resolution Plan submitted by the Resolution Applicants namely Dr. Agarwal, ASG Hospital Pvt Ltd. iLabs special situations fund, Mr. M.K Rajagopal and Maxivision Eye Hospital Pvt Ltd. were opened individually and the Resolution Applicants were allowed to present the plans before the COC.

3.2. It is submitted that the Resolution Plans received by the RP and synopsis of each plan and summary of the Resolution plan along with important clauses in the plan was shared by the RP in the 17th COC meeting held on 20.12.2021 with the COC members.

3.3 It is submitted that the COC members suggested the Resolution Applicants to re-look into the Resolution Plan terms and the amount and sought for increased value to the Corporate Debtor. Accordingly, it is submitted that the last date for submission of improved plan was stated to be 04.01.2022 at 5.00 PM. As such equal opportunity to all the PRAs were provided and the same was also informed by the RP. It is submitted that on 04.01.2022, only three revised Resolution Plans were received and detail discussion regarding the terms of the plans were discussed by the COC members with the Resolution Applicants and it was informed by the Respondent to the COC members that there was substantial improvement in the revised Resolution Plan and it was discussed in the COC meeting that the voting of the Resolution Plan can take place and Respondent has sought the views of the COC members, if they would like to go for further negotiations.

3.4. It is stated in Para 7 of the reply that the COC has also took note of the unsolicited Resolution Plan received from ASG Hospital Pvt Ltd. and decided to disregard the same. This fact is recorded in the minutes of the 19th CoC meeting. However, due to the subsequent developments, some of the COC members were of the opinion that for value maximization another last and final opportunity may be given to all the PRAs to improve the Resolution Plan within a short period.

3.5. It is submitted by the Ld. Senior Counsel for the RP that the RFRP issued on 03.08.2021 did not prohibit the COC

from going in for another round for further improving the value of the Resolution plan and hence, it was submitted in view off the potential maximisation of the value it was suggested that the COC called upon all four (4) Resolution Applicants to submit their improved plan within two to three days. It was submitted that after discussing with all PRAs the issue was put to voting before the COC. This was so, as the COC members could not decide on the issue of whether to go for yet another and final round to revise the Resolution Plan. Thus, it is submitted that by a majority vote of 51% of the COC members decided to go for one more round of negotiation which should be last and final round, and no more opportunity to improve or modify the plans would be given. Accordingly, it is submitted that all the Resolution Applicants were informed about the decision of the COC and the last date for the submission of the final and revised resolution plan was fixed as 02.02.2022 at 06.00 PM.

3.6. It is submitted by the Ld. Senior Counsel for the RP that the Applicant herein as well other PRAs accepted the decision of the COC and submitted the revised and final resolution plan on 02.02.2022 at 06.00 PM along with the other PRAs without objecting to the decision of the COC to go for another final round. Hence it is submitted that on 20th COC meeting held on 08.02.2022 all the final resolution plans were discussed and decided to be put for voting by the COC. The voting of the CoC took place between 11th to 21st February 2020 and one M/s. ASG Hospital Pvt Ltd. was declared as successful by a majority

voting of 97.90%. Subsequent to the COC voting the RP has sent an e-mail on 22.02.2022 to each of the Resolution Applicant informing them that ASG Hospital Pvt Ltd. has emerged as the successful Resolution Applicants.

3.7. In relation to the violation pointed out by the Ld. Senior Counsel for Applicant, the Ld. Senior Counsel for the RP submitted that the amended Regulation 39(1A) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 is not applicable to the present CIRP proceedings, since it came into force only with the effect from 30.09.2021 and in any event it applies prospectively. In the present case, it was submitted that Form – G was issued on 28.06.2021 and RFRP was issued as early as on 03.08.2021 and therefore the amended Regulation which came into the force on 30.09.2021 will not apply in the present matter. Further it was submitted that the Applicant is misreading the word *"may"* in Regulation 39(1A) as *"shall"* which is incorrect.

3.8. Further, it is submitted that the decision of the COC to ask for the revised and improved Resolution Plan from all the PRAs is their prerogative and no one including the Applicant can question the COC in its endeavour for value maximisation, provided the actions are within the parameters of the provisions of the code and regulations.

