IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH

MA 170/2018

CP292/I&B/NCLT/MAH/2017

Under Section 30(6) read with Section 60(5) of IBC, 2016

In the matter of

Mr Dhinal Shah,
Resolution Professional

...Applicant

And
In the Matter of
Edelweiss Asset Reconstruction Company Ltd.

...Financial Creditor

Vs

Bharati Defence and Infrastructure Ltd**.**

...Corporate Debtor

Order dated 14.01.2019

Coram: Hon'ble Shri V. P. Singh, Member (Judicial)
Hon'ble Shri Ravikumar Duraisamy, Member (Technical)

For the Resolution Professional: Mr Gaurav Joshi, Sr. Advocate a/w Mr Shyam Kapadia (Adv.), Mr Anoj Memon (Adv.), Mr Aniket Nimbalkar (Adv.), Mr Pranay Chitale (Adv.), i/b AZB & Partners.

Mr Dhinal Shah, Resolution Professional

For Resolution Applicant: Mr Ravi Kadam, Sr. Advocate, Mr Dhananjay Kumar (Adv.), Mr Animesh Bisht (Adv.), Ms Saloni Kapadia (Adv.),

Mr Anush Mathkar (Adv.)
i/b Cyril Amarchand
Mangaldas.

For Respondents:

For ARCS Shipbuild Services Pvt. Ltd.: Mr S. Purohit i/b Chaitanya Bhandarkar

For Mr Ricky Nathanial: Ms Ankita Shinghania i/b Ms Sonu Tandan

For Geotec Investment and Holding LLC: Mr Kunal Dwarkadas i/b Vikrant D Shetty

For Suspended Board of Directors: Mr Mustafa Doctor, Sr. Advocate, Mr Karl Tamboly Adv., Mr Rahul Lakhani Adv., Ms Prachi Dave Adv., Mr Bankim Gangar Adv., i/b Dhaval Vussonjji & Associates,

For Titagarh Wagons Ltd: Mr. Rajesh Kumar Chaudhary Adv. a/w Mr. Rajendra Mishra Adv., Ms. Kalyani Sharma Adv.

For BESI Marine Systems: Mr Rohit Gupta Adv., a/w Anagh Pradhan Adv., i/b Divya Shah Associates.

For Mumbai South,

CGST Commissionerate: Mr. Raguram K., IRS, The Deputy Commissioner, CGST & Central Excise and Mr Jamna Prasad Sharma, Asst. Commissioner of Customs.

For Employees, Workers, Contractor and

Consultant: Adv. Jai Prakash Pawar, Mr Nimay Dare, Mr Prashant Bare.

Mr. Manoj Mishra Adv., Zain Mookhi Adv., Arshil Shah Adv.

Ms. Rashi Agrawal Adv. i/b Manilal Kher Ambalal & Co.

Per V. P. Singh, Member (Judicial) And Ravikumar Duraisamy, Member (Technical)

ORDER

1 The MA **No. 170** is filed by the RP seeking approval of the Resolution Plan submitted by Edelweiss Asset Reconstruction Co. Ltd (EARC) duly approved by the CoC by a vote share of 94.3 %.

2 Initially, the Company Petition No. 292/2017 was filed under section 7 of the Insolvency and Bankruptcy Code, 2016 ("IBC") by Edelweiss Asset Reconstruction Company Ltd., Financial Creditor, for initiating Corporate Insolvency Resolution Process

("CIRP") against Bharati Defence and Infrastructure Ltd., Corporate Debtor.

3 The petition was admitted vide order of this Tribunal dated 06.06.2017, and Mr Dhinal Shah was appointed as Interim Resolution Professional. The Interim Resolution Professional was later resolved by the Committee of Creditors to be appointed as Resolution Professional ("RP"). The CIRP period was extended vide an order of this Tribunal dated 15.11.2017 by 90 days from 06.12.2017.

4 The Expression of Interests ("EOI") were published on 04.09.2017 and 11.01.2018, in response to which five resolution plans were received by the RP. Out of the five resolution plans received by the RP, one plan was put before the CoC for consideration, and the other four plans were not in compliance with section 30(2) of IBC. The said plan was approved by a requisite majority of voting share of CoC on 03.03.2018.

5 There are various other applications filed by different stake holders of the Corporate Debtor opposing the resolution plan approved by the CoC.

6 It is pertinent to note the following submission of RP as salient features of the resolution plan:

Sr. No.	**Particulars**	**A provision in the Plan**	**Reference to RPA**
1.	Intent and Objective of	• CoC believes the asset is of great national importance and	Page 56, 58, 59

Sr. No.	**Particulars**	**A provision in the Plan**	**Reference to RPA**
	the Resolution Plan	has the potential to revive • The company employs 800+ employees. • Liquidation of the asset will be a loss to the nation given the national importance for naval shipbuilding and the employment generated. • The plan envisages cleaning up the Corporate Debtor by placing professional management and sell to an investor in the next three years. • The aim is to ensure that the wrongdoing of the Promoters and imprudent transactions are rectified and the Company is run under professional management. • Lenders not be termed as promoters of the Corporate Debtor.	
2.	Payment of Insolvency	• INR 35 crs (in full) as per Sec. 30(1)(a).	Page 59

Sr. No.	**Particulars**	**A provision in the Plan**	**Reference to RPA**
	Cost Of INR 35 crs	• Payment as per liquidation waterfall – INR 35 crs (in full).	
3.	Payment to Financial Creditors (secured and unsecured) with o/s INR 11,373 crs	• INR 400 crs at 10% interest to be paid at the end of 3 years. • INR 600 crs will continue as an unsustainable loan with 0.01% interest repayable after ten years as bullet repayment • INR 1000 crs debt at 0.01% interest would continue as convertible debt (option with RA) against which instrument may be issued at a later date – any unconverted portion of this would be repaid after 15 years. • Payment to ECL finance (priority loan included in total o/s) to be over and above this amount. • Equity to be issued to lenders in a manner that on a fully diluted basis all lender's hold	Pg. 74, 75 and 69 (equity structure on a fully diluted basis) and 59 (liquidation value) There is an error in this amount – liquidation value is INR 497 Crores.

Sr. No.	**Particulars**	**A provision in the Plan**	**Reference to RPA**
		90% equity in the Company in proportion to their o/s. • As against this the liquidation value due to financial creditors is INR 497 crs.	
4.	Payment towards Workmen dues with O/S ~INR 5 crs (for last 24 months) and ~ INR 4 crs (for more than 24 months)	• Payment of INR 5 cr's total to Workmen towards their dues. • Liquidation value due towards the last 24 months is ~ INR 20 lakhs where for more than 24 months in NIL. • Apart from this, a trust for employees and workmen will be created which will initially hold 20% stake in the Company (before dilution). • During the implementation of the Plan, there will be timely payment of salaries to all workmen and employee. • Payment to be made in a phased manner.	Page 79, 68, 73, 111

Sr. No.	**Particulars**	**A provision in the Plan**	**Reference to RPA**
5.	Payment towards Employees dues with O/S of ~ INR 9 crs for last one year and ~ INR 19 crs more than one year	• Payment of INR 5 crs approx. Total to Workmen towards their dues. • Liquidation value due towards the last 12 months is ~ NIL where for more than 24 months in also NIL. • Apart from this, a trust for employees and workmen will be created which will initially hold 20% stake in the Company (before dilution). • During the implementation of the Plan, there will be timely payment of salaries to all workmen and employee. • Payment to be in a phased manner.	Page 79, 68, 73, 111
6.	Payment to Operational creditors with O/S of INR 187 crs	• Payment of INR 9 crs in a phased manner. • Liquidation value due to them is NIL. • Payment after CIRP period will be timely.	Page 76, 77, 111 , 74

Sr. No.	**Particulars**	**A provision in the Plan**	**Reference to RPA**
7.	Payment of Statutory Dues of INR 270 crs	• Payment is NIL. • Liquidation value is also NIL. • Settlement by way of 10% equity in the Company (before dilution).	Page 66, 77, 78
8.	Operations of the Company	• Company to operate as going concern and generate revenue through shipbuilding, fabrication work. • Company's current order book includes around ~48 defence vessels. • Res. Plan states that there is a significant delay in the completion of these contracts by the earlier management and accordingly most of them are a burden on the Company. • The Plan further envisages to complete 9 out of 48 defence vessels, and the Applicant prays no penalty arising out of this cancellation should be waived off, and BG's should	Page 72, 73, 97, 62, 98, 111,82

Sr. No.	**Particulars**	**A provision in the Plan**	**Reference to RPA**
		be returned to the Company. • The company will sell Kolkata Yard as per Binding offer received. • Assets will be identified for scrap. • Professional Board will be set up to run the Company operations. The Company is proposed to be Professionally Managed Company as compared to a Promoter Managed Company. • A Governance committee will be set up for the day-to-day review of operations. It will consist of an expert nominated by the Board and two by lenders. • A Monitoring agency will also be set up to oversee implementation of the plan.	
9.	Capital Structure of the Company	• Current capital structures are ~ 5 crs. shares of Face Value INR 10 each with ~40%	Page 66, 67, 68, 69

Sr. No.	**Particulars**	**A provision in the Plan**	**Reference to RPA**
		promoter holding. • Since the net worth of the Company is completely eroded and the share does not have any book value, share capital will be written down in 2 rounds to ~ five lakhs share of FV INR 10 each. • The holding of the Promoters will be written down, and the new capital structure will have 68% held by Lenders, 10% by GOI, 20% for employee trust and balance 2% by Public Holding. • The Company will comply with SEBI guidelines at all times. • Further, the lenders will have option to issue preferential shares to the lender shareholder within the next five years to further dilute the non-lender shareholding ~10%.	

