IN THE NATIONAL COMPANY LAW TRIBUNAL
CHANDIGARH BENCH, CHANDIGARH

CA Nos. 567/2018 & 601/2018
In
CP (IB) No.42/Chd/Hry/2017
(Admitted)

In the matter of:-
Corporation Bank …Petitioner-Financial Creditor

Versus

Amtek Auto Ltd. & Others …Respondents-Corporate Debtors

And in the matter of:- **CA No.567/2018**

The Committee of Creditors of Amtek Auto Limited,
through Corporation Bank, Corporate Banking Branch,
MGF Automobiles Building,1, Faiz Road,
Jhandewalan, New Delhi …Applicant

Versus

1. Liberty House Group Pte Ltd.,
   8 Marina View, #40-06
   Asia Square Tower 1,
   Singapore- 018960

2. Mr. Dinkar T. Venkatasubramanian,
   Resolution Professional of Amtech Auto Limited,
   Having office at EY Restructuring LLP
   Golf View Corporate Tower B,
   Sector 42, Gurugram, Haryana …Respondents

And in the matter of:- **CA No.601/2018**

Liberty House Group Pte Ltd.,
Having its Registered Office at 7 Hertford Street,
Mayfair, London, W1J7RH, United Kingdom

…Applicant

Versus

1. Dinkar T. Venkatasubramanian,
   Resolution Professional of Amtech Auto Limited,
   Having office at EY Restructuring LLP,
   Golf View Corporate Tower B,
   Sector 42, Gurugram, Haryana- 122002

2. Committee of Creditors of Amtek Auto Limited,
   through Corporation Bank, Corporate Banking Branch,
   MGF Automobiles Building,1, Faiz Road
   Jhandewalan, New Delhi

…Respondents

Order delivered on 13.02.2019

Coram: HON'BLE MR. JUSTICE R.P.NAGRATH, MEMBER (JUDICIAL)
HON'BLE MR. PRADEEP R.SETHI, MEMBER (TECHNICAL)

Present: Mr. Akshay Bhan, Senior Advocate with Ms. Misha, Mr. Nitin Kaushal, Mr. Siddhant Kant and Mr. Aman Talwar, Advocates for Committee of Creditors
Mr. Sumant Batra and Ms. Srishti Kapoor, Advocates for the Resolution Professional
Mr. A.S. Chandiok, Senior Advocate & Mr. Anand Chhibbar, Senior Advocate, with Mr. K. Datta, Mr. Gaurav Mankotia, Mr. Angad, Ms. Sweeta and Ms. Priya, Advocates for Liberty House Group

Per: R.P.Nagrath, Member (Judicial)

ORDER

CA No.567/2018

The instant application has been filed on behalf of all the Financial Creditors of the corporate debtor through the Corporation Bank under Section 60(5) read with Section 74(3) of the Insolvency and Bankruptcy Code, 2016, (for short to be referred hereinafter as the '**Code**'), with the prayer to declare that the Resolution Applicant M/s Liberty House Group Pte Limited (respondent No.1 herein) and its promoters upon whom the Resolution Plan is binding under Section 31 of the Code, have knowingly contravened the terms of the Resolution Plan, having failed to implement the same. The further prayer made is that the Committee of Creditors be reinstated to run the corporate debtor, as a going concern and to grant minimum of 90 days for the Resolution Professional to make another attempt for a fresh process rather than forcing the corporate debtor into liquidation on account of fraud committed by respondent No.1. It has also been prayed that respondent No.1 be debarred from applying for a fresh resolution plan and the Insolvency and Bankruptcy Board of India, may be directed to initiate the process under Section 74(3) of the Code.

2. The facts of the case, briefly stated, are that Corporation Bank as a financial creditor filed a petition under Section 7 of the Code against M/s Amtech Auto Limited, for having made a default in making payment of the outstanding dues. The petition was admitted on 24.07.2017, declaring the moratorium in terms of sub-section (1) of Section 14 of the Code and by order

dated 27.07.2017, Mr. Dinkar T. Venkatasubramanian, was appointed as Interim Resolution Professional with the necessary directions. It is borne out from the record that the Interim Resolution Professional was confirmed as a Resolution Professional by Committee of Creditors. In the meanwhile, certain miscellaneous applications came to be filed, which were disposed of from time to time.