3.9. In para 15 of the reply, the RP has stated that the allegation of the Applicant that the e-mail dated

31.01.2022 was sent by the RP at 10:34PM seeking clarification on the terms of the Resolution Plan is denied as false since it was submitted that no e-mail has been sent to the Applicant on the said date and time.

4. OBSERVATIONS OF THIS TRIBUNAL

4.1. Before we render our finding in relation to the merits of the case, during the course of hearing it was revealed that the RP has in fact sent an e-mail to the Applicant and all the PRAs on 31.01.2022. However in his reply he has denied that he did not send the same. Hence, in order to purge himself from the wrong statement and erroneous plea, the RP has filed an affidavit before this Tribunal on 20.09.2022 tendering his unconditional and unqualified apology for the error committed by him stating that the e-mail dated 31.01.2022 was not sent to the Applicant and others. It is submitted that due to inability to locate the said e-mail within the available time frame, the RP has erred in stating that such an e-mail was not sent.

4.2 We have perused the e-mail and its source. It was sent to all the PRAs and it was acted upon. The denial of the e-mail due to oversight does not appear to be a genuine explanation. The details of the e-mail dated 31.01.2022 are as under:

> Dear Sir,
>
> Please find the consolidated clarifications sought in your resolution plan submitted for Vasan Health Care Private Limited.

We request you to consider these points while submitting your resolution plan on 02nd February 2022 in addition to the points attached below.

1. The resolution applicant undertakes to take over the Corporate Debtor un "as is where is", "as is what is" & "whatever there is" basis on the date of approval of resolution plan by CoC & AA as per Clause 6.2 (1) of the RFRP.

2. Treatment of future terminal liabilities of continuing employees need to be clearly spelt out in the resolution plan.

3. Clauses relating to utilisation of contingency funds shall state that the cost or expenses mearred after the date of approval of resolution plan by AA shall not be covered under the contingency funds.

4. Excess requirement of funds in relating to unpaid CIRP costs as on NCLT approval date over and above the funds allocated to CIRP cost & contingency funds in the resolution plan amount shall be met from the cash flows of the Corporate debtor.

5. The resolution applicants while submitting this resolution plan have done their due diligence in addition to the data available in VDR & the Information Memorandum shared by the Resolution Professional.

6. Resolution Applicant shall not be entitled to get involved in any operational activities in relation to the corporate debtor between the plan approval date by CoC and the plan approval date by AA.

7. Resolution Applicant shall take necessary approvals with Competition Commission of India, Income tax for relief, other regulatory approvals, if required.

8. Resolution Applicant shall reinstate the statement of accounts as on the date of approval of resolution plan by AA.

9. Monitoring Committee comprising the representatives of CoC, RA & the RP shall facilitate the implementation of the resolution plan. Expenses relating to MC committee shall be met by RA as mutually agreed.

10. In case of delay in payment of resolution plan amount by the RA due to events other than the stay order imposed by NCLAT / High Court / Supreme Court, RA may provide interest on such delayed payment.

This is a conscious decision relevant to the Resolution Plan. The RP with all fairness could have owned it up instead of making such a false statement. A perusal of the email dated 31.01.2022 shows that the same is a clarification given to all the PRAs so as to enable them to take relevant parameters before submitting the Final Resolution Plan. We do not concede to the motive attributed to it by the Applicant, but disapprove the conduct of the RP in denying what is black and white.

5. FINDINGS OF THIS TRIBUNAL

5.1. We have heard the submissions made by the Ld. Senior Counsel for the both the parties. The Learned Senior Counsel for the Applicant has pointed out three violations on the part of the RP in conducting the Resolution Process of the Corporate Debtor. They are

(i) The RP has violated Regulation 39(1A) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

(ii) The successful Resolution Applicant has violated clause (e) and (f) of the Non - Disclosure Agreement by sharing the revised Resolution Plan to all the COC members.

(iii) A new clause has been introduced in the email dated 31.01.2022 in respect of payment of interest after the second revision of the Resolution Plan.