Sr. No.	**Particulars**	**A provision in the Plan**	**Reference to RPA**
10.	Sources of Funds	• To implement the plan following sources will be used: - Ongoing operations - Existing liquid investment - Existing cash balance - Margin money release - Receipt from debtor - Sale of Kolkata Yard - Sale of identified assets - Sale of Scrap	Page, 71, 72, 73, 111
	Dissenting financial creditors - LIC: INR 145 crs - APA: INR 62 crs - UCO: INR 180 crs - Sicom: INR	• Dissenting Financial Creditors to be paid through cash generated from operations or through the issuance of equity. • Dissenting Financial creditors will be paid before any assenting lender has been paid. • Dissenting Financial Creditor shall also have the option to become assenting Financial	Page 75, 111

Sr. No.	**Particulars**	**A provision in the Plan**	**Reference to RPA**
	75 crs - DBS: INR 170 crs - Syndicate – INR 45 crs (unsecured) - South Indian – INR 5 crs (unsecured)	Creditor within six months of the approval of the plan. • Liquidation value due to Dissenting creditors is as under: - LIC – INR 6.4 crs - APA Finance – INR 2.7 crs - UCO – INR 7.9 crs - Sicom – INR 3.3 crs - DBS – INR 7.5 crs - Syndicate – NIL (unsecured) - South Indian Bank – NIL (unsecured)	
11.	Other key terms of the Plan	• The RA reserves right to review all existing contracts and cancel any onerous contracts. • The RA reserves right to right size the workforce in the Company to sustain operations. • RA does not assume any	Page. 88, 89, 90

Sr. No.	**Particulars**	**A provision in the Plan**	**Reference to RPA**
		liability towards ongoing arbitration cases. • RA prays to NCLT that all the 100% Subsidiary companies created by the erstwhile management be dissolved.	

Brief about the different Applications filed by various stake holders in the present Petition:

7 The **IA no. 21/2018** is filed by one of the subsidiary company of the Corporate Debtor along with the suspended directors of the Corporate Debtor. This application has challenged the process of approving the resolution plan by the CoC and has raised objections against the resolution plan approved by the CoC. The relief sought in this application is to direct RP to disclose the details of all resolution plans received, to disclose reasons for which the expression of interest received from other applicants was rejected and the concluded CIRP be set aside. It shall be noted that during a hearing of this Petition, the counsel appearing for the applicants in this application has submitted that he does not wish to press for the reliefs in this IA 21/2018.

8 The MA no. 489/2018 is filed by ARCS Ship Build Services (P) Ltd., which is one of the unsuccessful resolution applicants. This application has challenged the defects in the process of calling for resolution plans, lack of provisions of information provided

for the preparation of resolution plan. The relief sought in the application is, among other things, to make the ARCS Ship Build Services (P) Ltd. a party to the proceedings and to provide a copy of the final resolution plan.

9 The MA no 461/2018 is filed by MEC Consultants, operational creditors of the corporate debtor. The relief sought in this application is, among other things, to direct the RP to pay the operational debt due as well as the lease rent of ₹9,82,000/- per month in respect to the plant and machinery and enabling works, materials that are owned by MEC Consultants but are lying at Corporate Debtor's yard in Dhabol till the time it is released.

10 The MA no. 482/2018 is filed by Poly-Tech Engineers, Operational Creditor of the Corporate Debtor whose part claims are disputed and not admitted. The relief sought in this application is, among other things, to make payment of the operational debt due and to update the debt amount due for the Poly-Tech Engineers.

11 The INVP no. 830/2018 is filed by Steadfast Shipping Private Limited, whose claims are not admitted by the RP. The relief sought in this application is, among other things, to direct the RP to furnish the bare boat charter agreement on which Steadfast Shipping Private Limited is basing its claim as a financial creditor and to make the payment due to it.

12 The MA no. 473/2018 is filed by Titagarh Wagon Limited whose claims are not admitted by the RP. The relief sought in this application is to direct the RP to include Titagarh Wagon Limited in the list of creditors and not to deal with the lease hold land of Kolkata Port Trust.

13 The MA no. 837/2018 is filed by Besi Marine Systems GmbH seeking inclusion of its name in the list of operational creditors by admitting its claim.

14 MA 584/2018 has been filed by the suspended board of directors of the Corporate Debtor namely (1) Mr Vijay Kumar and (2) Mr P.C. Kapoor u/s 60(5) of IBC, 2016 r/w Rule 11 of the NCLT Rules, 2016, inter-alia, praying that RP and CoC consider all resolution plans afresh bearing in mind the principle of maximization of value envisaged under the Code. Another prayer is for seeking directions to RP to disclose all information, documents, bids received.

15 It is stated that EARC acquired aggregate debt of approximately ₹ 6248.84 crores through the assignment agreements for a meagre sum of ₹ 1813.90 crores which is a severe haircut of nearly 71% of the value of the loans outstanding. It is contended that the entire process of CIRP is vitiated because of the following grounds:

a) RP did not provide notice to the suspended board of directors as contemplated u/s 24, IBC read with Regulation 19 and Regulation 21 of the CIRP Regulations as notices for meetings were not sent at least seven days in advance. Further, since the relevant documents about the discussions of the CoC meetings were not provided to the suspended board of directors, they were not able to participate effectively in the meetings. Also, in some of the CoC meetings, the suspended Board of Directors were asked to leave the meeting half way through. Further, minutes of the CoC meetings were not circulated to the suspended board.

b) RP failed to circulate the agenda for the 2nd CoC meeting, 5th CoC meeting.

c) Applicant No. 2 namely, Mr Prakash Chandra Kapoor was asked to the excuse himself before the meeting before the discussion on the "Presentation Deck".

d) The expression of interests received by the RP was not disclosed to the suspended board.

e) RP has been acting collusively with the Resolution Applicant (**RA**) EARC as Mr Vijay Pasupathy, who has been present at the meetings of the CoC, is, in fact, part of the team of E & Y, EARC approached that prior to Insolvency Commencement Date and proposed to be engaged by EARC for (1) facilitating the development of a 'resolution plan' for the CD; (2) drafting resolution strategy/ plan; (3) work with financial creditors for approval of the appropriate resolution plan; (4) Understand commercial interest of different lenders and develop the tenets of a potential resolution plan; (5) prepare the draft resolution plan in the pre-IBC period that can be fine-tuned during the IBC based on the new information. RP is a partner of E&Y.

f) An analogy has been drawn regarding EARC approving its resolution plan with the principle of law of property that a "man cannot sell to himself" and such a sale, if any, would be wholly void under the provisions of Transfer of Property Act, 1908, rationale being that the purchase price is likely to be depressed and undervalued as the mortgagee would not aim to achieve fair market value and would be in a position to manipulate the price as the mortgagee selling the said assets.

16 In the Reply filed by the RP to MA 584/2018, he has denied all allegations and stated that application filed with the sole intent to delay the grant of approval of resolution plan of the Corporate Debtor. It is stated that the RP verified and confirmed that out of the five resolution plans received; only the plan of EARC was found in compliance with the provisions of Section 30(2) of the IBC. The RP contends that during the entire term of the CIRP, the Applicants have not raised objections concerning the conduct of the CIRP nor approached the Tribunal to seek directions. Regarding the objection that the proper notice not having been issued as per Section 24 of the IBC read with Regulation, the RP states that the CoC decided to reduce the period from 7 days to 25 hours. Regarding the objection that the documents not having been circulated, the RP states that the Applicants do not possess any statutory right to vote. Concerning non-provision of proper and complete minutes of meetings, the RP stated that minutes to the extent, that relate to Applicants' participation had been provided.

17 Further, the RP states that the Code does not contemplate the sharing of a valuation report with the suspended board of directors. With regards to the Resolution Plan, it has been contended that the Code does not envisage sharing of the resolution plan with the Applicants. Section 30(3), IBC specifically says that all compliant resolution plans are to be represented by a resolution professional to the CoC for approval and not to all participants in the CoC meetings. It is further stated that E & Y was engaged in by EARC by a service agreement to undertake a background study of the CD before the initiation of the CIRP and later RP was appointed by this Bench. Further, the applicants were marked in the impugned

emails which demonstrate that they knew the contents of such emails. The discussions were conducted so that the CIRP can be carried out in a transparent and effective manner and a manner beneficial for all stakeholders.

