IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH

MA No. 1272/2018 &MA No. 956/ 2018

In

CP 1555 (IB)/MB/2017

Under the Insolvency & Bankruptcy Code, 2016

MA No. 1272/2018

Deccan Value Investors L.P. and

DVI PE (Mauritius) Limited

…Applicant/Resolution Applicant

v/s

Deutsche Bank AG

State Bank of India

Mr. Dinkar Venkatasubramanian

(Resolution Professional)

…Respondents

And

MA No. 956/ 2018

Mr. Dinkar Venkatasubramanian

(Resolution Professional)

…Applicant

Consortium of Deccan Value Investors LP and DVI PE (Mauritius) Limited

…Resolution Applicant

In the matter of

State Bank of India

...Financial Creditor

v/s

Metalyst Forgings Ltd.

…Corporate Debtor

Order delivered on 27th Sept.2019

Coram: Hon’ble Member (Judicial) Mr V. P. Singh

Hon’ble Member (Technical) Mr Rajesh Sharma

For the Resolution Applicant: Adv. Ravi Kadam, Senior Counsel, Adv. Ashish Kamat, Adv. Rohan Dakshini and Adv. Aakanksha Saxena and Adv. Nikita Mishra

For the Resolution Professional: Adv. Fredun De’vitre, Senior Counsel, Adv. Sneha Jethwa and Adv. Akash Menon.

For the Committee of Creditors: Adv. Rishabh Jaisani

Per Mr V. P. Singh, Member (Judicial)

Mr Rajesh Sharma, Member (Technical)

ORDER

1. The Resolution Applicants, Deccan Value Investors L.L.P. and D.V.I. PE (Mauritius) Ltd. (collectively referred to as ‘**Deccan**’) have filed this Miscellaneous Application No.1272/2018 under section 60(5) of the Insolvency & Bankruptcy Code, 2016 (‘**I&B Code**’) seeking cancellation of the process of submission, finalisation and filing of the resolution plan for approval of this Adjudicating Authority as being vitiated by misrepresentation and/or mutual mistake of fact and also seeking stay on encashment of Bid Bond Guarantee.

2. It is stated in the Application that on 20.04.2018 Deccan had submitted a **Bid Bond Guarantee** dated 13.04.2018 for ₹40crore as required under the Process Memorandum. Subsequently, Deccan submitted its resolution plan on 30.04.2018, and the plan was approved by the Committee of Creditors (**CoC**) on 28.08.2018.

3. It is stated that on 04.09.2018, 05.09.2018, 08.10.2018 and 09.10.2018 the representatives of Deccan conducted various

meetings with the Resolution Professional and the management of the Corporate Debtor and visited various plant sites of the Corporate Debtor during which it is alleged that Deccan came to know material and contradictory information regarding production capabilities of the Corporate Debtor that are said to have material impact on the viability of the resolution plan.

4. The Resolution Professional, vide its letter dated 15.10.2018, called upon Deccan to submit the performance guarantee. In reply to this demand of Performance Guarantee, Deccan, vide its letter dated 17.10.2018, conveyed its decision to withdraw the Resolution Plan that has been approved by the CoC and filed for approval of the Adjudicating Authority.

5. It is stated that Deccan was looking to negotiate the terms of the Resolution Plan with the CoC and to show its *bona-fides,* the validity of the Bid Bond Guarantee was extended till 30.11.2018. On 23.10.2018, the CoC is said to have invoked the Bid Bond Guarantee submitted by Deccan and have further directed Deccan to comply with their obligations under the Resolution Plan. Thus, it is alleged that the CoC is pressurising Deccan to fulfil its obligation under a Resolution Plan that is vitiated in law.

6. Deccan submits that the new information provided to it was significantly at variance from the information made available to it for the due diligence exercise before the submission of the Resolution Plan. It is alleged that net realistic capacity of the Corporate Debtor was shown as being 210,747 Tons per annum(TPA) as per the information available in the virtual data room, which was more than 3 times the annual maximum achievable production, as stated by the team of the Resolution Professional and management of the corporate debtor during the meetings and site visits, post submission of the Resolution Plan.

7. The misrepresented facts as per Deccan are:

i. The achievable production volumes from the existing facilities are far below the levels represented to Deccan and consequently those considered in the Resolution Plan;

ii. The audited financial statements of the Corporate debtor provided incorrect turnover and production capacity value;

iii. Suppression of historical production and achievable production levels in the report on the Feasibility and Viability of the Resolution Plan;

iv. Land that were represented to be available are not available for installation and operationalisation of a 12,500-ton press; and

v. The condition of the machines and status of warranties and installation contracts for the 12,500-ton press.

8. It is submitted that the Resolution Professional was under an obligation to disclose to Deccan that the information provided to Deccan was incorrect. This alleged non-disclosure of material facts is said to have vitiated the resolution plan on account of fraud, non-disclosure and misrepresentation of facts.

9. It is submitted that Deccan are merely seeking time to negotiate and submit revised resolution plan in light of new material facts and circumstances and the CoC shall not encash the Bid Bond Guarantee as it would be highly detrimental to Deccan.

10. The Resolution Professional has filed its Affidavit in Reply date 07.12.2018stating that this application by Deccan is an attempt to renegotiate the terms of its approved resolution plan, which is conclusive and binding. It is submitted that ambit of examination, by the Adjudicating Authority, of an application under section 31 is limited and cannot be expanded beyond those stipulated in the section to decide disputed questions of fact and any triable issues. It is further submitted that the I&B Code does not have any provision for withdrawal of a resolution plan in contrast with the

section 12A that provides for the withdrawal of application filed under section 7, 9 or 10 of I&B Code.

11. The Resolution Professional had prepared a data room for ease of access to data by the potential resolution applicants to enable them to make an informed decision after conducting their due diligence. This data room is said to have contained information of the Corporate Debtor as available with the Resolution Professional at the relevant time, and access to this data room was given to the Resolution Applicant, Deccan along with other prospective resolution applicants. The Resolution Professional also arranged for site visits of the Corporate Debtor's plants or factories on 19.03.2018 and 20.03.2018 for Deccan.

12. It is stated that the financial bids were only submitted by three potential resolution applicants, namely Liberty House Group, Deccan Value Investors (Deccan) and Bharat Forge Limited. Out of these three, Deccan submitted highest bid and was declared as H1 bidder at the 6thCoC meeting held on 08.05.2018. Deccan submitted the Bid Bond Guarantee dated 13.04.2018 for ₹40crore on 20.04.2018. The resolution plan of Deccan was approved by 87.57% vote of the CoC on 25.08.2018. The Resolution Professional filed an application under section 31 of the I&B Code for approval of the Resolution Plan as approved by the CoC on 29.08.2018. The CoC on 28.08.2018 issued a Letter of Intent in favour of Deccan, who in turn duly accepted the same on 28.08.2018. As per the terms of the Letter of Intent, Deccan was to submit a performance guarantee for ₹100crores till 08.09.2018. Deccan did not submit the said Performance Guarantee till 15.10.2018, so the Resolution Professional by its letter demanded submission of the Performance Guarantee. It was also informed that in case of failure to submit Performance Guarantee, the CoC would invoke the Bid Bond Guarantee.