Issue No.(i)

5.2. In this regard, it required to be noted that said Regulation 39(1A) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 came into force only with effect from 30.09.2021. However, in the present case it is an admitted fact the Form – G and the RFRP were issued by the RP as early as on 28.06.2021 and 03.08.2021 respectively. Since the amended Regulation 39(1A) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 came into force with effect from 30.09.2021, whether it will apply to the facts and circumstances of the present case is the issue which is requires consideration.

5.2. In this regard, it is significant to refer to the clarification issued by the IBBI in respect of the applicability of tenure on completion of Liquidation period, as to whether it would apply prospectively or retrospectively, to which the IBBI has clarified as under;

> ".....It is reiterated that the provisions of the Amendment Regulations are not applicable to the liquidation processes, which had commenced before coming into force of the said Amendment Regulations and that they are applicable only to liquidation processes, which commenced on or after 25th July, 2019."

5.3. Drawing inference from the above said clarification it can be inferred that Regulation 39(1A) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations,

2016 would apply prospectively and in the present case the RFRP issued by the RP as was 03.08.2021. Thus, there is no violation of Regulation 39(1A) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

5.4. The arguments of the Learned Senior Counsel for the Respondent that the said Regulation even if made applicable would bind the RP alone, who is empowered to seek revision of plan only once, however there is no limit fixed on the COC to seek improvement of the Resolution Plan is tenable. The COC in its commercial wisdom can request the prospective Resolution Applicants to revise the resolution plan any number of times and there is no bar to that effect can be countenanced as value maximization of the Corporate Debtor is the paramount objective of the Code.

5.5. Thus, we find credence in the submissions made by the Learned Senior Counsel for the RP. For the reasoning stated above, the alleged violation pointed by the Ld. Senior Counsel for the Applicant has no legal basis and as such the said objection stands over ruled.

Issue No. (ii)

5.6. With regard to the second violation pointed out by the Ld. Senior Counsel for the Applicant that the successful Resolution Applicant has violated the Non - Disclosure agreement by sharing revised Resolution Plan to all the COC members. In this regard, it is required to be noted that after the first revision of the Resolution Plan on

04.01.2022, the successful Resolution Applicant has sent an e-mail to the Respondent and also to the COC of the Corporate Debtor on 21.01.2022 stating that they want to improve their Resolution Plan. The 2nd Respondent ASG Hospital Ltd. has also not denied the factum of sending this e-mail to the COC members. While examining the issue as such, it is required to be noted that the said unsolicited e-mail sent by the successful Resolution Applicant was discussed in the 19th COC meeting held on 28.01.2022 wherein the minutes it has been recorded as follows:

> **Decision on last and final round of negotiations:**
>
> RP requested the CoC members to share their views on considering the unsolicited revised resolution plan submitted by ASG on 21st January 2022. While the COC members had different views on the subject, they highlighted that there could be delay in completing the resolution process if again one more round of negotiation were to be resorted as no further extension of CIRP period could be sought from NCLT and the risk of company getting into liquidation was also there. Legal impediments and challenges by other resolution applicants were also possible if the unsolicited revised resolution plan of ASG were to be accepted. RP while acknowledging the views of the COC members agreed that the unsolicited revised resolution plan should be disregarded as it was not submitted as per the RFRP process. All the COC members unanimously agreed to the above view.
>
> However, the COC members discussed the potential for maximising the value of the corporate debtor and the RP requested all the COC members to give their opinion whether to go for one more round of negotiation.

NAME OF THE COC MEMBERS	VOTED YES (VOTING SHARE %)	VOTED NO (VOTING SHARE %)
Union Bank of India	24.10%	-
Kotak Mahindra Bank	8.78%	-
Bank of Maharashtra	7.17%	-
HDFC Bank Limited	6.31%	-
Clix Finance India Private Limited	4.72%	-
Siemens Financial Services Private	0.05%	-

Limited		
Edelweiss Asset Reconstruction Company Limited	-	37.10%
TATA Capital Financial Services Limited	-	4.70%
IDBI Bank Limited	-	2.72%
Aditya Birla Finance Limited	-	0.64%
Pinnacle Financial Consultancy & Investment Services Private Limited	-	0.49%
Total	**51.03%**	**45.65%**

RP summarised the above decision of the COC members and suggested that all the resolution applicants be informed immediately about one last round of opportunity to improve their plans which may be submitted within a short period.