18 Rejoinder filed by suspended Board of Directors to MA 584/2018 states that their objections of the suspended board were not recorded. It also states that RP has delegated his duties under the CIRP to one Mr Dinkar Subramaniam by way of a power of attorney. Subsequently, Mr Dinkar Subramaniam has been exercising the powers of the Resolution Professional under the Code, which violates Regulation 3(3) of the CIRP Regulations, as he is a partner of E&Y. It has also been contended that the CD is an indirect shareholder of Great Offshore Limited and holding 49.73% shares as on 31st March 2016. Accordingly, the CD and Great Offshore Limited are interrelated parties to each other. E&Y was also appointed as the monitoring agency in respect of Great Offshore Limited which is also a related party of the CD. This is in clear breach of the provisions of the Code of Conduct as contained in the First Schedule to the IBBI (Insolvency Professionals) Regulations, 2016. The Applicants believes that the Resolution Plan submitted by the EARC is the plan which has been prepared by E&Y under the service agreement read with the Proposal Document. In such case, the RP and EARC cannot be said to have duly examined the resolution plans submitted by all resolution applicants without bias and prejudice. Approval of EARC's resolution plan by the CoC wherein EARC itself accounts for approximately 83% vote share is in contravention of the principle nemo debet esse judex in propria causa. Further, any resolution plan proposed by such a Resolution Applicant shall ex

facie be for its interest and not for other stakeholders. It has been stated that it would be unfair, unjust and inequitable to allow EARC to use its brute majority in the CoC to vote in favour of its Resolution which furthers its interest.

19 Sur-rejoinder by RP to MA 584/2018 states that the Power of Attorney given to Mr Dinkar Subramaniam was given after approval of the CoC. It was done considering the size, complexity and nature of the operations and functioning of the CD. It has been further stated that EY Restructuring LLP is the Insolvency Professional Entity and not the EY LLP. EY Restructuring LLP and EY LLP are two separate entities, and therefore the present scenario is not covered under Regulation 3(3) of the CIRP Regulations. It has also stated that the reliance on the First Schedule to the IBBI(Insolvency Professionals) Regulations, 2016 is misconceived. EY was appointed by the lead lender Axis Bank for the period from April 2015 to March 2017 to conduct the monitoring of cash flow on behalf of the lenders of Great Offshore Limited. This is in no manner related to the present CIRP of the CD. It has also been stated that the approved Resolution Plan has been independently prepared by EARC and not by any member of RP's team.

20 A further affidavit filed by suspended Board of Directors in MA 584/2018 states that of the estimated CIRP costs of ₹ Thirty-five crores, approximately ten crores have been incurred towards the professional fees of the RP and his firm/ group. The duties of RP are of personal nature and cannot be imposed on his firm or its employees, and hence RP illegally delegated its authority to Mr Dinkar Subramaniam. Further, it is evident that E&Y has been directly/indirectly managing and conducting the

CIRP and has done so in a manner to favour EARC and EY itself. Mr Dinkar Subramaniam who is reflected as a partner of E&Y Restructuring LLP as per the records of the IBBI admittedly has been/ is a partner at E&Y LLP. Even after the initiation of CIRP, E&Y has been appointed as the investment banker by the CoC.

21 MA 334/2018 has been filed by the Contractors of the Corporate Debtor u/s 60(5) of the IBC read with the Rule 11 of the NCLT Rules, 2016. They have, inter-alia, prayed that (a) RP be directed to disclose on oath the details of Resolution Plans received from the potential Resolution Applicants pursuant to the Advertisement by the Interim Resolution Professional; to disclose on oath the reasons in detail for rejection of EOIs from the Potential Resolution Applicants; the concluded CIRP be set aside for being violative of the letter and spirit of the IBC;RP to consider the resolution plans submitted by various other resolution applicants in a fair and unbiased manner. The Contractors stated that their claims have been ignored by the RP and the CoC. They have submitted their claims to the Interim Resolution Professional, but they have not heard from either the Interim Resolution Professional or the RP.

22 In the Reply to MA 334/2018 filed by the RP, it has been contended that the present application is not maintainable and the reliefs sought cannot be granted by the Bench for being contrary to, and ultra vires the provisions of the IBC. It has been further stated that the application has been filed with the sole intent to delay the grant of approval of a resolution plan. The RP further states that out of the five resolution plans received, only one plan (which is of EARC) conformed with the requirements of the S. 30(2) of the Code. The RP further states that the purported contractors of the CD have no locus standi to

question the commercial wisdom of the financial creditors in as much as the Approved Resolution Plan meets the requirements of the Code. With regards to resolution applicants, the RP submits that none of the resolution applicants barring EARC submitted a complaint resolution plan with the required KYC details. With regards to the claims of the contractors, the RP states that the same have been adjudicated under the provisions of IBC.

23 MA 420/2018 filed by the Workers of the Corporate Debtor on behalf of 242 workers under Section 60(5) of IBC read with Rule 11 of NCLT Rules, 2016. The application states that the claims of the Workers have been ignored by the Resolution Professional and the Committee of Creditors. The applicants, inter-alia, seeks transparency of the entire CIRP, all information/ documents in respect of the resolution plans which were received by the RP, give reasons for non-acceptance of other resolution plans. The reliefs sought are same as in MA 334/2018.

24 The RP in his reply to MA 420/2018 has reiterated his responses given in MA 334/2018. The RP has also stated that the Code does not prohibit a Creditor from submitting a resolution plan for the revival of operations of the Corporate Debtor. To show that legislature was aware of such situation, reliance has also been placed on Section 30(5), of the IBC which states that a resolution applicant shall not have a right to vote at the meeting of the CoC ,unless such resolution applicant is also a financial creditor.

25 MA 463/2018 is filed by an employee of the Corporate Debtor namely Mr Jayanta Bhattacherjee, who is the constituted

attorney of 206 employees and 13 consultants of the Corporate Debtor under Section 60 of IBC. The prayers, inter-alia, are to pay employees and consultants their outstanding salaries and dues of time period before the commencement of CIRP, to give representation to the employees and consultants in the CoC and allow their representative to take part in the meetings of CoC, reinstate the employees who have been terminated by the RP without following the due process of law.

26 In its reply to MA 463/2018, the RP has stated that this application is not maintainable and the relief sought cannot be granted as the same is contrary to and ultra vires the provisions of IBC. Further, the RP states that the present application has been filed to delay the grant to the approval of the resolution plan. The RP has stated that since in the present case the total debt of the Corporate Debtor is Rupees Eleven thousand three hundred seventy-three crores, whereas dues owed to operational creditors of the Corporate Debtor are ₹ Four hundred fifty-six crores which are substantially less than the statutory requirement of 10% as provided u/s 24(3)(c) of IBC. Therefore, the operational creditors do not qualify for entry in the meetings of the CoC. With regards to the termination of employees, the RP states that prior approval of CoC was taken before termination of services.

27 In MA 170/2018, under the receipt of the Resolution Plan, the suspended Board of Directors have raised following objections vis-à-vis the Resolution Plan:

a) Laying off/ Right-sizing of the employees without mentioning the persons to be retained/ laid off. The plan sought for dispensation with the compliance of labour laws.

b) Prayer is made to seek an indefinite period of moratorium till a 'Monitoring Agency' is not appointed and a Board is not formed, which is in contravention of Section 31(3)(a) read with Section 14 and Section 5(14) of the IBC.

c) Clause 5(E)(28) of the Resolution Plan provides that if the plan is revoked or it fails, then the rights and remedies of the creditors will revive. This clause is in contravention of Section 31(1) of the IBC. It is unclear under what circumstances the plan might be revoked.

d) Prayer for seeking a waiver of lock-in period as prescribed in the SEBI (ICDR) Regulations, 2009 is contrary to Section 30(2)(e) and Section 31(1) of the Code which requires the Plan to be conformity with the law.

e) Seeks exemption for the Resolution Applicant, EARC from being designated as a promoter *among other things* under SEBI regulations.

f) The plan provides that out of twenty-four vessels ordered by the Ministry of Defense and the Coast Guard, only nine vessels will be completed and all other contracts will be cancelled. The Resolution Applicant or the Company will not be liable for any liability arising on cancellation and bank guarantees given by the Company for such contracts will be returned to the Company.

g) The Resolution Applicant shall not be liable as against any advance received by the Company about any under construction vessels before initiation of the CIRP.

h) With regards to the revival of contracts and subsequent cancellation, no criteria have been provided by the Resolution

Applicant to conclude that a contract is onerous or not in tandem with the operational requirements.

i) The plan proposes to liquidate the various shell companies formed by the erstwhile management. For these shell companies, the primary asset and liability are loans to and from the Company and other related parties of the Company.

j) The plan proposes to liquidate the shell companies and transfer to itself shares in a company known as Tebma Shipyard which is held by Nirupam Energy Projects Pvt. Ltd.

k) The plan seeks that its approval by the Bench will be considered a deemed approval for the process of changes in capital structure, for all compliances under the Companies Act and SEBI Regulations. A similar prayer is made in respect of a preferential allotment.

l) Though the plan proceeds on the basis that it aims to continue the operations as a going concern, but it has failed to demonstrate the manner in which the same is proposed to be achieved.

m) The plan is contrary to basic tenets of the maximisation of value as envisaged in the IBC and the protection of the interest of all the stakeholders.

n) The plan contemplates that neither the CD nor the Resolution Applicant will be liable for any claims arising from the various proceedings which have been initiated in the ordinary course of business of the CD.

o) The plan proposes to continue enforcement of the rights of the creditors against the guarantors despite the conversion of the

debt into equity and to write off the debt by the lenders. This is in contravention of Section 134 of the Indian Contract Act.

28 We have tested the resolution plan in the light of Section 29A which lays down the ineligibility criteria for being a Resolution Applicant. The resolution applicant, Edelweiss Asset Reconstruction Company Limited (**"EARC"**) was incorporated in September 2009 as an asset reconstruction company by Edelweiss group along with a group of high net worth individual investors. The resolution applicant is not an undischarged insolvent neither a wilful defaulter. The resolution applicant is not ineligible under any of the clauses under section 29A of the Code.