13. It is submitted that the Resolution Applicant has no right to interfere in any decision of the Committee of Creditors at any

stage, until and unless the Adjudicating Authority approves the Resolution plan in terms of Section 31 of the Code. Reliance is placed upon the order of the Hon'ble National Company Appellate Law Tribunal, New Delhi in *Tata Steel Limited v. Liberty House Group Pte. Ltd. &Ors.* Company Appeal (AT) (Insolvency) No. 198 of 2018, wherein the Hon'ble Tribunal held the following:

> " 30. *Further, according to him**, a 'Resolution Applicant' cannot challenge a decision of the 'Committee of Creditors' at any stage, till the Adjudicating Authority approves the 'Resolution Plan' under Section 31*** …………………………………………………………………………………….
>
> ***40. In this background, while we hold that this appeal preferred by 'Tata Steel Limited' is premature, uncalled for, in absence of any final decision taken by the Adjudicating Authority under Section 31, this appeal is not maintainable****"*

14. It is further submitted that, in case of Arce*lor Mittal India Private Limited v. Satish Kumar Gupta &Ors.* (Civil Appeal Nos. 9402-9405 of 2018 etc.), the Hon'ble Supreme Court has held:

> "75*. What has now to be determined is whether any challenge can be made at various stages of the corporate insolvency resolution process. Suppose a resolution plan is turned down at the threshold by a Resolution Professional under Section 30(2). At this stage, is it open to the concerned resolution applicant to challenge the Resolution Professional's rejection?* ***It is settled law that a statute is designed to be workable, and the interpretation thereof should be designed to make it so workable….***
>
> *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 Article226 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 Section30(4), whereby a Resolution Professional may only invite fresh resolution plans if no other resolution plan has passed muster. …………………………………………………………………………….*

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.

*81. If, on the other hand, a resolution plan has been approved by the **Committee of Creditors, and has passed muster before the Adjudicating Authority, this determination can be challenged before the Appellate Authority under Section 61, and may further be challenged before the Supreme Court under Section 62, if there is a question of law arising out of such order, within the time specified in Section 62.** Section 64 also makes it clear that the timelines that are to be adhered to by the NCLT and NCLAT are of great importance, and that reasons must be recorded by either the*

NCLT or NCLAT if the matter is not disposed of within the time limit specified. Section 60(5), when it speaks of the NCLT having jurisdiction to entertain or dispose of any application or proceeding by or against the corporate debtor or corporate person, does not invest the NCLT with the jurisdiction to interfere at an applicant's behest at a stage before the quasi-judicial determination made by the Adjudicating Authority. The non-obstante clause in Section 60(5) is designed for a different purpose: to ensure that the NCLT alone has jurisdiction when it comes to applications and proceedings by or against a corporate debtor covered by the Code, making it clear that no other forum has jurisdiction to entertain or dispose of such applications or proceedings."

15. Given the above, it is submitted that in terms of the Code, a Resolution Plan can only be challenged, once the resolution plan has not only been approved by the Committee of Creditors but has also passed the muster before the Adjudicating Authority. In view thereof, Deccan has no right to challenge, withdraw or modify the resolution plan, pending the adjudication of the Adjudicating Authority.
16. It is submitted that Deccan, by participating in the process for submission of the Resolution Plan, is bound by the terms of the Process Note which is *"irrevocable and binding on the Shortlisted Applicant".* Further, the Resolution Applicants cannot unilaterally change/withdraw the financial bid or resolution plan, once the same has been submitted to the Resolution Professional. Moreover, the Resolution Plan has already been approved by the CoC and the LOI, confirming Deccan has also accepted such approval of Resolution Plan.
17. The Resolution Professional submits that the information provided to Deccan was based on information as available with the Resolution Professional. Under the Process Note issued by the

Resolution Professional on behalf of the CoC, it was made abundantly clear to all resolution applicants, including Deccan that the onus of carrying out all requisite site visits and diligence was on the Resolution Applicant. It is submitted that the Resolution Professional or the CoC cannot be held responsible for the accuracy of information made available in the virtual data room.

18. In terms of the Process Note, the Resolution Applicants were required to and deemed to have carried out their diligence, and the CoC and Resolution Professional were not responsible or liable in respect of any statements or omissions herein, or the accuracy, correctness, completeness or reliability of the information provided;

19. Deccan was expected to independently assess the veracity of the reports provided by the Resolution Professional on the virtual data room and not place reliance on them without carrying out independent diligence, as is also clear from the terms of the Process Note. Under such circumstances, Deccan, having agreed to the terms of the Process Note and participating in the resolution plan process, cannot attempt to withdraw the Resolution Plan for want of information.

20. There was no representation made to the Applicants by the management of the Corporate Debtor or the RP's team to effect any understanding on the capacity of the manufacturing facilities in any of the meetings that have been cited by the Applicant, vide the Withdrawal Letter. The Resolution Professional further contends that no detailed view on achievable production volumes and capacity was discussed or even contemplated in any of the meetings.

21. Furthermore, the production levels and the monthly profit and loss accounts of the plants of the Corporate Debtor, from December 2017 to March 2018 have been shared by the Resolution Professional on the VDR as well as by e-mail to Mr Matt Monson (Deccan's representative) on 11.04.2018. It is submitted that in multiple discussions, the Resolution Professional has updated

Deccan about an exceptional performance of 3513 M.T. (which would potentially annualise to around 42,156 M.T.) of production done in March 2018. Deccan was also informed that this was above the average production of 3059 M.T. (which would potentially annualise to around 36,078 M.T.).

22. However, it was made clear that Deccan, vide their independent due diligence is required to ascertain the production capacity of the Corporate Debtor, based on the details of the machinery provided and after conducting a physical inspection at the site of the condition of the equipment, if necessary along with their specialised/advisory experts.

23. The Resolution Professional also gave detailed financial information with the plant-wise profit and loss statements, including specific classification of the revenues for the year 2015-16 and 2016-17 and for the six months up to September 2017 into "Manufacturing" and "Trading/Metals". These were part of the "H.O. Model" placed in the VDR and made available to all potential Resolution Applicants.

24. Based on the information available and their due diligence exercise, Deccan, with the aid of their experts, submitted their Resolution Plan. For their calculation purposes, Deccan appear to have taken into account the total revenue and price to arrive at annual production capacity. This is their exercise, based on the correct figures provided by the RP.

25. In doing so, Deccan chose to ignore the revenue bifurcation and treated the entire revenue as being from "manufacturing". The Resolution Applicant now wants to blame the Resolution Professional for this exercise done by them, on their own, is unsustainable.

26. It is submitted that as far as the historical statements are concerned, the Corporate Debtor is listed on both BSE and NSE and the financial information for at least past five years is available to the public as required under the SEBI (LODR) Regulations.

27. The Resolution Professional also provided detailed financial information to all the potential resolution applicants with plant wise profit and loss statements, including specific classification of the revenue during those years into "Manufacturing" and "Trading / Metals"; turnover of the Corporate Debtor for financial year 2016, financial year 2017 and the period between April 17 to September 17, as was made available to the Resolution Professional. Furthermore, the Resolution Professional's team had also shared the detailed financial information and operational information for December 2017 till March 2018, to provide the most updated information possible. Similar information was also shared with the Applicant during the meetings in September and October for April 2018 till June 2018.

28. It is submitted that the 2018 Report, being the 'Feasibility and the Viability of Resolution Plan' by Mott Mcdonald was commissioned by the COC to evaluate the feasibility and viability of the Resolution Plan submitted by the Applicant. The aforesaid is a specific requirement in terms of the provisions of Section 30(4) the Code for the COC to evaluate viability and feasibility. This information is said to be generated after the submission of the resolution plan, and as such, has no relevance to the Resolution Applicant.

29. It is further submitted that not only Deccan was fully aware of the fact that the said press is currently not in the Corporate Debtor's premises and stored at the associate company's land (**Clover**), but Deccan has also had detailed discussions on the mode of securing access to the same. Furthermore, to facilitate security of and the access to the 12,500 TPA for potential resolution applicants, the Resolution Professional had negotiated and agreed to a lease agreement between the Corporate Debtor and Clover.