Accordingly, the RAs were invited to the meeting again and informed about the decision of COC going for one more round of negotiations which would be last and final round and no more opportunities would given to RAs to modify their plans. All RAs except iLabs agreed to modify the clauses as mutually agreed between RAs and CoC also assured to improve their resolution plan amounts and submit the improved and final resolution plan by 6.00 pm on Wednesday, 2nd February 2022.

5.7. A perusal of the aforesaid minutes recorded in the 19th COC would makes it evident that the said unsolicited e-mail sent by the successful Resolution Applicant was rejected by the COC, since it was not submitted as per the RFRP process. It is also clear that the COC members and RP have unanimously agreed to reject the email. However, on considering the issue as above, a voting took place in respect of way forward as to whether there should be an endeavour for maximisation of value of the Corporate Debtor. The COC with a majority of 51.03% of voting share has suggested to afford one last opportunity to all the PRAs to improve their plans.

5.8. Further, the Learned Senior Counsel for the Applicant has alleged that the 2nd Respondent has violated clause (e) and (f) of the Non – Disclosure Agreement, which is extracted hereunder;

> e. Without limiting the generality of the foregoing, the Receiving Party further agrees that, without the prior written consent of the Disclosing Party, the Receiving Party will not, directly or indirectly, enter into any agreement, arrangement or understanding, or any discussions which might lead to such agreement, arrangement or understanding, with any other person regarding the Resolution Plan.
>
> f. Without the prior written consent of the Disclosing Party, the Receiving Party further agrees that all communications (both written and oral) regarding the Confidential Information, and/or the proposed Resolution Plan, requests for additional information, and discussions or questions regarding procedures related to the Resolution Plan, will be sent only to the Disclosing Party through the RP and/or authorized representatives of RP.

5.9. In respect of clause (e), a perusal of the same would posit the fact that the PRAs should not directly or indirectly, enter into any agreement, arrangement or understanding, or any discussions which might lead to such agreement, arrangement or understanding, with any other person regarding the Resolution Plan. However, in the present case the 2nd Respondent has not entered into any agreement or arrangement or understanding or any discussions regarding the Resolution Plan. The said clause was not acted upon by the 2nd Respondent herein and as such there is no violation in relation to the same.

5.10. In respect of clause (f), a perusal of the same would manifest the fact that all the information regarding the Resolution Plan should be sent only to the RP. In the present case, it is alleged that the 2nd Respondent has sent an e-mail to the members of the COC directly. However, it is required to be noted that at first instance the 2nd Respondent has sent an e-mail to the RP, to which the RP has not replied. Hence, there is no violation in relation to the same.

Issue No. (iii)

5.11. With regard to the third violation pointed out by the Learned Senior Counsel for the Applicant that a new clause has been introduced in respect of the payment of interest after the second revision of the Resolution Plan, it is submitted that the RP has sent an e-mail to all the Resolution Applicants on 31.01.2022 indicating a list of clarifications to be kept in mind before submitted the final Resolution Plan. In this at point No.10, the RP has stated that in case of delay in implementing the Resolution Plan, due to the events other than the stay order imposed by the NCLAT / High Court / Supreme Court, the Resolution Applicant may provide interest for such delayed payment.

5.12. The unsuccessful Resolution Applicant, who is the Applicant herein, seeks to object to the said clause as a dubious entry by the RP. The rule of the game has been changed after the issuance of RFRP and after submitting the second revised Resolution Plan. The Applicant has however acted upon the clarification issued by the RP and in pursuance to the same has also gone ahead and

submitted his final Resolution Plan before the RP on 02.02.2022. The Applicant is estopped from making any such objection after having acted upon it without demur. This is an afterthought on failure to succeed in the Resolution Plan.

5.13. In this case, the RP has filed a comparative chart showing the amount offered by the each of the Resolution Applicants and the said chart is extracted here under for clarity.