29 Section 31(1) of IBC lays down that Adjudicating Authority shall approve the resolution plan, if it meets the requirements of section 30(2) of the Code. The proviso to section 31(1) provides that before passing the order for approval of the resolution plan, the Adjudicating Authority shall satisfy that the resolution plan has provisions for its effective implementation. The Adjudicating Authority may reject the resolution plan under section 31(2) if it appears that the resolution plan does not conform to the requirements referred to in section 31(1).

30 In accordance with the provision of section 30(2) when a resolution applicant submits a resolution plan to the RP under section 30(1) of the Code, then the RP, as per section 30(2) has to confirm that the submitted resolution plan is in conformity with the requirements laid down in six clauses under the sub-section. Accordingly, the RP has examined the resolution plan and has given his certificate stating that the proposed plan

confirms to all the requirements laid down in section 30(2) of the Code.

31 On perusal of the Resolution Plan, it is noted that the plan has provided for the payment of ₹35crore as Insolvency Resolution Process costs in priority to the payment of other debts of the Corporate Debtor. During the hearing, the Bench also expressed its concern over huge fee charged by IRP/RP and his team of few people even though the company has a huge workforce. It is noted that monthly fee charged by RP and his team is approx. ₹80lakhs whereas monthly salary bill of around 850 employees is approx. ₹1.5crores, which indicates a huge fee to RP and his team. As per the Resolution Plan submitted by EARC, the CIRP cost projected was ₹35crores, whereas as per his submissions, the CIRP cost is approximately ₹62crores as of August 2018. During the hearing held on 10.09.2018 on a query raised by the Bench, it was informed that CIRP cost upto August 2018 was ₹62crores.

32 Section 30(2)(b) of the Code provides for the payment of debts of the Operational Creditors in such manner as may be specified by the Board which shall not be less than the amount to be paid to the Operational Creditors in the event of liquidation of the Corporate Debtor under Section 53. In the resolution plan, Operational Creditors' admitted dues are ₹187 crores whereas the resolution plan proposes the payment of ₹9 crores to the Operational Creditors, i.e. 4.81% of their admitted dues. It is further stated in the plan that the payment to the Operational creditors whose claims have been admitted would be made in a phased manner as given in Schedule 3 of the plan. The settlement amount and period for each operational creditor

subject to a total cap of ₹9 crores will be at the discretion of the new management/Board.

33 It is important to mention that Hon'ble NCLAT in case of Binani Industries Ltd vs Bank of Baroda CA (AT) Insolvency No.82/2018 has held that:

> *" the law must ensure all key stakeholders will participate to collectively assess viability. The law must ensure that all creditors who have the capability and willingness to restructure their liabilities must be part of the negotiation process. The liabilities of all creditors who are not part of the negotiation process must also be met in any negotiated solution.*
>
> ***The IB Code aims at promoting availability of credit. The credit comes from the Financial Creditors and the Operational Creditors. Either creditor is not enough for business. Both kinds of credits need to be on a level playing field. Operational Creditors need to provide goods and services. If they are not treated well or discriminated, they will not provide goods and services on credit. The objective of promoting availability of credit will be defeated.***
>
> ***The IB code is for reorganisation and insolvency resolution of corporate persons, for maximisation of value of assets of such persons to ---- balance interest of all stake holders. It is possible to balance interest of all stakeholders if the resolution maximises the value of assets of the Corporate Debtor. One cannot balance interest of***

all stakeholders, if resolution maximises the value for a or set of stakeholders cannot benefit unduly stakeholders at the cost of another.

It follows from the above:

i. The liabilities of all creditors who are not part of 'Committee of Creditors' must also be met in the resolution;

ii. The Financial creditors can mostly the terms of existing liabilities, while other creditors cannot take risk of postponing payment for better future prospects. That is, 'Financial Creditors' can take haircut and can take their dues in future, while 'Operational Creditors' need to be paid immediately;

iii. A creditor cannot maximise his own interests given the moratorium;

iv. If one type of credit is given preferential treatment, the other type of credit will disappear from the market. This will be against the objective of promoting availability of credit.

v. The I&B Code aims to balance the interests of all stakeholders and does not maximise value for 'Financial Creditors'.

vi. Therefore, the dues of creditors of 'Operational Creditors' must get at least similar treatment as compared to the due to 'Financial Creditors'."

34 The Resolution Professional has stated that liquidation value due to the Operational Creditors is **NIL.** However, resolution plan proposed ₹9 crores payment to the Operational Creditors against the admitted due of ₹187 crores.

35 In the proposed resolution plan, Financial Creditors' admitted dues are ₹11,373.40 crores, out of that, Financial Creditors are getting ₹1,124 crores in a phased manner as detailed in Section 5D (1) of the plan which is as follows:

(i) Secured and Unsecured Financial Creditors having admitted dues of ₹11,373.40crores as on 06.06.2017 shall be paid as follows:

(a) As mentioned in Section 5A of this plan, the debt of ₹93crores would be converted into equity;

(b) Continuing sustainable debt (term loan) of ₹400 crores at the interest of 10%. The principal would be repayable at the end of three years and accrued interest to be converted into fresh term loan payable in five equal instalments starting from the end of the fourth year. The debt facility to carry an option of pre-payment based on cash flows of the company. It will reduce in proportion to dissenting financial creditors;

(c) The unsustainable term loan of ₹600 crores would continue in the company carrying interest at 0.01% repayable after ten years as bullet repayment.

(d) A debt with the principal of ₹1000 crores at the interest of 0.01% would continue in the company which at the option of the resolution applicant would be convertible to any instrument being issued by the company in future. Any remaining debt after conversion would be repaid by the company at the end of 15 years. The conversion would be carried out in a manner such that on fully diluted basis the lenders to hold – 90% equity of the company distributed amongst themselves in the ratio as given in Section 3(11) of the plan. Since, EARC TRUSTS are being given lower equity initially, their share in unsustainable debt will be higher to achieve the fully diluted shareholding mentioned earlier.

Lenders will be allowed to write off this unsustainable debt (or any other instrument issued later against this) instead of the fresh shares issued to them as mentioned above.

(e) Payment of principal on priority loan issued by ECL Finance will be in addition to payments mentioned above.

(f) Balance debt to be written off.

36 Regarding dissenting Financial Creditor, it is stated that they will be paid through cash flow generated from Operations of the company and their payment would be made before making any payment to the assenting financial creditors.

37 In the proposed plan, Operational Creditors out of admitted claims of ₹187 crores will get ₹1 crore in FY 2019, ₹2 crores in FY 2020, ₹2 crores in FY 2021, ₹2 crores in FY 2022 and ₹3 crores in FY 2023 whereas plan provides total payment of ₹9 crores to the Operational Creditors. There is a difference in the amount proposed to be paid to the Operational Creditors given in schedule 3 and the amount mentioned in the resolution plan itself. It is not clear whether Operational Creditors will get ₹10 crores as given in Schedule 3 of the Plan or ₹9 crores as mentioned at page 77 of the plan.

38 It is important to point out that Resolution Applicant is a financial creditor having 82.7% voting share in the Committee of Creditors and the total outstanding amount admitted to financial creditors is ₹11,373 Crores, and workmen dues, employees claims, statutory claims, other claims are ₹1,136 Crores. Thus, the total admitted claim is ₹12,509 Crores.

39 Statutory dues to Government of India/other authorities is about ₹270 Crores, and advances received from Customers is ₹600crores out of which the Government Departments paid ₹148crores (₹116 Crores from Coast Guard, ₹32 Crores from Indian Navy). We have observed that despite the company having received a huge amount of ₹600 crores as an advance, the Resolution Plan does not propose even a single Rupee to be repaid to these customers who have paid ₹600 crores. We are of the considered view that **Nil** amount proposed to be paid to them in the resolution plan, is not a genuine proposal, especially when the Government Departments have already paid about ₹148 Crores.

40 Further, no proposal is made towards repayment of any amount for advances received in addition to various waivers. The plan contains a lot of uncertainties, a lot of speculation; the plan also envisages to allot equity shares to the Government of India towards various statutory dues.

41 The public shareholding in the company would be reduced to a mere 2% from the current substantial level of approx. 60%.

42 In addition to various waivers, relaxation sought, the resolution plan sought exemption from complying with SEBI-ICDR Regulations, especially relating to lock in period which was strongly opposed by other parties.

43 It is further stated in the plan that the company is also one of the very few private sector shipyards in India to have a defence warship building license. The order book of the company shows that it has pending orders of 24 defence vessels, 9 interceptor vessel, 5 Fast Speed Boats (Indian Coast Guard), 9 Water & Sewage Barges, 1 Tank Cleaning Vessel. It is also stated in the

plan that the key customers of the company are Indian Coast Guard, Indian Navy and Defence Research Development Organisation (DRDO).

44 The resolution plan provides for pending orders with the company. Details, as provided in the plan, shows that the company has live orders for twenty-four vessels from the Ministry of Defence and Coast Guard. To show the commitment towards continuing service to the nation based on working by company nine vessels have been identified which can be completed with resources available. The plan provides to complete these nine vessels and permission has been further sought from this Tribunal for cancellation of contract for remaining vessels and further relief has been sought that neither the company nor the resolution applicant shall be held liable for any penalty arising due to such cancellation, and that all the Bank Guarantees given by the company for such contracts is proposed to be returned to the company.