30. The Resolution Professional has opposed Deccan's case that since corporate insolvency resolution process has been commenced with respect to Clover, the press may not be available for Deccan, and this has led to the Resolution Plan of Deccan being impossible to be

implemented as an attempt to resile from binding and irrevocable Resolution Plan approved by the COC.

31. It was pointed out that as per Resolution Professional's understanding, Deccan itself has participated in the CIRP process of Clover and has submitted an expression of interest for Clover. Further, as is admitted by each party, the Resolution Professional had negotiated and agreed to a lease agreement between Corporate Debtor and Clover. The Clover land could also be made available to Deccan using a simple application in the CIRP of Clover by Deccan.

32. It is submitted that Deccan had arranged an inspection of 12,500 Ton press by the SMS team, which was facilitated by the Resolution Professional in good faith. The SMS team stated during their visit to Aurangabad that each of the 100 Crates (which contain different parts of the 12,500 M.T. Press) have been packed by SMS in 3 protective layers of packaging. The SMS team, based on their review stated that the 2nd layer of packing is intact and unequivocally confirmed that there is no damage.

33. **Deccan has made strenuous attempts to rely upon the Mott McDonald Report dated 30th September 2016. It is submitted that the management of the Corporate Debtor prepared said Report for a potential investment. It is worth noting that Respondent No. 3 had originally not placed the said Report in the VDR, firstly, because it was dated, and secondly because it was prepared for a purpose not related to the resolution process. The MM Report was placed in the VDR, only on the Applicants' request.**

34. It is stated by the Resolution Professional that in the Process Note, he made no representations to Deccan about the veracity of the **Mott McDonald** Report. Moreover, at the meetings held on March 2018, he gave Deccan data about the actual levels of production achieved in the two months in which the Resolution Professional

was in charge, which as indicated above, were lower than the MM Report.

35. It is stated that Deccan's reliance on the Mott McDonald Report was clearly at their risk and they cannot attempt to foist the blame about such reliance, upon the Resolution Professional or the COC.

36. It is submitted that the bid bond guarantee can be invoked for Deccan's failure to provide a performance guarantee. The Bid Bond Guarantee itself indicates that the same can be invoked if Deccan fails to provide a performance guarantee. As Deccan has admittedly failed to submit the performance guarantee within ten days of the issuance of the same, the Bid Bond Guarantee was rightly invoked on 23rd October 2018.

37. Further, under the Process Note, it was specifically stated that invocation of the Bid Bond Guarantee would not limit the right of the Resolution Professional against the successful applicant (in the present case Deccan). The relevant portion of Clause 1.8.4 and 1.8.5 of the Process Note reads thus:-

> *"i. MFL shall be entitled to invoke the Bid Bond Guarantee where*
>
> *……(c) in case of non-submission of Performance Guarantee by the Successful Applicant….*
>
> *…*
>
> *1.8.5 It is clarified that any invocation of the Bid Bond Guarantee by MFL, or any Person on behalf of Resolution Professional, shall not limit any rights or remedies that the Resolution Professional may have under Applicable Laws or otherwise, against any Applicant, or Shortlisted Applicant or Successful Applicant, as the case may be"*

38. Given Deccan's failure in providing the performance guarantee, the State Bank of India invoked the Bid Bond through a letter dated 23rd October 2018. Moreover, the invocation of the Bid Bond could

not have limited the rights and remedies available to the Resolution Professional under law or otherwise against Deccan.

39. In terms of Clause 1.9.1 of the Process Note, the COC was provided with discretion whether or not to treat the non-submission of the performance guarantee by the successful applicant as an event which leads to cancellation of LoI. The relevant portion of the Clause 1.9.1 of the Process Note reads thus:-

> *"It is hereby clarified that non-submission of the Performance Guarantee by the Successful Applicant, along with the acceptance of the LoI, shall lead to cancellation of LoI issued by the CoC, unless determined by the CoC at its sole discretion."*

40. It was thus the sole discretion of the CoC whether or not to treat the LoI as revoked/cancelled given the non-submission of the performance guarantee by Deccan. By exercising its discretion, the CoC through the letter dated 23rd October 2018, while invoking the bid bond, had chosen to proceed with the enforcement of the Resolution Plan of Deccan. By the said letter, CoC had also expressly objected to the withdrawal of the Resolution Plan of Deccan. The Resolution Professional thus submits that Deccan's submission that the CoC and Resolution Professional have accepted the withdrawal of the Resolution Plan of Deccan or accepted the repudiation of the Resolution Plan of Deccan is wholly misconceived and contrary to the terms of the Process Note.

41. The CoC has filed its Affidavit in Reply dated 07.12.2018 for opposing the application of Deccan and the reliefs sought in it. It is stated that Deccan was responsible for carrying out their due diligence and that the members of the CoC did not take any responsibility for the accuracy of the information provided to Deccan. The clause 1.7.3 of the Process Note makes the resolution plan submitted by a resolution applicant irrevocable and binding and cannot be amended except pursuant to (a) instructions of the Resolution Professional or the CoC, due to the Resolution Plan not

meeting any requirement under the Process Note or any other condition/requirement stipulated by the CoC and (b) the negotiations held with the CoC or to meet the requirements of the CoC pursuant to negotiations held by the CoC. Deccan has accepted the terms of the Process Note and cannot now seek to amend or withdraw the resolution plan.

42. The CoC has further submitted that no provision in the I&B Code allows a Resolution Applicant to amend or withdraw its resolution plan which is pending for approval of the Adjudicating Authority.It is also submitted that the COC discontinued its discussions with other two eligible resolution applicants after 09.05.2018 when Deccan was declared as the H1 bidder. After this, for three months, the CoC held several meetings with Deccan to work the contours of the Resolution Plan, experts were appointed, and funds were expended to evaluate the resolution plan of Deccan. The resolution plan of Deccan was approved by the CoC on 25.08.2018, and the Corporate Insolvency Resolution Process expired on 11.09.2018.

43. It is also submitted that the scrutiny of the Resolution Plan by the Adjudicating Authority is also limited to the parameters set out in section 31, and the Adjudicating Authority ought not to consider many factors beyond those enlisted in the I&B Code, including Deccan’s present application.

44. It is stated that on a bare perusal of the resolution plan it is apparent that Deccan made representations to the CoC about their capacity and their intent, to convince the CoC of their ability to perform the Resolution Plan and eliminate other potential bidders. It is stated that if Deccan is allowed to resile from its resolution plan at this belated stage, the Corporate Debtor will be forced into liquidation, causing huge loss to the CoC.

45. About the invoking of the Bid Bond Guarantee, it is submitted that as per the Letter of Intent and the Process Note, Deccan was required to submit the Performance Bank Guarantee on or around 08.09.2018. Deccan admittedly failed in submitting the

Performance Bank Guarantee, and therefore the CoC invoked the Bid Bond Guarantee strictly as per the terms of the Bid Bond Guarantee.