PARTICULARS	Amount Claimed 10.01.22	Amount Admitted 10.01.22	RA-1 Dr. Agarwal's				RA-2 M K R				RA-3 A S G				RA-4 L-Labs	
			Original Amount	Revised 04.01.22	Revised 02.02.22	% of amount admitted	Original Amount	Revised 04.01.22	Revised 02.02.22	% of amount admitted	Original Amount	Revised 04.01.22	Revised 02.02.22	% of amount admitted	Original Amount	% of amount admitted
FCs (Secured)	1,783.09	1,248.88	145.00	250.00	300.00	21.92%	140.91	226.98	304.51	22.24%	155.00	206.00	343.00	25.06%	150.00	14.53%
FCs (Unsecured)		120.02					-	1.06								
Interest for 5yrs @ 12%															48.90	
Operational Creditors																
Workmen & Employees	19.99	5.41	4.02	5.40	5.40	99.82%	4.02	5.40	5.40	99.82%	5.50	5.50	5.93	22.57%	4.02	74.31%
Consultant Doctors	26.48	20.86	0.12	0.09	0.09	0.43%		1.04	0.10	0.48%					0.09	0.43%
Landlords	127.02	75.40	0.38	0.32	0.32	0.42%	11.81	3.77	0.38	0.50%	13.38	2.00	2.00	0.37%	0.09	0.12%
Suppliers	743.48	467.53	2.28	1.99	1.99	0.43%		23.38	2.34	0.50%					0.54	0.12%
Statutory Dues – PF	69.15	24.40					1.50									
Statutory Dues – ESI	15.56	10.63					-									
Statutory Dues – Income Tax	508.18	85.60	0.22	0.60	0.60	0.43%	-	6.99	0.70	0.50%	2.75	1.00	1.00	0.71%	0.05	0.04%
Statutory Dues – Others	22.43	19.25					-									
Statutory Dues – Gratuity	-	-	-	-	-	0.00%	3.76	-	-	0.00%	-	-	-	0.00%	-	0.00%
Equity & Pref. Shares	-	-	-	-	-	0.00%	-	-	-	0.00%	-	-	-	0.00%	-	0.00%
CIRP Costs	-	-	48.37	42.07	42.07	0.00%	50.00	42.07	42.07	0.00%	48.37	42.07	42.07	0.00%	48.37	0.00%
Contingencies	-	-	-	5.00	5.00	0.00%	8.50	4.31	-	0.00%	-	-	6.00	0.00%	-	0.00%
TOTAL	3,315.38	2,077.98	200.39	305.47	355.47	17.11%	220.50	315.00	355.50	17.11%	225.00	256.57	400.00	19.25%	252.06	12.13%
Proposed investment for future operations	-	-	99.61	99.53	99.53	-	50.00	100.00	100.00	-	125.00	125.00	126.00	-	125.00	-

5.14. A perusal of the aforesaid chart would reveals that even the commercials offered by the Applicant herein is far less by 45 Crores to that which offered by the successful Resolution Applicant. Thus, in all respects the objections

raised by the Learned Senior Counsel for the Applicant in this regard is required to be eschewed. The Applicant is estopped from raising such an objection only on his own conduct of acquiescence. Further, Hon'ble Supreme Court in the matter of **Arcelormittal India Private Limited Vs Satish Kumar Gupta & Ors (2019) 2 SCC 1** while dealing with the objections raised by the unsuccessful Resolution Applicant, in para No. 76 to 79 has held as follows;

> 76. Given the timeline referred to above, and given the fact that a resolution applicant has no vested right that his resolution plan be considered, it is clear that no challenge can be preferred to the Adjudicating Authority at this stage. A writ petition under Article 226 filed before a High Court would also be turned down on the ground that no right, much less a fundamental right, is affected at this stage. This is also made clear by the first proviso to Section 30(4), whereby a Resolution Professional may only invite fresh resolution plans if no other resolution plan has passed muster.
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> 77. However, it must not be forgotten that a Resolution Professional is only to "examine" and "confirm" that each resolution plan conforms to what is provided by Section 30(2). Under Section 25(2)(i), the Resolution Professional shall undertake to present all resolution plans at the meetings of the Committee of Creditors. This is followed by Section 30(3), which states that the Resolution Professional shall present to the Committee of Creditors, for its approval, such resolution plans which confirm the conditions referred to in sub-section (2). This provision has to be read in conjunction with Section 25(2)(i), and with the second proviso to Section 30(4), which provides that where a resolution applicant is found to be ineligible under Section 29A(c), the resolution applicant shall be allowed by the Committee of Creditors such period, not exceeding 30 days, to make payment of overdue amounts in accordance with the proviso to Section 29A(c). A conspectus of all these provisions would show that the Resolution Professional is required to examine that the resolution plan submitted by various applicants is complete in all respects, before submitting it to the Committee of Creditors. The Resolution Professional is not required to take any decision, but merely to ensure that the resolution plans submitted