45 It is also important to point out that in Schedule 3, which is relating to projected Cash Flows under the plan, provides Cash Inflow from Operations, details of which are given below:

Sr. No.	Particulars	FY 2019 (In ₹ Cr.)	FY 2020 (In ₹ Cr.)	FY 2021 (In ₹ Cr.)
1.	Refunds of SBI Margin Money	43		
2.	MOD Receivables	18		
3.	Sale of Kolkata Yard	17		
4.	Sale of Andheri office	29		

5.	Sale of Scrap	11	11	
6.	The release of BG Margin Money for executed vessels		3	6
7.	Sale of land at Alibaug		10	
8.	Settlement of RGPPL		1	
9.	Other inflows (A)	117	25	6
10.	Inflow from Operations (B)	88	185	214
	Total Inflows (A) +(B)	**206**	**211**	**220**

46 **On a close scrutiny of the Resolution Plan of EARC, it appears that the plan provides for generation of income from its ongoing operations, from the existing liquid investment, existing cash balance, release of margin money, receipt from debtors, sale of Kolkata Yard, sale of Andheri Office & other identified assets, sale of scrap, sale of land etc. and no upfront money is brought in by the Resolution Applicant.**

47 It is provided in the plan that after approval of the plan, the company seeks to cancel the Defence order and further relief has been sought regarding the release of margin money and Bank Guarantee in favour of the company. Resolution Applicant is not infusing any cash in the company, but Resolution Applicant's investment is only by way of refund of SBI margin money, by the sale of Kolkata Yard, the sale of Andheri Office or Bank Guarantee Margin Money for executed vessels, the sale

of land at Alibaug etc. The entire cash inflow is by way of sale of assets of the company and by getting the refund of SBI margin money and release of Bank Guarantee Money. The plan is against the contract terms, which has been executed by the company with Govt. Of India for getting defence contracts from Govt of India. It is also proposed in the plan that any corporate guarantee provided by the company shall turn null and void on approval of this plan.

48 It is pertinent to mention that in the proposed plan, it is stated that the company shall continue with the existing defence warship license in its current form. The company would also bid for new orders from Indian Coast Guard and Ministry of Defence depending on its operational and financial strength. In the plan, it is also provided that all existing registration with Director General Foreign Trade, Ship Builders Association shall continue in its normal course. It is important to point out that Defence Warship License is itself a Premium asset and can be a tradable commodity, and value of that has not been taken into consideration for determination of liquidation value.

49 It is also proposed that various shell companies, details of which are given in Schedule 9 of this plan, primary asset and liabilities of these company are loans to and loans from the company and other related parties of the company. There is no disclosure of the amount of loan to and from the subsidiary company in the plan. It is proposed to liquidate these companies and transfer to itself, shares in Tebma Shipyard held by Nirupam Energy Projects Private Limited, against advance made to Nirupam Energy Projects Private Limited.

50 The counsel for the employees, workmen and even the suspended directors vehemently opposed the proposal of right-sizing of employees and workmen. The plan provided for the right-sizing of employees but without mentioning the approximate number of employees to be terminated or to be retained, without complying with labour laws, which is not permissible under law.

51 It is important to point out that in Statement of Purpose i.e. Section 1 of the resolution plan, it is stated that "In order to save the company from liquidation, EARC, as lead lender is proposing a plan by way of which lenders will hold majority equity in the company, will run the operations of the company with the help of professional management team and over a period endeavour to find a suitable investor/buyer for the same. This will also allow them time to rectify several imprudent transactions entered into by the erstwhile management and thus, enhance the value of the company which would be a better option than the piecemeal sale of such a valuable asset in liquidation."

52 Hon'ble NCLAT in Binani Industries case supra has held that:

> *"the IB Code defines resolution plan as a plan for insolvency resolution of the Corporate Debtor as a going concern. ..... **It is not a sale.** No one is selling or buying the "Corporate Debtor" through a resolution plan. It is a resolution of the Corporate Debtor as a going concern. One does not need a resolution plan for selling the Corporate Debtor. If it were a sale, one can put it on a trading platform. Whosoever pays the highest price would get it. There is no need of voting*

or application of mind for approving resolution plan, as it will be sold at the highest price. One would not need, Corporate Insolvency Resolution Process, Interim Resolution Professional, Resolution Professional, Interim Finance, calm period, essential services, Committee of Creditors or Resolution Applicant and detailed Regulated Process for the purpose of sale. ..... It is not an auction. Depending on the facts and circumstances of the Corporate Debtor, Resolution Applicant may propose a resolution plan that entails change of management, technology, product portfolio on marketing strategy; acquisition or disposal of assets, undertaking of business; modification of capital structure or leverage; infusion of additional resources in cash or kind over time; etc. Each plan has a different likelihood of turnaround depending on credibility and track record of 'Resolution Applicant' and feasibility and viability of a 'Resolution Plan' are not amenable to bidding or auction. It requires application of mind by the 'Financial Creditors' who understand the business well."

53 It is thus clear that resolution plan should be a plan for insolvency resolution of the Corporate Debtor as a going concern and not for the addition of value and intended to sale the Corporate Debtor. In the approved resolution plan, it is specifically stated that the Resolution Applicant will run the operations of the company with the help of professional management team and over a period, endeavour to find a suitable investor/buyer for the same. There is provision for

selling the assets of the company, encashing the Bank Guarantee, collecting the money from the refund of margin money and collecting cash from the sale of the immovable properties of the subsidiary companies and further right-sizing the work force, i.e. reducing the strength of workforce from a current number of 800 employees. The resolution plan envisages sale of the company after addition in value. There is no provision of infusing cash by RA from its resources. Hon'ble NCLAT has held that the resolution plan should not be a plan for just for sale or auction. Acquiring property of the corporate debtor and running the company with the sole intention of value addition and after that selling, the company and its assets, can't be treated as Insolvency Resolution Plan of the corporate debtor. Such a plan can't be approved given the law laid down by Hon'ble NCLAT in case of Binani Industries Limited (supra).

54 The resolution plan mentions that the lenders intend to keep the company as a going concern to improve recovery and preserve national asset. The plan as submitted by the lead lender is to operate this company by placing professional management and sell to an investor in the next three years. It further states that the lenders should not be termed as promotors of the company at any point. It is further stated in the statement of purpose of the resolution plan that the CoC believes that the business unit has the potential of revival. It is stated in the plan that EARC as the lead lender is proposing a plan by way of which lenders will hold majority equity in the company, will run the operations of the company with the help of professional management team and over a period endeavour to find a suitable investor/buyer for the same. It is requested to

this Tribunal and other authorities, in the resolution plan, to support in bringing the erstwhile promotors to the task, make good the imprudent transactions and allow financial creditors to run the company with the help of a professional management team till they find an investor for the company.

55 It is admitted that the resolution applicant is the lead lender holding 82.7% of share in financial debt, by which it may be presumed that it had access to certain information and proceedings of the CoC and the voting rights in the decision making of the CoC that a financial creditor would have.

56 When such a resolution plan, that is not with the intent of running the company, but to manage it for a specified period of time, three years as per plan, and then sell it to an investor, then it raises a doubt regarding the object of the resolution plan . The object of the Resolution Plan should be to save the company and not recovery of the debts of the financial creditors which appears to be the case in this resolution plan.

57 The plan proposes that the company will not be able to pay cash for the government dues and thus it will issue 10% shares of the company to the Government of India for the settlement of dues. The RP has sent letters to various officials of the Tax Departments seeking approval for allotment of equity shares instead of paying outstanding tax amount. On perusal of the letter, it is observed that the letters submitted by the RP regarding such a major policy issue of allotment of shares to Government of India in lieu of the Government dues, which in our view has to be decided at the Ministry level, are sent to the dealing officials of some departments who cannot be presumed to have any authority to take such a decision. The officials of

the CGST & Central Excise, Customs Department, appeared during the hearing on 12.10.2018 and submitted their reply confirming that the proposal by RP to issue equity shares to Government of India instead of payment of Government dues is not acceptable to the Department and the same was conveyed to the RP by way of letter. They have also confirmed that there is **No provision** in the CGST/Central Excise Act to accept equity shares for tax dues. There is **No** provision in the law that permits issuing of equity shares to Government of India, instead of payment of Government dues. This proposal rather appears to be in spirit to evade the liability of the corporate debtor towards the Government dues. The resolution applicant would get a company that is free from any liability towards government dues that would increase the equity value. Therefore, the scheme proposed by EARC is without complying with the provisions of other laws.

58 The plan states that as on effective date all the existing contracts with employees/workmen/consultants shall be deemed to be cancelled. The company would enter into new contract/workman revised terms which are proposed to be retained as per the operational requirements of the company. Permission of this Tribunal is sought to cancel such contract after approval of the Plan. It is further stated in the plan that such permission would be deemed dispensation with the requirement of labour laws, and they would have no claims against the company or the Resolution Applicant.