46. We have heard the Ld. Counsels appearing from both the sides and perused the records.

47. It is stated that Deccan submitted its resolution plan dated 30.04.2018 and subsequent addenda to it dated 20.08.2018 and 23.08.2018 based on the several representations made by the Resolution Professional and the CoC. However, subsequent to the submission of Deccan Resolution Plan, the Applicants discovered that the entire basis and making of Deccan Resolution Plan has been vitiated by non-disclosure of material facts and documents; Deccan Resolution Plan is vitiated by the vices of suppression, misrepresentation and/or mistake; and in any event, Deccan Resolution Plan can no longer be considered viable or implementable. This is essential, because of the large discrepancy between the representations made by the Resolution Professional and the COC about the actual, realistic position of the technical capacity of the Corporate Debtor, its operations, and its assets.It is submitted by Deccan, that the past financials of the Corporate Debtor indicate that a turnover of more than ₹2000 crores was regularly achieved by the Corporate Debtor and such turnover was based on the production capacity of the Corporate Debtor. Further, the 2016 MM Report, uploaded by the Resolution Professional in the VDR, which assessed the net realistic capacity of the Corporate Debtor at 210,747 MTPA was later disavowed by the Resolution Professional stating that the Resolution Professional has no responsibility of the accuracy of the data furnished in the VDR and that the 2016 MM Report was uploaded in response to a specific query on technical capacity of the Corporate Debtor. It is submitted that VDR was created for the specific purpose of making available to all participating resolution applicants, data and documents about the Corporate Debtor, to facilitate the making of a viable and

compliant Resolution Plan. The 2016 MM Report, was, therefore, also made available on this basis and for this reason. There can be no other purpose for either the Applicants to have sought or for the Resolution Professional to have made available the 2016 MM Report, save and except, to consider and rely on the same for the making of Deccan's Resolution Plan. Furthermore, it is submitted by Deccan that on being commissioned by the Resolution Professional, the Mott Macdonald by another report dated 19.06.2018 purported to confirm the viability of Deccan Resolution Plan by terming the production values estimated by the Applicants as 'conservative'. It is submitted that in light of the revelation that the production of the Corporate Debtor was at best 36,000 MTPA – 42,000 MTPA and can potentially only be increased up to 66,000 MTPA, the conclusion of the 2018 MM Report that Deccan resolution plan was 'conservative' is incorrect.

48. It is noted that the Committee of Creditors discussed the 2018 MM Report with the RP, following which the Resolution Applicants were requested to increase the bid-offer made, as is evident from the minutes of the Meeting held on 21st August 2018. The Resolution Professional has also sought to distance himself from the 2018 MM Report which he commissioned.

49. It is further stated that in the interactions and/or meetings held on 4th/5th September 2018 and 8th October 2018, it emerged that the realistic production volume from the existing facilities represented by the RP's team was not higher than 25 % - 30% than the prevailing levels [i.e. 25% - 30% higher than average monthly production volume during the CIRP of 3059 MT per month, with a peak of 3513 MT in March 2018 – therefore, potentially between approx. 36,000 MTPA - 42,000 MTPA and confirmed by the management team of the Corporate Debtor to be no higher than 5500 MT per month in its history (i.e. potentially only 66,000 MT per annum). It is to be noted that even this level was never

actually achieved in a single month - it was derived by adding the peak production ever achieved by each machine, in any month.

50. On the realistic and actual basis of the technical production capacity of the Corporate, the Applicants submit that a resolution plan on the basis of the actual and realistic technical capacity of the CorporateDebtor would further establish the Applicants' case that DeccanResolution Plan is unviable, unfeasible, and incapable of implementation; the facts that were disclosed subsequent to submission of Deccan Resolution Plan have entirely displaced the basis thereof, as is clear from the tabular representation hereunder:

Revised DVI Model (based on maximum achievable capacity and cost assumptions as per DVI resolution plan)	2019	2020	2021	2022	2023
Tons					
Total MFL	42,156	52,695	54,803	69,803	84,803
Monthly Tonnage	3,513	4,391	4,567	5,817	7,067
Sales	464	580	603	768	933
Material Consumed	270	333	345	394	489
Employee Expenses	92	110	115	146	178
Manufacturing Expenses	57	67	74	105	129
Administrative & Selling Expenses	51	61	64	81	98
Total Expenses	469	572	598	727	894
EBIDTA	-6	8	5	41	39
EBIDTA Margin %	-1%	1%	1%	5%	4%
Interest	3	11	22	29	33
Depreciation	33	41	45	44	44
EBT	-42	-44	-62	-32	-38
Tax	0	0	0	0	0
PAT	**-42**	**-44**	**-62**	**-32**	**-38**

Assumptions

1. Production numbers increasing from present peak production level achieved (3513 MT in March'18 by 25% in Year 2020, 30% in Year 2021 and (after subsequent addition of new 12,500 ton press), additional 15000 MT per annum in Year 2022 and further additional 15000 MT per annum in 2023
2. Average Sales Realisation = INR 110,000 per ton
3. Material consumed, Manufacturing Expenses - pro-rata to production volume
4. Employee, Administrative & Selling Expenses - fixed as per plan in Year 1, pro-rata increase in subsequent years.
5. For reasons detailed hereinafter, DVI's assumption regarding 2-year period for installation and making the 12,500 ton press operational, are no longer true; Resolution Applicants are unaware as to if (and when) the 12,500 ton press will become operationa .

51. Deccan has pointed the discrepancy between the representation made by the Resolution Professional on which Deccan formulated its Resolution Plan and the actual undisputed production capacity of the Corporate Debtor as under:

Corporate Debtor's Production Capacity [in MTPA]		
Represented by the Resolution Professional in the 2016 MM Report	*Projected by the Applicants in Deccan Resolution Plan*	*Actual position*
210,747	110,000	Approx. maximum 66,000

52. It is contended by Deccan that the financial and technical documents and data of and in relation to the Corporate Debtorwasdiscrepant and false, as the Financial Statements for the Financial Years 2015-16 and 2016-17 and the Provisional Financial Statements for the period April 2017 to December 2017 were provided in the VDR for the Resolution Applicants for undertaking their due diligence. But these statements, as per the Resolution Professional and the CoC, are discrepant, unreliable and contains false information since they are being subjected to the transaction and forensic audit. Therefore, any reliance upon these statements is said to have vitiated Deccan's Resolution Plan.

53. The income tax returns of the company for FY 2015-16 and FY 2016-17 do not indicate trading operations. The audited financial statements of the Corporate Debtor also, do not indicate any trading operations at all. The Corporate Debtor was represented as a primarily manufacturing company to the Bidders. However, as per the claims made by the Resolution Professional, based upon the document purporting to be the "relevant excerpt of the details of historical revenues provided to the Resolution Applicant in the "Metalyst HO Model" under the tab Historical Financial", the

obvious implications would be that almost 70% of the revenue of the Corporate Debtor would come from trading, and not from manufacturing, which would mean that the Corporate Debtor's business has been misrepresented to bidders as a primarily manufacturing company, and the size and scale of the purported revenues from manufacturing were also misrepresented.

54. With regard to the installation and utilization of the 12.5K ton press, it is submitted that at the meeting held on 05.09.2018, and thereafter, by way of the Resolution Professional's letter dated 23.10.2018 it was informed that the 12,500 ton Press that was proposed to be installed as part of Deccan's Resolution Plan, would only be installed on-premises owned by a third-party, Clover Forgings and Machining Pvt. Ltd. ("**Clover**") and that it is not possible to install the 12.5k ton Press at the Aurangabad plant of the Corporate Debtor. It was also pointed out that insolvency resolution proceedings had been admitted in respect of Clover, by way of an Order dated 4th December 2018 of the National Company Law Tribunal, New Delhi Bench.

55. It may be noted that once the CIRP is admitted against the Clover, the Resolution Professional cannot enter into a lease agreement with the Clover for the 12.5K ton Press as the fate of the lease agreement would be dealt in the resolution plan approved by the CoC of Clover.