are complete in all respects before they are placed before the Committee of Creditors, who may or may not approve it. The fact that the Resolution Professional is also to confirm that a resolution plan does not contravene any of the provisions of law for the time-being in force, including Section 29A of the Code, only means that his prima facie opinion is to be given to the Committee of Creditors that a law has or has not been contravened. Section 30(2)(e) does not empower the Resolution Professional to "decide" whether the resolution plan does or does not contravene the provisions of law. Regulation 36A of the CIRP Regulations specifically provides as follows:-

> "(8) The resolution professional shall conduct due diligence based on the material on record in order to satisfy that the prospective resolution applicant complies with-
>
> (a) the provisions of clause (h) of sub-section (2) of section 25; (b) the applicable provisions of section 29A, and (c) other requirements, as specified in the invitation for expression of interest. (9) The resolution professional may seek any clarification or additional information or document from the prospective resolution applicant for conducting due diligence under sub-regulation (8). (10) The resolution professional shall issue a provisional list of eligible prospective resolution applicants within ten days of the last date for submission of expression of interest to the committee and to all prospective resolution applicants who submitted the expression of interest. (11) Any objection to inclusion or exclusion of a prospective resolution applicant in the provisional list referred to in sub-regulation (10) may be made with supporting documents within five days from the date of issue of the provisional list. (12) On considering the objections received under subregulation (11), the resolution professional shall issue the final list of prospective resolution applicants within ten days of the last date for receipt of objections, to the committee."

78. Thus, the importance of the Resolution Professional is to ensure that a resolution plan is complete in all respects, and to conduct a due diligence in order to report to the Committee of Creditors whether or not it is in order. Even though it is not necessary for the Resolution Professional to give reasons while submitting a resolution plan to the Committee of Creditors, it would be in the fitness of things if he appends the due diligence report carried out by him with respect to each of the resolution plans under

consideration, and to state briefly as to why it does or does not conform to the law.

79. Take the next stage under Section 30. A Resolution Professional has presented a resolution plan to the Committee of Creditors for its approval, but the Committee of Creditors does not approve such plan after considering its feasibility and viability, as the requisite vote of not less than 66% of the voting share of the financial creditors is not obtained. As has been mentioned hereinabove, the first proviso to Section 30(4) furnishes the answer, which is that all that can happen at this stage is to require the Resolution Professional to invite a fresh resolution plan within the time limits specified where no other resolution plan is available with him. It is clear that at this stage again no application before the Adjudicating Authority could be entertained as there is no vested right or fundamental right in the resolution applicant to have its resolution plan approved, and as no adjudication has yet taken place.

(emphasis supplied)

5.15. Hence, it is made clear from the aforesaid judgment that the un-successful Resolution Applicant has no vested interest to challenge the Resolution Plan which has been approved by the COC.

6. We have no hesitation to hold that on all the three issues raised by the Applicant no case is made out to interdict the Resolution Plan approved by the CoC in favour of the successful Resolution Applicant. On the grounds stated by the Applicant, the plea of prejudice has been overturned by the Hon'ble Supreme Court in the matter of **Arcelormittal** *(supra)*. We also find no error in violation of the Code or the Regulations a stated by the Applicant in respect of all the issues raised. It will however be necessary for the RP to place and

satisfy this Adjudicating Authority on the Resolution Plan that it is compliant with all other requirement of the Code and Regulations.

7. In so far as the Application is concerned, we find no merit on the objections raised and all the plea raised by the Applicant are rejected as not tenable in law or on facts. Accordingly, this Application stands **dismissed.**

— Sd

MEMBER (TECHNICAL)

— Sd —

Justice RAMALINGAM SUDHAKAR
PRESIDENT

Raymond