59 The resolution plan proposes to "right size" the current workmen, employees and consultants employed/appointed by the company. For this, the plan proposes to first cancel all the existing contracts with the employees/workmen/consultants

and extinguishing the rights of employees/workmen/consultants to raise claims against the company without complying with the requirement of labour laws and this the resolution plan proposes to do by order of this Tribunal. The company would then enter into new contracts with employees/workmen, that is proposed to be retained, on revised terms as per the operational requirements of the company. The counsel for the employees, workmen and even the suspended directors vehemently opposed the proposal of right-sizing. In our view, the resolution applicant seeks to be absolved from all the liabilities concerning the termination of contracts with employees/workmen/consultants without having to comply with various laws. The order sought from this Tribunal is to terminate the contracts of the existing employees/workmen/consultants without mentioning the number of employees/workmen/consultants that will be terminated/retained or the terms on which the new contracts would be entered into. The resolution applicant wants all powers to decide the fate of employees/workmen/consultants of the company and further seeks exemption from complying with the applicable laws and immunity from any claims from the employees/workmen/consultants so terminated. We are of the strong opinion that it would be inappropriate to approve such a plan, which contravenes the law, and which is prejudicial and causing injustice to the existing employees/workers/consultants.

60 On perusing the valuation reports filed by Duff & Phelps (D & P) and RBSA, who were initially appointed as Valuers for valuation as per Regulation 35 of IBBI (Insolvency Resolution for Corporate Persons) Regulations 2016 to arrive at the liquidation

value of the Corporate Debtor, D & P valued liquidation value at ₹489 crores and RBSA valued at ₹939 crores. Since the two estimates of values were significantly different (92% difference), the RP has appointed 3rd valuer namely T.R Chadha & Co. LLP, Charted Accountants for carrying a third valuation that valued liquidation value at ₹584 crores. The RP and CoC considered the Liquidation value of ₹489 crores & ₹584 crores to arrive at the average liquidation value of ₹536 crores. However, after taking into account valuation done by the 3rd valuer, the average of the two closest estimates of liquidation value come to ₹ 761.50 crores as against ₹ 536 crores. On scrutiny of the valuation report of the three valuers, it may be noted that the Non-Current Assets viz. building was valued at ₹103 crores by RBSA whereas D & P have valued the same at only ₹27 crores and TRC valued the same at ₹59 crores. The other component of Non-Current Assets, i.e. capital work-in-progress was valued at ₹71 Crores by RBSA whereas other two valuers have assigned **Nil** value.

61 Further, a stock which is current assets of the Corporate Debtor was valued at ₹221 crores by RBSA whereas the same was valued at just ₹8 crores by D & P and ₹126 crores by TRC. Again work-in-progress which is current assets was valued at ₹290 crores by RBSA whereas D & P valued the same at ₹205 crores and TRC valued at ₹201 crores. Another important component of current assets, i.e. Cash and cash equivalent was valued at ₹114 crores by RBSA whereas the same was valued at only ₹46 crores by both D & P and TRC. It is quite interesting to observe that TRC has not assigned even a single rupee for "Security Against Borrowings" and the book value of the same was ₹59.02 crores as on 31.03.2017. D & P have also not

assigned any value towards the same and noted that these deposits should be considered unrealizable, and their recoverable value has been considered as **zero**.

62 It may be noted that the Resolution Professional has issued advertisement inviting Expression of Interest in Economic Times, Delhi & Mumbai editions, on 04.09.2017 and 11.01.2018. The corporate debtor is one of the largest shipbuilding companies in India which is primarily engaged in construction and repair of ships and rigs for Defence and commercial entities. It is one of the very few private sector shipyards in India to have a Defence Warship Building Licence. We think that prospective buyers of the company could be present across the world and the publication of advertisement calling for EOI should have been published internationally. On the contrary, the Resolution Professional published the advertisement calling for EOI only in Economic Times, Delhi and Mumbai editions and not even in all India edition. It is the responsibility of the Resolution Professional to safeguard the value of assets of the corporate debtor and take all steps to maximise the value of assets of the company. The wide publication of the EOI would have reached more prospective buyers of the corporate debtors, and thus the CoC would have received more resolution plans leading to maximisation of value of the assets of the corporate debtor, but for the failure of the Resolution Professional to take such appropriate action as per the requirements of this case, the CoC had only limited resolution plans to choose from virtually only one Resolution Plan.

63 It may be noted that 94.3% of the voting share of CoC Members approved the Resolution Plan of EARC, 1.8% opposed

and 3.9% abstained from voting. Amongst the various lenders, 20 have assigned their financial debt aggregating to approximately ₹6248.84 crores to EARC through assignment agreements for a meagre sum of ₹1813.90 crores.

64 The Resolution Plan, as per Regulation 38 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 has identified the sources of funds that consists of inflows from its ongoing operations, the existing liquid investment, existing cash balance, release of margin money, receipt from debtors, sale of Kolkata Yard, sale of Andheri office and other identified assets, sale of scrap, etc. that is to say only the internal funds are being identified for Regulation 38. The resolution applicant is not infusing any upfront money in the company.

65 The plan proposes that the resolution applicant and the company shall not be liable towards any liabilities arising out of the arbitrations that have been initiated against or by the corporate debtor as well as those which have not yet initiated but might arise out of any transaction/contracts/commitments entered before the effective date. The resolution plan further reserves the corporate debtor's rights to recover any amount becoming due and payable to it under any arbitration case.

66 The unsuccessful bidders/resolution applicants submitted, during various hearings, that the current resolution plan approved by the CoC is nothing but the plan submitted by EARC, which is the major financial creditor having 82.5% of vote share in the CoC/total outstanding financial debt, therefore, the plan is hit by conflict of interest and should be rejected. The suspended directors also raised the issue of

conflict of interest of the Resolution Professional with E&Y, the resolution Professional being partner of E&Y; the same E&Y provided support services. Further, the other Resolution Applicants also argued that the liquidation value and the plan submitted by EARC is substantially lower when compared to the intrinsic/market value of the company considering the projects/orders on hand, the sector to which it caters as stated above.

67 The CoC approved the Resolution Plan of EARC who is the major financial creditor of the Corporate Debtor having approx. 82.5% in the vote share of the CoC.

68 Total admitted outstanding amount to financial creditors is ₹11,373crores, and workmen dues, employees claims, statutory claims, other claims are ₹1136 Crores. Thus, the total admitted claim is ₹12,509 Crores. If we look at the summary of proposed payment to financial creditors, as against such a huge admitted amount of outstanding, only ₹400 crores are proposed to be paid that too at the end of 3 years as against ₹11,373 crores which are only 3.5% of the outstanding debt amount. Thus, the proposed haircut is 96.5%.

69 The manner of paying the amount is by way of continuing sustainable debt of ₹400 crores at 10% for 3 years, and continuing unsustainable debt of ₹600 crores at 0.01% interest payable after 10 years and convertible debt of ₹1000 Crores at 0.01% interest with conversion option with resolution applicant, non converted portion to be repaid after 15 years.

70 The plan also does not envisage any upfront payment towards outstanding dues, and no concrete schedule of payment is proposed such as payment of particular sum/band in

quarterly/half yearly/yearly basis, etc. The timeline proposed is at the end of three years, after/at the end of 10 years, after 15 years, etc. which is very ambiguous. Considering such an ambiguous financial plan, may not be in the interest of the financial creditors as well as of the company to continue to run the company smoothly as a going concern. Therefore, the proposed Resolution Plan does not provide for the exact term of the plan, and it's implementation schedule as prescribed in Regulations 38(2)(a) and provisions for approvals required from various authorities/statutory bodies and timelines for the same as prescribed under Regulation 38(3)(d).

71 The RA has proposed that it will not assume any liability towards ongoing arbitration cases. Upon perusal of the record, it is seen that the Corporate Debtor faces a lot of arbitration cases filed by various parties including Shipping Corporation of India, DRDO, etc. and seeking a prayer that it will not assume any liability. We are of the view that it is for the Arbitrators to decide the case before them and without knowing the facts of the matter, it is difficult for us to accede to this prayer.

72 Resolution Applicant has prayed to this Tribunal that all the 100% Subsidiary companies created by the erstwhile management be dissolved. The Resolution Applicant has not provided sufficient facts, the justification for this prayer, therefore, we are not inclined to accede to this prayer.

73 From the records, it is observed that RP is the partner of E&Y. E&Y was engaged by EARC, i.e. the Resolution Applicant by way of a service agreement. RP admitted that E&Y provided support services to him during the CIRP. Further RP has delegated his authority and duties to one Mr. Dinkar Venkatsubramaniam by

a Power of Attorney. The said Mr. Dinkar Venkatsubramaniam was also a partner of E&Y restructuring LLP.

74 Further E&Y was given the mandate of investment banker for the Corporate Debtor to find investors. From the records submitted by the parties, it is noted that the disciplinary committee of IBBI after issuing Show Cause Notice and an opportunity of hearing, imposed a monetary penalty of ₹1lakh on Mr. Dinkar Venkatsubramaniam vide order dated 23.08.2018 in another Insolvency matter of JEKPL Pvt. Ltd. In spite of disciplinary proceedings initiated by IBBI, RP has delegated his power to the said Mr. Dinkar Venkatsubramaniam, and he has issued a letter to the erstwhile Managing Director on 08.09.2017.

75 As discussed in detail above, the Resolution Plan has not given due consideration to the interest of all the stakeholders.