56. Ld. Counsel for the applicant has emphasised on the Resolution Professional's legal duties and obligations as provided under I&BCode. The applicant contends that Resolution Professional has statutory obligations to act fairly, independently and as an officer of Adjudicating Authority. As an officer of the court, the Resolution Professional is expected to act fairly, reasonably and objectively in his deals with all stakeholders in the CIRP, without adopting an adverse position. His conduct, therefore, has to meet with the test of judicial review and be in terms of IBC and the regulations that govern his conduct.

57. In this regard, it was pointed out that the Report of Bankruptcy Law Reforms Committee, November 2015 (BLRC Report) envisaged the role of Resolution Professionals an agent of Adjudicating Authority. It is imperative here, to note certain relevant clauses of the said report.

58. Clause 4.4 set out certain mandates for the Resolution Professional, including that **the Insolvency professional will treat the assets of the debtor with honesty and transparency. The BLRC Report recommends that the Resolution Professional must provide the Information Memorandum to the entity (based on which solution can be offered to resolve insolvency). Further, the Information Memorandum put out by the Resolution Professional must be with a "degree of completeness" of the information that the Resolution Professional is willing to certify (Clause 5.3.2).**

59. The Clause 5.3.2 regarding the role of the Resolution Professional provides that:

> "The first phase of the IRP is completed when the creditor's committee is formed, and the window to submit claims is closed. The creditor's committee can apply to the Adjudicator to appoint a new RP to replace the interim RP. The RP must be chosen by a majority vote in the creditor's committee for the Adjudicator to accept the application.
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> ……………………………………………………………………………
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> The RP becomes **the manager of the negotiation between the debtor and the creditors in assessing the viability of the entity**. In this role, she has the responsibility of managing all information so that debtors and creditors are equally informed about the business in the negotiations. Finally, she is responsible for inviting and collecting proposals of solutions to keep the entity going. In this role, she is responsible for managing the process

through which to invite proposals from the overall financial market, rather than just the creditors and debtor. The Committee discussed that this could include other potential market participants, such as other financial institutions, asset reconstruction companies, foreign financiers, strategic investors, other firms and minority shareholders in the entity. Part of the task of the RP is to ensure as much equality of information about the entity to all participants in the negotiations as is possible.

Thus, the RP needs to ensure several features in the IRP, giving priority to the need to preserve time value and equality in negotiations in the process.

1. **The RP must provide the most updated information about the entity as accurately as is reasonably possible to this range of solution providers. In order to do this, the RP has to be able to verify claims to liabilities as well as the assets disclosed by the entity. The RP has the power to appoint whatever outside resources that she may require in order to carry out this task, including accounting and consulting services.**
2. **The information collected on the entity is used to compile an information memorandum, which is signed off by the debtor and the creditor's committee, based on which solutions can be offered to resolve the insolvency**. In order for the market to provide solutions to keep the entity as a going concern, the information memorandum must be made available to potential financiers within a reasonable period of time from her appointment to the IRP. If the information is not comprehensive, the RP must put out the information memorandum with a degree of completeness of the information that she is willing to certify. For example, as part of the information memorandum, the RP must clearly state the expected shortfall in the coverage of the liabilities and assets of the entity presented in the information

memorandum. Here, the asset and liabilities include those that the RP can ascertain and verify from the accounts of the entity, the records in the information system, the liabilities submitted at the start of the IRP, or any other source as may be specified by the Regulator.

3. Once the information memorandum is created, the RP must make sure that it is readily available to whoever is interested to bid a solution for the IRP. She has to inform the market (a) that she is the RP in charge of this case, (b) about a transparent mechanism through which interested third parties can access the information memorandum, (c) about the time frame within which possible solutions must be presented and (d) with a channel through which solutions can be submitted for evaluation.The Code does not specify details of the manner or the mechanism in which this should be done, but rather emphasises that it must be done in a time-bound manner and that it is accessible to all possible interested parties.

Finally, the RP is responsible for calling the creditors committee to evaluate the submitted proposals. She has a role to play indiscussing and ranking the proposals in terms of how to maximise enterprise value. As a first stage filter, she must ensure that all the proposals have clarity on how the IRP costs and the liabilities of the operational creditors will be treated and that all parts of the proposed solutions are consistent with the relevant laws and regulations. But she must leave the choice of final solution to selection by the majority vote from the creditors committee."

60. **Thus, on perusal of the above report, regarding the role of the Resolution Professional about the preparation of the Information memorandum, it is clear that ResolutionProfessional is duty-bound to provide the most updated information about the entity as accurately as is reasonably possible to this range of solution providers.**

61. It is also the duty of the Resolution Professional to prepare the Information Memorandum, in order for the prospective investors to provide solutions to keep the entity as a going concern, the information memorandum must be made available to potential financiers within a reasonable period of time and if the information is not comprehensive, the Resolution Professional must put out the Information Memorandum with a degree of completeness and the information that she is willing to certify. In the report, an example is also given that **the part of the Information Memorandum; the Resolution Professional must clearly state the expected shortfall in the coverage of liabilities and assets of the entity** presented in the Information Memorandum. The Resolution Professional also must make sure that the information is readily available to whosoever is interested in bidding, a solution for Insolvency Resolution Process. Given the duties as prescribed in the BLRC Report, it is clear that Resolution Professional becomes the manager of the negotiation between the debtors and creditors in accessing the viability of the entity.

62. In the said report, in clause 4.4, it is stated that:

> ***"This entire insolvency and bankruptcy process is managed by a regulated and licensed professional namely the Insolvency Professional or an IP, appointed by the adjudicator. In an insolvency and bankruptcy resolution process driven by the law, there are judicial decisions being taken by the adjudicator. But there are also checks and accounting as well as conduct of due process that are carried out by the IPs. Insolvency professionals form a crucial pillar upon which rests the effective, timely functioning as well as credibility of the entire edifice of the insolvency and bankruptcy resolution process.***
>
> ....

In administering the resolution outcomes, the role of the IP encompasses a wide range of functions, which include adhering to procedure of the law, as well as accounting and finance related functions. The latter include the identification of the assets and liabilities of the defaulting debtor, its management during the insolvency proceedings if it is an enterprise, preparation of the resolution proposal, implementation of the solution for individual resolution, the construction, negotiation and mediation of deals as well as distribution of the realisation proceeds under bankruptcy resolution. In performing these tasks, an IP acts as an agent of the adjudicator. In a way, the adjudicator depends on the specialised skills and expertise of the IPs to carry out these tasks in an efficient and professional manner.

The role of the IPs is thus vital to the efficient operation of the insolvency and bankruptcy resolution process. A well functioning system of resolution driven by IPs enables the adjudicator to delegate more and more powers and duties to the professionals. This creates the positive externality of better utilisation of judicial time. The worse the performance of IPs, the more the adjudicator may need to personally supervise the process, which in turn may cause inordinate delays. Consumers in a well functioning market for IPs are likely to have greater trust in the overall insolvency resolution system. On the other hand, poor quality services, and recurring instances of malpractice and fraud, erode consumer trust."(Emphasis supplied)

63. It is also to be noted that the Hon'ble Supreme Court in the case of *Mobilox Innovations (P) Ltd vs. Kirusa Software (P) Ltd (2018 1 SCC 353*, while tracing the background of the I&BCode, referred to the *"Legislative Guide on Insolvency Law of the United Nations Commission on International Trade Law"* and the following pertinent provisions/clauses thereof:

'11. An insolvency law should be transparent and predictable. This will enable <u>*potential lenders*</u> *and creditors to understand how insolvency proceedings operate and* <u>*to assess the risk*</u> *associated with their position as a creditor in the event of insolvency. This will promote stability in commercial relations and foster lending and investment at lower risk premiums. Transparency and predictability will also enable creditors to clarify priorities, prevent disputes by providing a backdrop against which relative rights and risks can be assessed and help define the limits of any discretion. ...*

12. An insolvency law should ensure that <u>*adequate information is available in respect of the debtor's situation*</u>*, providing incentives to encourage the debtor to reveal its positions and, where appropriate, sanctions for failure to do so. The availability of this information will enable those responsible for administering and supervising insolvency proceedings (courts or administrative agencies, the insolvency representative) and creditors to assess the financial situation of the debtor and determine the most appropriate solution."*

64. The Court has while discussing the history and purpose behind the enactment of the IBC, set out in *Innoventive Industries Ltd vs ICICI Bank (2008) 1 SCC 407* as under:

"….the important paragraphs contained in the Report of the Bankruptcy Law Reforms Committee of November 2015, as these excerpts give us a good insight into why the Code was enacted and the purpose for which it was enacted:

…..