3. The Resolution Professional filed CA No.8 of 2018, seeking extension of time in completion of the Resolution Process as borne out from the order dated 17.01.2018. The initial period of 180 days, prescribed for completion of the Resolution Process under Section 12(1) of the Code, expired on 19.01.2018. For the reasons stated in the order dated 17.01.2018, the period of completion of Resolution Process was extended by 90 days. As such, the total period of CIRP process would have expired in the middle of April, 2018.

4. It is stated that the Resolution Plan submitted by respondent No.1 Liberty House Group Pte Ltd. (for brevity '**LHG**'), was approved by this Tribunal, vide order dated 25.07.2018. The successful resolution applicant is said to have failed to honour its commitment to comply with the requirements for implementation of the approved plan and expressed its inability to comply with the commitments on one pretext or the other. The respondent No.1 has intentionally evaded to fulfil the following financial commitments made in the Resolution Plan:-

a. *Failure to pay a sum of INR 3,310 Crores upfront along with the fresh infusion of INR 350 Crores and compliance of the terms of the approved Resolution Plan within the stipulated closing period of*

ninety (90) days, extendable by another 30 days (in case the CCI approval is not received within a period of 60 days from the NCLT approval date) from the NCLT approval date, i.e. November 22, 2018.

b. *Failure to fulfil commitments prescribed under the process note dated 07.12.2017, prepared under the mandate of Section 25(2)(h) of the Code ("**Process Note**") including (i) furnishing a performance guarantee of an amount of ₹100 Crore ('**Performance Guarantee**') against the committed amounts of ₹4404 Crores; and (ii) creation of the escrow equivalent to 15% of the upfront cash pay-out contemplated under the terms of the approved Resolution Plan as an alternative to the provision of the performance bank guarantee in favour of the Committee of Creditor (in the form acceptable to the Committee of Creditors).*

5. Various steps taken by the Resolution Professional in inviting the prospective Resolution Applicants, release of the detailed process note dated 07.12.2017 and other conditions required for a binding resolution plan have been detailed. The objective evaluation criteria was also approved by the Committee of Creditors. The binding Resolution Plans were received only from two prospective applicants, being respondent No.1 and Deccan Value Investors LP (**DVI**). The applicant was the highest bidder and its bid was approved by the Committee of Creditors. It was conveyed by the Resolution Professional to both the prospective Resolution Applicants, vide e-mail dated 26.02.2018 that the Resolution Applicant should undertake to create an escrow equivalent to 15% of the upfront cash pay-out in the event the Committee of Creditors approving the Resolution Plan. The final plan was submitted by respondent No.1 (LHG) on 26.03.2018.

6. Certain detailed assertions have been made with regard to the issuance of the letter of intent as some of the compliances were not made by

the respondent. But for the disposal of the instant application, all these issues were not raised during arguments by learned Senior Counsel for the applicant, on the ground that those aspects would be raised before the appropriate authority relating to wilful contravention of the terms of the Resolution Plan. The basic ground that has been highlighted is that the Resolution Process needs to be restarted as respondent No.1 has failed to make payment of the upfront amount as required under the approved Resolution Plan. The Corporation Bank, a financial creditor also invoked the bid bond guarantee, against which respondent No.1 has filed the Civil Suit, CS (Comm) 1245 of 2018 before the Hon'ble High Court of Delhi, *inter* alia, seeking a permanent injunction of the invocation of the bid bond guarantee, which is pending adjudication.

7. Respondent No.2-Resolution Professional has filed his reply by way of affidavit vide Diary No.320 dated 21.01.2019 and the stand of the Committee of Creditors is adopted. It is stated that the Resolution Professional is also a member of the Monitoring Committee to implement the Resolution Plan. The Resolution Professional has also prayed that relief sought by the applicant is not only necessary for the effective resolution of the corporate debtor and protecting the interest of all the stakeholders, but to avoid the liquidation of the corporate debtor. It is stated that despite repeated attempts, discussions and accommodation by the Members of the Committee of Creditors and the Resolution Professional, respondent No.1 has failed to honour its commitments and faltered in implementing the Resolution Plan.