76 It is noted that E&Y/E&Y LLP is providing entire service in the current CIRP like a single window system viz. the RP, Mr Dhinal Shah is partner of E&Y, the Power of Attorney holder Mr Dinkar Venkatsubramaniam is also from E&Y, RP's team members are also from E&Y, Investment Banker appointed during the CIRP is also from E&Y. This creates a conflict of interest which was even highlighted by the counsel for the suspended Board of Directors for the Corporate Debtor. We believe that the RP and CoC have failed to ensure appropriate checks and balances and failed to implement "Chinese wall" concept during the entire CIRP. Further, this will also act as a monopoly in the entire CIRP, which needs to be examined by IBBI. Therefore, we direct IBBI to examine this issue and to frame suitable guidelines. The successful Resolution Applicant wants to find a suitable buyer

for the corporate debtor on a going concern basis within three years, whereas the Resolution Applicant has proposed in its scheme continuing unsustainable debt of ₹600 crores at 0.01% interest payable after 10 years and convertible debt of ₹1000 crores at 0.01% interest with conversion option with Resolution Applicant, non converted portion to be repaid after 15 years. Therefore a substantial amount of debt will be paid/ converted after 10 years/15 years which is not matching with the overall scheme of the Resolution Plan.

77 It is stated in the plan that the Company paid for the purchase of land at Alibaugh however the agreement was executed between Mr Bharat K Shah and Mr Jayant Mahadeo Thakur and Ms Vandana Parag Doshi where the Company was a confirming party, as it could not have owned Agricultural Land. It is prayed to this Bench to direct the parties to the said purchase agreement to execute PoA in favour of the Company.

78 It is also proposed in the plan to liquidate various subsidiary and associate companies and transfer to itself shares in Tebma Shipyard. It is prayed to NCLT that approval of this plan would be deemed as approval required under existing Laws for giving effect to such treatment. It is also prayed that any liability of this company whether current or contingent due to outside parties to be waived off. The bench is of the considered view that the prayer is misconceived as the subsidiary/ associate companies are separate legal entities and they are outside the preview of current CIRP of the corporate debtor, i.e. Bharti Defence and Infrastructure Ltd.

79 The plan seeks various waivers, to transfer the land to the Corporate Debtor at no cost, non repayment of advances

received, continuation of existing Defence Warship Licence, no liability on the company or the Resolution Applicant for cancellation of contracts, corporate guarantee provided by the company on any pending and ongoing litigation/ legal proceedings including winding-up petitions against or by the Company, all such dues have been reduced to **Nil** as per the plan. After approval of the resolution plan in case of any liability arising out of current pending disputes, consequent to any judicial pronouncement neither the company nor the RA shall be liable for such claim. Further, it is also proposed that any action against the company and the cases should not be allowed and earlier management should be held responsible for the same and proceed against but not against the current management and the company. It is also observed that the money lying with the corporate debtor are being used, assets of the corporate debtor will be sold to generate cash flow, sale of scrap, waiver of advances received from the customers especially from the Government Departments, no claim towards arbitration awards etc. which implies that the resolution applicant hardly brings in any money towards the resolution plan wherein it would acquire the entire stake/controlling interest of the corporate debtor whose market value would run into thousands of Crores as per the valuation of one of the registered valuers, and the other bidders/resolution applicants as discussed above. The proposed settlement of claims at **Nil** value is totally against the prudent/ normal commercial practices especially when a huge amount of advances was paid by the various Departments of Government of India.

80 As per the Balance Sheet of EARC, it appears that RA does not have an adequate source/ current assets to pump in the money

required for investments to be made in the corporate debtor as discussed in its plan. The resolution applicant has not explained in detail regarding the source of funds for investments to be made in the Corporate Debtor and also the periodicity/schedule/interval of infusing funds into the Corporate Debtor.

81 The counsel for the Resolution Professional and the Resolution Applicant submitted that fair value had not been arrived at since the concept of fair value was introduced by the Amendments to the Regulations, and the same was effective only from 06.02.2018, whereas in the instant case the valuation was carried out in June 2017.

82 From the details of expenses incurred for Corporate Insolvency Resolution Process submitted by the Resolution Professional, we have observed that during the CIRP, under the period of Resolution Professional, the expenses of ₹2.57crores has been paid towards Legal Professionals, ₹4.27 crores paid to the Professionals of RP team and ₹0.25 crores was travel and other out of pocket expenses. Thus approximately an amount of ₹7 crores was paid towards Legal fees and fees to the Professionals of RP team. We have observed that an amount of ₹16.53 crores have been paid towards Employees and Workmen for approximately 850 employees which translates into approximately ₹1.5 crores per month. Whereas for a handful of employees of a team of RP was paid approx. ₹75 lakhs per month which we feel, that there is no transparency and adequacy of the fees paid to the team of RP and legal fees.

83 The number of employees and workmen are 896, and their monthly bill is ₹1.55 Crores which works out to an average of

₹17,250 whereas the average fee paid to the other professionals/team of RP engaged works out to approximately ₹7.5 lakhs per month. We have also observed that the amount of ₹9,07,16,025 was paid towards other expenses from 06.07.2017 to 30.06.2018, details for the same are not provided. Fee payable to the RP was ₹37.48lakhs and cost of insurance for RP was ₹33.80lakhs, from the details submitted by the RP it is noticed that an amount of ₹5,58,48,283 was paid towards fee to legal professionals, fee payable to any other professionals, fee payable to other professionals, other expenses etc. and the same works out to ₹42,96,020 per month. This amount is exclusive of fee payable to RP of ₹40,78,320 and ₹57 lakhs fee payable to all three registered valuers.

84 Upon perusal, the resolution plan submitted by the successful resolution applicant, the debts of operational creditors, the amounts to be paid to the operational creditors are not in compliance with section 30(1) (b) of the I & B Code 2016. The RA has proposed in the plan to allot 20% of shares to employees/trusts, 10% equity shares to the Government towards the Government dues which is not permissible under law as confirmed by the Departments as discussed above and also without prior sanction of the Government.

85 The RA has also not given a practical and viable plan to manage the affairs of the corporate debtor. We are of the considered view that the plan is not compliant with section 30(1) (b) in addition to other lacunas as discussed above and is in contravention of the provisions of the Law. The proposed plan is not in the interest of all stake holders including the financial creditors, as they are taking a haircut of more than 95% and

paid only around 4% that too without any certainty/fixed payment schedule. The operational creditors are proposed to be allotted shares, especially to the Government of India. The same is in addition to various waivers sought, the sale of assets of the Corporate Debtor, not to repay the huge advances received especially from the government departments as discussed above.

86 Under IBC the legislature has provided a limited period of 180 days which may be extended for further period of 90 days, in which the financial creditors, as members of the CoC, are to turnaround the insolvency situation and find a resolution applicant who can run the company. This period of 180/270 days for CIRP cannot be extended, and if the purpose is not fulfilled within this stipulated period, then the order for liquidation is the obvious and inevitable legal consequence.

87 It is pertinent to mention following part of the report where it is stated that "the CoC believes that the asset is of great national importance in more so, a viable unit which is a viable potential…. The company employs more than 800 people and has been building ships for the Indian Coast Guard & Ministry of Defence. **Such assets take a lot of time to build and hence liquidation of the company will be loss to nation, the public and its creditors."**

88 The purpose of the resolution applicant, who also holds the 82.5% (approx.) of the financial debt of the corporate debtor and consequently majority voting share in CoC, is clearly to run the company and try to add value to it for three years or so and then sell the same to an interested investor. This, in essence, is what was supposed to be done within the stipulated time for

CIRP. The resolution applicant through its resolution plan is, in effect trying to extend the stipulated period beyond the law to find an investor for the Corporate Debtor. This, in our view, was not what was intended by the legislature. Moreover, the resolution plan is not to buy and selling of the Corporate Debtor as has been held in Binani Industries Limited (supra.) by the Hon'ble NCLAT. Considering all the aspects as mentioned above, the resolution plan deserves to be Rejected. It also appears that resolution plan envisages sale of the corporate debtor after value addition. Considering the nature of business, **having Defence Warship Manufacturing License**, and fact that the asset is of great national importance and the company provides employment to more than 800 people and has been building ships for the Indian Coast Guard & Ministry of Defence, we also agree that scrap sale during liquidation will be loss to nation, the public and its creditors. If the ultimate object in the resolution plan is to sell the company, then it can be achieved by allowing the sale as a going concern during the liquidation process.

89 In addition to various waivers, relaxation sought, the resolution plan sought exemption from complying with SEBI-ICDR Regulations, especially relating to lock in period which was strongly opposed by other parties, also requires appropriate approval from SEBI in this regard. The Bench is of the considered view that any waiver sought in the plan, the same will be subject to the approval by the concerned authority as decided by New Delhi Bench of NCLT in the matter of Parveen Bansal v. Amit Spinning Industries Ltd. and Kolkota Bench of NCLT in the matter of Edelweiss Asset Reconstruction Company v. Jalan Intercontinental Hotels Pvt. Ltd.

90 At this stage, it is pertinent to narrate the interest evinced by other bidders and opportunity provided by the Tribunal to maximise the value of the asset of the Corporate Debtor.