II. The Code will enable the symmetry of information between creditors and debtors.

(5) The law must ensure that information that is essential for the insolvency and the bankruptcy resolution process is created and available when it is required.

(7) The law must enable access to this information to third parties who can participate in the resolution process, through the regulated professional,"

65. Thus, it is clear that the Resolution Professional has a continuing statutory duty of adequate and correct disclosure during the CIRP.

66. 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.

67. The Resolution Professional has had access to the Corporate Debtor's records, business and assets for several months whereas the Applicants have had no time for independent evaluation. It is submitted that the Resolution Professional cannot urge that the Applicants were not entitled to rely upon either the information and documents made available in the VDR or that it was obligatory on the Applicants to conduct independent due diligence. The VDR was created and maintained by the Resolution Professional for the admitted purpose of the due diligence of the resolution applicants.

68. 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.

69. It is pertinent to mention that "Due Diligence" a key challenge when acquiring an asset under Insolvency and Bankruptcy Code. *The issue is that the asset you would not get everything –not all the information, not all the assets, as the Resolution Professional is himself is struggling in managing the business and is not an Industry Person in most of the cases*.During Due Diligence process, **a prospective acquirer takes stock of the Asset by looking at the company data**,walking around sites and doing third party diligence, is one of the most critical areas of any, but is often considered as customary and left to advisers.

70. The facts, information and material, as noted in preceding paragraphs, make it clear that Deccan Resolution Plan was based on misleading MM Report 2016 uploaded in VDR, and this has rendered the entire Resolution Plan un-viable, un-feasible and that cannot be successfully implemented. By subsequent event, there remains least possibility of getting the lease of sister concerns land i.e.Clover land,because of initiation of CIRP Process separately against the company Clover itself, for installation of 12500 MT Press , will also makes the Resolution Plan unviable.

71. It appears that Resolution Plan was submitted on the presumption of increased additional production capacity, on account of further installation of 12500 MT Press. The RP had assured the Resolution Applicant that he would make available the lease of Clover Land for installation of 12500 MT Press. But it all depends on the approved Resolution Plan of Clover itself, and the RP of the corporate debtor will not have any right in that process.

72. The IBC neither confers the power or jurisdiction on the Adjudicating Authority to compel specific performance of a plan by an unwilling resolution applicant. The letter and spirit of the I&B Code mandate the acceptance of only a viable and lawful resolution plan being implemented at the hands of a willing resolution applicant. Absence of these factors renders the Section 31 application liable to be rejected. The I&B Code envisages a scheme

whereby the Corporate Debtor is taken over by the successful resolution applicant. This Scheme must contain a provision for its implementation and supervision under Section 30(2)(d) and as required by the proviso to Section 31(1).

73. At this point, it is fit to refer to the subsection (4) of section 30 of the I&B Code as it lays down the basis on which a resolution plan would be approved by the committee of creditors. For the sake of reference, the said clause is reproduced below:

> *"(4) The committee of creditors may approve a resolution plan by a vote of not less than sixty-six per cent. of voting share of the financial creditors, after considering its feasibility and viability, and such other requirements as may be specified by the Board."*

74. Thus, a resolution plan is to be approved by the CoC only after being satisfied that it is feasible and viable. This clearly implies that if a resolution plan is not viable and found unfit for implementation or does not have proper provisions for its successful implementation or is based on incorrect assumptions which would lead to failure of the resolution plan and eventual, inevitable death of the Corporate Debtor, then the CoC ought to reject such a Resolution Plan. Regulation 38(3) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides that the resolution plan shall demonstrate with (a) it addresses the cause of default, (b) it is feasible and viable, (c) it provides for effective implementation, (d) it provides for approvals required and the time lime for the same, and (e) the Resolution Applicant has the capability to implement the resolution plan.

75. Thus,it is clear that mandatory contents of the resolution plan as provided in the Resolution Process Regulations provides that the resolution plan should be feasible and viable, and it has provides for effective implementation.It is thus clear that the facts disclosed after submission of Deccan Resolution Plan have entirely displaced the basis thereof and the resolution plan of Deccan is unviable,

unfeasible, and incapable of implementation based on the actual and realistic technical capacity of the Corporate Debtor.

76. In the present case, undisputedly MM Report 2016 which contained incorrect and unrealistic information, was uploaded on the VDR, which is created as a data centre to facilitate the resolution applicants to carry out their due diligence. The huge discrepancy in the vital and fundamental information such as the production capacity of the Corporate Debtor and financial information would undoubtedly raise questions on the credibility of the resolution plan. Further, the 12.5K ton Press is an important part of the resolution plan and due to the non-availability of land uncertainty looming over the fate of the said Press. But the admission of CIRP against the Clover has further made the resolution plan un-viable. Above all this, the resolution applicant does not wish to continue with its resolution plan. We believe that it should be no one's case to approve a Resolution Plan, the foundation of which is based on

    (a) Incorrect information relating to production capacity figures, which are unrealistic.

    (b) Unavailable asset, i.e. land for installation 12500 Ton Press.

    (c) Unwilling resolution applicant.

77. The fault here lies on both sides as M. M. Report 2016 containing incorrect information was uploaded on the VDR, and it was admittedly not disclosed before submission of the Resolution Plan that the M M Report 2016 was got prepared for a particular purpose for inviting investment, has derailed the entire Resolution Process. So the resolution applicant could have discovered more realistic data about the Corporate Debtor in its due diligence. But the cumulative outcome of the mistakes by both the sides have led us all to this situation wherein the time for CIRP period have elapsed.In the circumstances, approval of the only resolution plan by the CoC would not serve its purpose ,if allowed to be implemented.

78. We are of the considered opinion that the Resolution Professional has merely uploaded the data available with him regarding the Corporate Debtor, which he was duty-bound to do. The M M Report 2016 was relating to the production capacity of the corporate debtor,though it was admittedly prepared for the particular purpose for inviting investment, was uploaded in VDR at the instance of Resolution Applicant has derailed the Resolution Plan. It is on record that the Resolution Professional had negotiated a lease agreement for installation of the 12.5k ton Press with Clover. However, the land on where press was to be installed, was of sister concerns land, i.e. Clover, which also went into CIRP, that created uncertainty over the lease and installation of the said Press.