8. A detailed reply has been filed by LHG. The respondent has tried to build a case that there has been gross misrepresentation/mistake of facts/irregularities in the information relating to the corporate debtor and the fraud allegedly played by the Resolution Professional, has resulted in the entire Insolvency Resolution Corporate Process, being vitiated. It is denied that respondent No.1 has knowingly or wilfully contravened the terms of the Resolution Plan or acted blatantly. It is otherwise stated that the Adjudicating Authority being the creature of the statute is not entitled to grant the reliefs, being prayed for. It is stated that after the approval of the Resolution Plan under Section 31 of the Code, the role of the Adjudicating Authority comes to an end. Further, there is no power for the Adjudicating Authority to recommend an action under Section 74(3) of the Code or to declare that the Resolution Applicant has knowingly or wilfully contravened any of the terms of the Resolution Plan. The offences for contravention are exclusively triable by the Special Court.

9. The other preliminary objection raised was that the Committee of Creditors is non-existent. After the approval of the Resolution Plan, it cannot file any such application before the Tribunal.

10. The Resolution Applicant has also raised the dispute on the alleged violation of the terms of the Resolution Plan. Detailed facts have been stated in order to contend that there has been misrepresentation committed by the Resolution Professional for which a separate application, being CA

No.601/2018 has been filed, which would be taken up at the later stage in a separate order.

11. The respondent No.1 has alleged the violation of Clause 5.6 of the Resolution Plan pertaining to escrow undertaking, which reads as under:-

> *"5.6 Escrow undertaking*
>
> *Upon execution of the letter of intent by the Resolution Applicant and prior to the submission of the Plan to the NCLT by the Resolution Professional in accordance with Section 30(6) of the code, the Resolution Applicant shall create an escrow or any equivalent arrangement for an aggregate amount of 15%(fifteen percent) of the Upfront Amount, in favour of a member of the Committee of Creditors, on terms and conditions mutually acceptable to the Resolution Professional and the Resolution Applicant."*

12. It is stated that before the approval of the Resolution Professional by this Tribunal, the Committee of Creditors sought to introduce unilateral conditions regarding terms of escrow and additional requirement of performance guarantee. It is highlighted that before the Resolution Plan is placed before the Adjudicating Authority for approval, the terms of LOI and the terms of submission of escrow were not finalized. The Adjudicating Authority was not properly assisted at the time of hearing of the application for approval of the Resolution Plan with regard to non-compliance with Section 30(6) of the Code. The Resolution Plan was approved by this Tribunal on 25.07.2018. It is averred that Resolution Plan could not have taken place as the pre-condition of approval by Committee of Creditor under Section 30(6) of the Code was not fulfilled.

13. It is stated that there has not been wilful non-compliance or contravention on the part of LHG. Rest of the grounds are mostly taken in CA No.601/2018 filed by respondent No.1 before this Tribunal, which need not be discussed here in view of ultimate submission made by the learned Senior Counsels for the parties, during the course of arguments.

14. Rejoinder was also filed by the applicant. It is stated that the instant application has been filed on behalf of all the financial creditors and have been only mentioned as Committee of Creditors for sake of reference. The detailed process note was issued on 07.12.2017, prepared under the mandate of Section 25(2)(h) of the Code and selection and evaluation of the Resolution Plan, whereby Clause 1.9 clearly requires the successful Resolution Applicant to submit a performance guarantee of ₹100 Crores in favour of Committee of Creditors within 10 days of issuance of Letter of Intent. Till date Resolution Applicant has failed to comply with the conditions for the implementation of the approved binding Resolution Plan and intentionally evaded from performing its obligation under the process note inasmuch as i) The Resolution Applicant has not made the payment or compliance of the terms of Resolution Plan within a stipulated long stop date of 90 days from the date of approval by the Tribunal, subject to receipt of CCI approval. In the instant case, the CCI approval was received on 22.11.2018. ii) The Resolution Applicant failed to furnish a performance guarantee of ₹100 Crores against total bid amount of ₹4025 Crores, which has been committed as part of the Resolution Plan; or the

creation of escrow equivalent to 15% of the upfront cash pay-out contemplated under the terms of the Plan as an alternative to the performance guarantee.