91 ARCS Ship Build Services Pvt Ltd valued the company at ₹2300 Crores (to make an upfront payment of ₹ 200 Crores as per their previous plan and ready to revive the upfront payment substantially). Another Unsuccessful Bidder, Mr. Ricky Nathanial has come forward to make upfront payment of ₹2500 crores as resolution plan amount and had undertaken to bring in the Earnest Money Deposit amount of Rs.10 crores on or before 21.09.2018 and to file his Resolution Plan showing source of funds on or before 21.09.2018 certified by the Bankers which is situated in India. Adjudicating Authority also directed that no further extension of time will be granted beyond 21.09.2018 and also expressed that if any un-successful bidder fails to bring in the Earnest Money Deposit amount as per the schedule agreed, the Adjudicating Authority would levy a cost on the parties for their failure, since the stipulated period of 270 days are already over, and the Resolution Professional expressed that they do not have sufficient funds to run the company, to pay for the employees, etc. However, in spite of providing sufficient time/opportunities both the parties failed to bring in even a single rupee.

92 In spite of knowing the consequences that the Bench would levy a cost on the un successful bidders, they had undertaken to bring in the Earnest Money Deposit amount ,but however as stated above they failed to bring in even a single Rupee, and the counsels who have vociferously argued for the above two unsuccessful bidders did not even turn up during the subsequent hearings which proved their malafide intention, to

drag on the matter. When they could not fulfil even the basic/ minimum criteria of bringing in Earnest Money Deposit amount of Rs.10 crores. ARCS Ship Build Services Pvt Ltd have not complied with the order dated 12.09.2018, and other un successful bidders namely Ricky Nathaniel and Perfect Industries Group Holding Ltd have not appeared. Mr Joshi Ld. Senior Counsel informed the Tribunal that the RP received a letter dated September 27, 2018, from Perfect Industries claiming that it had deposited a bank draft of INR 10 crore as Earnest Money Deposit with the Tribunal. The Tribunal stated that it had not received the Earnest Money Deposit of INR 10 crore from Perfect Industries and as such questioned the authenticity of the letter dated September 27, 2018;

93 Subsequently, during the hearing held on 25.09.2018, another un successful bidder, namely Geotech Investment and Holding LLC (Geotech) has come forward and submitted a letter expressing its interest to submit a revised Resolution Plan and proposed to pay an upfront amount of Rs.3000 crores by way of cash within 90 days of approval of the resolution plan together with Rs.130 crores towards operational creditors, including statutory dues and Rs.37 crores towards workmen and employees dues.

94 Ld. Counsel Mr Kunal Dwarkadas appearing on behalf of Geotech confirmed during the hearing on 25.9.2018 that Geotech would bring in Earnest Money Deposit of Rs.10 crores on or before 3.10.2018 and also Bank Guarantee for a value of 10% of the resolution plan value amounting to Rs.317 crores. The Ld. Counsel has also given an oral undertaking that if Geotech fails to submit Bank Guarantee amount of Rs.317 crores on or before 10.10.2018, the Earnest Money Deposit

amount of Rs.10 crores paid shall be forfeited. Further Ld. Counsel has also undertaken to submit the detailed resolution plan as prescribed under the provisions of IBC on or before 01.10.2018 and also the proof of fund availability within 2 days.

95 During the hearing held on 03.10.2018, the Ld. Counsel for Geotech submitted that due to continuous Bank Holidays in India as well as Hongkong, it could not bring in Earnest Money Deposit amount therefore, sought time up to Friday, 5th October, 2018, confirming that Geotech will make the full deposit of Earnest Money Deposit amount along with resolution plan and source of funds, and the matter was listed on 8.10.2018 with consent of all the parties.

96 During the hearing held on 08.10.2018, the Ld. Counsel for Geotech submitted that the representative of Geotech is in the Bank to obtain DD. Therefore, he requested for the short postponement of the matter. Accordingly, the matter was posted on 12.10.2018 as last and final opportunity, wherein the Counsel for the Geotech simply raised his hands and conceded that Geotech failed to arrange the minimum Earnest Money Deposit amount of Rs.10 crores.

97 As discussed above, the records show that the conduct of un successful bidders throughout the proceedings is not bonafide /genuine, not in the interest of the resolution process of the company. Their submissions/requests/ prayers/claims before this Adjudicating Authority was with a malafide intention to derail/delay the CIRP of the Corporate Debtor. In spite of the direction from the Bench, that if the un successful bidders failed to bring in the Earnest Money Deposit amount of Rs.10 crores, the Bench would levy a cost on them which was agreed by the

un successful bidders, but all the three bidders failed to bring in even a single rupee in spite of providing various opportunities which has substantially delayed the entire CIRP. Therefore, the Bench has taken a serious view of the misconduct, non-compliance of the assurances/commitments given by the un successful bidders, not genuine in their assurance, malafide intentions; we are forced to levy a cost. Accordingly, we impose a cost of ₹20 lakhs on each of the three un-successful bidders namely ARCS Ship Build Services Pvt Ltd., Mr Ricky Nathanial and Geotech Investment and Holding LLC as provided under Section 235A of the IBC, 2016 and the cost has to be paid within a period of two weeks from the date of receipt of copy of this order. We further direct that 50% of the cost to be paid into the account of the Corporate Debtor and the same shall be utilized towards payment to employees/workmen and the balance 50% is to be paid into the account of "Prime Minister's National Relief Fund".

98 To develop a robust Insolvency Eco System wherein the role of Genuine Resolution Applicant is also very important and at the same time, not genuine/non-serious players to be discouraged. Only genuine/ financially capable /serious players to participate in the resolution process and to prohibit such bidders, who dragged on the proceedings unnecessarily, causing loss to the valuation of assets, loss of employment. IBC being a new Code and evolving Code, we feel that some amount of discipline is required at the initial stage. Given the above, we direct IBBI to frame suitable guidelines in this regard.

99 Given the discussions above, facts and in circumstances of the instant matter, instead of approving the resolution plan as

approved by CoC, we at this moment reject the resolution plan u/s 31(2) of the IBC, 2016.

ORDER

100 We direct that the Corporate Debtor be liquidated as per provisions of Regulation 32(b) & (e) of the IBBI (Liquidation Process) Regulations, 2016 **which provides for assets in a slump sale, the corporate debtor as a going concern**, in the manner as laid down in Chapter III under Part II of IBC, 2016.

101 However, considering the national importance attached to product line of the company, the customers explicitly Ministry of Defence, Indian Coastguard, Customs etc, order book size, advances paid by various Government Departments, the work in progress stalled at various stages of production and huge number of workforce (around 850 employees) we direct that the Liquidator shall endeavour to sell the Corporate Debtor company as a going concern.

102 Given the conflict of interest of the RP as discussed in detail above, we intend to appoint a new Liquidator. We hereby appoint Mr. Vijay Kumar V Iyer having registration no. IBBI/IPA-001/IP-P00261/2017-18/10490, e-mail id. viyer@deloitte.com and Ph. No. 9821219493. The RP is directed to handover all the documents/records to the liquidator.

103 The Liquidator shall issue a public notice inviting interested investors from across the globe,in National level newspaper having all India circulation, in all the editions, stating that the Corporate Debtor is in liquidation. The maximum period applicable for trying the sale on a going concern basis of the

Corporate Debtor will be only six months from the date of the order.

104 In case the efforts to sell the company as a going concern fails during the stipulated period of six months, then the process of the sale of the assets of the company will be undertaken by the liquidator as prescribed under Chapter- III of IBC, 2016 and the relevant regulations of IBBI.

105 The Designated Registrar is directed to send a copy of this order, to RoC under which this Company is registered.

106 All powers of the Board of Directors, key managerial persons and the partners of the Corporate Debtor shall cease to affect and at this moment vest in the Liquidator. The personnel of the Corporate Debtor are directed to extend all co-operation to the Liquidator as may be required by him in managing the affairs of the Corporate Debtor. The Insolvency Professional appointed as Liquidator will charge fees for conduct of the liquidation proceedings in proportion to the value of the liquidation estate assets as specified under Regulation 4 of Insolvency and Bankruptcy (Liquidation Process) Regulations, 2016 and the same shall be paid to the Liquidator from the proceeds of the liquidation estate under Section 53 of the Code.

107 This liquidation order shall be deemed to be notice of discharge to the officers, employees and workmen of the Corporate Debtor, except to the extent of the business of the Corporate Debtor is continued during the liquidation process by the Liquidator.

108 We direct the CoC/Resolution Professional for initiation of the process of the sale of the corporate debtor unit as a whole, on a going concern basis, i.e. slump sale, to extract maximum value

to the assets of the company which may be in the interest of the company and its employee.

109 Since this liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the Corporate Debtor without prior approval of this Adjudicating Authority save and except as mentioned in sub-section 6 of Section 33 of the IBC.

110 Moratorium declared vide Order dated 06.06.2017 in CP No.292/2017 shall cease to exist.

111 Since the corporate debtor is a listed company, a copy of this order be served upon SEBI for initiating appropriate action as deemed fit.

112 Accordingly, the MA 170/2018 in CP 292/2017 is hereby disposed of and all connected MA 334, 473, 584/2018 & MA 377, 425, 501, 565, 602, 549/2017 and IA 334, 420/2018 & INVP 21/2018 are also hereby disposed of with a direction that the aggrieved person if any may make a claim with the Liquidator.

113 The registry is directed to communicate this order to RP, RA and all concerned parties immediately even by way of e-mail.

Sd/- Sd/-

RAVIKUMAR DURAISAMY **V.P. SINGH**
Member (Technical) **Member (Judicial)**

14th January 2019