79. The resolution Professional cannot be said to have misrepresented any fact or misled the Resolution Applicant in any way as he has always represented and communicated the facts about the 2016 MM Report and has never represented otherwise. This conduct of Resolution Professional is also not controverted by the applicant. The Resolution Professional provided detailed financial information to all the potential resolution applicants with plant wise profit and loss statements, including specific classification of the revenue during those years into "Manufacturing" and "Trading / Metals" for the period between April 17 to September 17, as was made available to the Resolution Professional. Furthermore, the Resolution Professional's team had also shared the detailed financial information and operational information for December 2017 till March 2018 to provide the most updated information possible. Similar information was also shared with the Applicant during the meetings in September and October for April 2018 till June 2018.

80. The applicant had extended the validity of its bid bond guarantee till 30.11.2018 however, it was the COC that immediately invoked the bid bond guarantee on 23.10.2018, instead of negotiating with the applicant. The act of applicant in extending the bid bond

guarantee reflected its *bona fides.H*owever, it was the hasty decision of the COC to invoke the bid bond guarantee, even after extension OF THE BBG period, has derailed the entire process

81. As regards the invocation of the BBG, while perusing the process note, we have observed that the Phase-II of the Resolution Plan Process is divided into Two Stages where in Stage-I, each applicant has to submit 'Financial Bid' along with 'Bid Bond Guarantee' which the COC will evaluate, on the basis of the highest amount offered, and select only Three Applicants on the basis of highest amount offered. Those Applicants whose Financial Bid is selected will only be allowed to submit a resolution plan which would then be evaluated and selected in Stage-II.

82. The clause 1.2 of the Process Note provides the manner of evaluation of the Financial Bid by the CoC and the Resolution Professional. Clause 1.5 of the Process Note details the circumstances in which the CoC and the Resolution Professional have right to disqualify any applicant and accept or reject the Financial Bids. What is worth noting is the clause 1.5.2.v. which clarifies as quoted below:

    "that if any Resolution Plan is received from a Shortlisted Applicant which is below the Financial Bid submitted by such Shortlisted Applicant, then the Resolution Professional and the CoC shall reject such Resolution Plan and such Shortlisted Applicant will not have any right to object to such rejection. For the avoidance of doubt, it is clarified that such rejection is without prejudice to the right to invoke the BBG."

83. Clause 1.8 of the Process note defines the terms and conditions related to Bid Bond Guarantee. It is required for all the applicants to provide a Bank Guarantee of ₹40,00,00,000/- from an India Bank along with the Financial Bid which shall be valid for atleast six months from the last date for submission of the resolution plan as may be amended. The non-submission of the Bid Bond Guarantee

along with the Financial Bid would lead to rejection of the Financial Bid.

84. The Bid Bond Guarantee is to be returned to the applicants who are not shortlisted within 45 days from the declaration of the list of shortlisted applicants or in case of expiry of the resolution plan validity period, whichever is earlier. Further, the Bid Bond Guarantee is to be returned to the shortlisted applicants who are not selected as Successful Applicant within 45 days from the declaration of the Successful Applicant or in case of expiry of the resolution plan validity period, whichever is earlier. The Bid Bond Guarantee is to be returned to the Successful Applicant upon submission of Performance Guarantee and signing of Letter of Intent by such Successful Applicant.

85. Thus, BBG is to be submitted by an applicant at the initiation of the resolution plan process at Stage-I and is returned when either the applicant is not shortlisted at Stage-I or not successful in Stage-II or when he submits the performance guarantee. In other words, the BBG is returned to an applicant when the applicant, either, exists the resolution plan process on account of being eliminated by the CoC or the Resolution Professional or when he is finally declared as the successful resolution applicant and has submitted the performance guarantee.

86. The Clause 1.8.4 and 1.8.5 of the Process note are particularly important for our present purposes as they deal with the Forfeiture of the Bid Bond Guarantee of the Applicant, the said clauses are reproduced below for quick reference:

"***1.8.4 Forfeiture of Bid Bond Guarantee of the Applicant***

i) MFL shall be entitled to invoke the Bid Bond Guarantee where (a) the Applicant fails to provide the Bid Bond Guarantee in accordance with Clause 1.8.1 herein; or (b) in case of any non-compliance with the Resolution Plan Process or unilateral change by the Shortlisted Applicant to the Resolution Plan submitted by it; or (c) in case of non-

submission of Performance Guarantee by the Successful Applicant; or (d) if any of the conditions under this Process Note are breached by the relevant Applicant.

ii) Without prejudice to the aforesaid, MFL shall also be entitled to invoke the Bid Bond Guarantee where (a) a Shortlisted Applicant fails to submit the Resolution Plan; (b) the Shortlisted Applicant fails to comply with the term of the Financial Bid submitted in Stage – I of Phase II; and (c) where the amount proposed to be paid to the creditors in the Resolution Plan by the Shortlisted Applicant is less than the amount offered in its Financial Bid.

iii) Provided, that MFL shall not be entitled to invoke the Bid Bond Guarantee of the Successful Applicant in accordance with Clause 1.8.4 (i) above, if any non-compliance with the requirements setout above arises due to :

(a) Non-receipt of the Letter of intent from the CoC; or

(b) The Successful Applicant not accepting additional terms stipulated by the CoC in addition to the Resolution Plan, pursuant to negotiations with the Successful Applicant.

***1.8.5** It is clarified that any invocation of the Bid Bond Guarantee by MFL, or any Person on behalf of the Resolution Professional, shall not limit any rights or remedies that the Resolution Professional may have under Applicable Laws or otherwise, against any Applicant, or Shortlisted Applicant or Successful Applicant, as the case may be.*"

87. Further, the BBG is forfeited in the following conditions which also leaves the financial bid or the resolution plan rejected:

(a) the Applicant fails to provide the Bid Bond Guarantee in the format and the as per conditions as specified in Clause 1.8.1 of the Process note and the clause 1.8.1 itself provides that

non-submission of the BBG would lead to rejection of the Financial Bid; or

(b) in case of any non-compliance with the Resolution Plan Process or unilateral change by the Shortlisted Applicant to the Resolution Plan submitted by it and if the Financial Bid or the Resolution Plan is not in compliance of the Process note it will be rejected as per the clause 1.13.4 and 1.13.7; or

(c) in case of non-submission of Performance Guarantee by the Successful Applicant and this would also lead to cancellation of the Letter of Intent, as per discretion of the CoC under clause 1.9.1; or

(d) if any of the conditions under this Process Note are breached by the relevant Applicant this also would lead to rejection of the Financial Bid.

88. Thus, the purpose of the Bid Bond Guarantee is to serve as security for adherence to conditions contained in the Process Note or Letter of Intent and it is invoked to penalise the applicants for their non-compliance. Every time the Bid Bond Guarantee is invoked, it is co-incident with the rejection of the applicant's financial bid or the resolution plan. Invocation of Bid Bond Guarantee is a penal action as per the terms of the Process Note. The mere saving of the right of the CoC or the Resolution Professional to continue with the applicant's Financial Bid or the Resolution Plan even after invocation of the Bid Bond Guarantee would not change the purpose of taking Bid Bond Guarantee neither the penal nature of invocation of the guarantee.

89. As per the terms of the Letter of Intent, the Process Note and the Bid Bond Guarantee, the Successful Resolution Applicant was required to submit the Performance Bank Guarantee on or before 08.09.2018. Deccan admittedly did not submit the Performance

Bank Guarantee till 23.10.2018, and therefore the CoC invoked the Bid Bond Guarantee strictly as per the terms of the Bid Bond Guarantee. At this moment in the present case, it is a matter of fact that the CoC has invoked the Bid Bond Guarantee, thereby penalising the Successful Resolution Applicant. It is also true that the CoC had the right to invoke the Bid Bond Guarantee as per the terms of the Letter of Intent, the Process Note and the Bid Bond Guarantee. Therefore, after the invocation of the Bid Bond Guarantee, the CoC now cannot force the reluctant Successful Resolution Applicant to implement the approved Resolution Plan.

90. In light of the above observations, we hold that invocation of the Bid Bond Guarantee was on account of non-submission of performance guarantee by the successful Resolution Applicant. The CoC was within its rights to invoke the Bid Bond Guarantee as per the terms of the Process Document, Bid Bond Guarantee and Letter of Intent. However, this can’t be denied that information uploaded on VDR, which was the very basis of submission of the resolution plan was based on misinformation and was based on M. M. Report 2016, which was admittedly prepared for the particular purpose for invitation of investment. Although the Resolution Applicant was also required to apply due diligence before submission of the Resolution Plan. Other reason of then on availability of the Clover Land for installation of 12500 tons of Resolution Applicant has also affected the viability and fesibility of the Resolution Plan, hence liable to be rejected.

91. It is also well-established that the object of the I&B Code is not liquidation of the Corporate Debtor but resolution of the insolvency situation. This is clear by the Preamble of the I&B Code and more specifically explained by the Hon’ble Supreme Court in ***Swiss Ribbons Pvt. Ltd. &Anr. Vs Union of India &Ors. (WRIT PETITION (CIVIL) NO. 99 OF 2018)*** judgment dated 25.01.2019 in the following extracts of the judgment:

"11. As is discernible, the Preamble gives an insight into what is sought to be achieved by the Code. The Code is first and foremost, a Code for reorganization and insolvency resolution of corporate debtors. Unless such reorganization is effected in a time-bound manner, the value of the assets of such persons will deplete. Therefore, maximization of value of the assets of such persons so that they are efficiently run as going concerns is another very important objective of the Code. This, in turn, will promote entrepreneurship as the persons in management of the corporate debtor are removed and replaced by entrepreneurs. When, therefore, a resolution plan takes off and the corporate debtor is brought back into the economic mainstream, it is able to repay its debts, which, in turn, enhances the viability of credit in the hands of banks and financial institutions. Above all, ultimately, the interests of all stakeholders are looked after as the corporate debtor itself becomes a beneficiary of the resolution scheme – workers are paid, the creditors, in the long run, will be repaid in full, and shareholders/investors are able to maximise their investment. Timely resolution of a corporate debtor who is in the red, by an effective legal framework, would go a long way to support the development of credit markets. Since more investment can be made with funds that have come back into the economy, business then eases up, which leads, overall, to higher economic growth and development of the Indian economy. What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern. [See ArcelorMittal (supra) at paragraph 83, footnote 3].

12. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters / those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests."

92. Further, in a recent order of the Hon'ble Supreme Court dated 24.09.2019 in ***Committee Of Creditors Of Amtek Auto Limited Through Corporation Bank vs. Dinkar T. Venkat Subramanian & Ors., Civil Appeal No(s). 6707/2019***, the Resolution Professional was permitted to invite the fresh offers and the COC was directed to take a final call on the fresh offers so received, if any, within a time bound manner. The order was passed after considering that a resolution plan was prepared but has failed owing to non-fulfilment of the commitment by the resolution applicant which resulted in expiry of CIRP period available under section 12 of the I&B Code. Further, the Apex Court also considered that as per The Insolvency and Bankruptcy Code (Amendment) Act, 2019 (No. 26 of 2019) with effect from 16.08.2019, by which the resolution process may be permitted to be completed within 90 days from the date of the commencement of the Amendment Act and there were eight other parties which have submitted their expression of interest. The relevant portion of the Amtek order (*supra.*) is reproduced below:

"It is submitted by the learned Solicitor General appearing on behalf of the Committee of the Creditors of Amitek Auto Limited that a resolution plan was prepared that has failed owing to

nonfulfillment of the commitment by Liberty House. That has consumed the time which was available as per the provisions contained in Section 12 of the Insolvency and Bankruptcy Code, 2016. Our attention has also been drawn to the third proviso by virtue of the Amendment Bill, 2019 with effect from 16.08.2019, by which the resolution process may be permitted to be completed within 90 days from the date of the commencement of the Amendment Act. The said period is available upto 15th November 2019. Reliance has also been placed on a decision of this Court in "Arcelormittal India Pvt. Ltd Vs. Satish Kumar Gupta and Ors.", reported in (2019) 2 SCC 1. Without deciding the aforesaid issue finally, the learned counsel for the parties have agreed that one more effort should be made to resolve the issue. It was also pointed out that expression of interest have already been indicated by eight other parties.

The learned Solicitor General has also submitted that the Resolution Professional may be permitted to invite the fresh offers within a period of 21 days as an earlier offer had been invited and considering the time limit of 15.11.2019, 21 days may be fixed instead of 30 days for submission of the offer. We permit the Resolution Professional to invite fresh offers within a period of 21 days. Let steps be taken by the Resolution Professional by tomorrow i.e. by 25.09.2019 for invitation of the fresh offers in accordance with the rules. Within 2 weeks after that, the Committee of Creditors shall take a final call in the matter, and the decision of the Committee of Creditors and the offers received to be placed before this Court on the next date of hearing for consideration."

93. The recent addition of the Third Proviso to the sub-section (3) of section 12 of the I&B Code provides for 90 days from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019 i.e. 16.08.2019, for completion of the CIRP process in cases where it has not been completed in time

provided under Second Proviso. Also, it must be noted that initially when the Expression of Interest was called for, the Resolution Professional received interest from seventeen prospective resolution applicants out of which three were allowed, as per the resolution plan process, to submit their financial bids and resolution plan which was then voted upon by the COC. Therefore, there are other parties interested in submitting a resolution plan for Corporate Debtor.

94. In the peculiar circumstances in the present case, and to prevent the Corporate Debtor from being liquidated, and as other potential resolution applicants had shown interest in bidding for the Corporate Debtor, there is still value and hope for the Corporate Debtor.

95. MA no. 956/2018 for approval of the Resolution Plan of Deccan, in light of the above observations and decision, is rejected. We further pass an order for inviting fresh Bid.

96. We are of the considered opinion that the entire Resolution Process was derailed and the Resolution Applicant withdrew its Plan, on account of uploading of M.M.Report 2016 which contains misleading and incorrect information in the VDR and further by non-availability of the lease of the land where the 12500 Tons of Press was to be installed. Therefore the applicant will also be allowed to submit fresh bid based on same BBG,to avoid the Liquidation of the Corporate Debtor. However, it will be the sole discretion of the CoC to either approve or disapprove the Resolution Plan. It is further clarified that the Resolution Applicants will not be entitled to refund of forfeited amount of BBG in case fresh Bid of Resolution Applicant is not accepted or Resolution Applicant didn't participate in fresh Bidding process.

97. Considering the recent order of the Hon'ble Supreme Court in Amtek Auto (*supra.*) and the Insolvency and Bankruptcy Code (Amendment) Act, 2019, the Resolution Professional and the CoC is directed to invite the fresh offers within a period of 21 days from

the date of receipt of this order, and within 2 weeks thereafter, the Committee of Creditors shall take a final call in the matter and the decision of the Committee of Creditors and the offers received to be placed before this Tribunal on the next date of hearing for consideration.

98. The MA 1272/2018 is disposed of accordingly.

99. The Registry is at this moment directed to immediately communicate this order to the Resolution Applicant, the Resolution Professional and the CoC even by way of email or WhatsApp. **Compliance report of the order by Designated Registrar is to be submitted today.**

Sd/-	Sd/-
RAJESH SHARMA	**V. P. SINGH**
Member (Technical)	Member (Judicial)

27th September 2019