15. Reference has also been made to an order passed in ***CA No.1220(PB)/2018 in (IB)-531(PB)/2017***, titled as ***State Bank of India Versus ARGL Limited*****,** passed by Hon'ble Principal Bench of National Company Law Tribunal. That application was filed by Resolution Professional to withdraw IA No.823(PB)/2018 filed by the Resolution Professional for approval of the Resolution Plan, submitted by LHG and for exclusion of certain time for restarting the CIRP Process. In Paragraph No.12 of the order of the Hon'ble Principal Bench, it was observed that LHG has in categorical terms stated that it was not possible for the Liberty House to honour the commitment of furnishing the performance guarantee. It was in this context that Committee of Creditors went to the extent of relaxing the condition for furnishing the performance guarantee. The Hon'ble Principal Bench while allowing the application of the Resolution Professional to withdraw the application for approval of the Plan also permitted the exclusion of certain time and to place the matter before the Committee of Creditors. The Hon'ble Principal Bench also imposed the LHG with costs of ₹1,00,000/- keeping in view the conduct of LHG.

16. It is stated that it was agreed between the Committee of Creditors and the Resolution Applicant that they shall be permitted to subsume the performance guarantee in the escrow arrangement, provided such an escrow ensures adequate assurance to the Members of the Committee of Creditors

and accordingly, necessary stipulation was also incorporated by LHG in its Resolution Plan.

17. It is also stated that Corporation Bank has been authorized by the Committee of Creditors to file the application before the Tribunal on the basis of the decision of the Committee of Creditors held on 19.11.2018. Rest of the contentions need not be dealt with in view of the observations made in the order dated 23.01.2019, when the application was heard.

18. The Resolution Professional has also filed an additional affidavit, vide Diary No.321 dated 21.01.2019, stating therein that the allegations made against the Resolution Professional in the reply of the Resolution Applicant are false and frivolous.

19. We have heard the learned Senior Counsel for the applicant, learned Senior Counsel for respondent No.1-LHG and the counsel for the Resolution Professional and perused the records.

20. Before disposing of the application, it would be necessary to consider the issue as to whether the Corporation Bank, stating itself to be representing the Committee of Creditors, is competent to file the application. It is submitted that Committee of Creditors is non-existent after the Resolution Plan is approved.

21. Reference has been made to the minutes of meetings of the Committee of Creditors held on 19.11.2018 and the relevant extract has been reproduced in Paragraph No.42 of the Rejoinder as under:-

> *" H. Lenders, after a detailed discussion decided that in addition to invocation of BBG, the next course of action as follows:*
>
> 1) *Application to be filed with the Hon'ble NCLT to seek exclusion of CIRP period which was spent with Liberty House, to reinstate the CIRP and conduct a rebidding by fresh issue of EOIs and Process document by the RP and COC as per IBC regulations it should be mentioned in the Application that LHG and its associates companies should be disqualified from submitting the resolution plan. This application should be shared with lenders for comments at least 48 hours before the proposed filing.*
>
> 2) *Application under Section 74(3) of the IBC should be moved immediately in parallel to 1) above to seek punitive actions on LHG.*
>
> 3) *Suit for damages should be filed against LHG.*
>
> 4) *Caveat to be filed with the relevant jurisdiction court with respect to invocation of the Bid Bond Guarantee submitted by LHG.*
>
> *I. Further Corporation Bank, Head of the Corporate Banking Branch, Faiz Road New Delhi, was also authorized by the Lenders to file for necessary proceedings with appropriate jurisdiction with respect to points 1), 2) 3) and 4) listed above."*

In any case, it was the Corporation Bank as a Financial Creditor, which initiated the process against the respondent under Section 7 of the Code, resulting into its admission, declaration of moratorium and appointment of Interim Resolution Professional. No other financial creditor has approached this Tribunal taking a contrary stand. So the instant applicant is competent.

22. With regard to the jurisdiction of this Tribunal to entertain this application, it would be appropriate to refer to the sub-section (5) of Section 60 of the Code, which reads as under:-

> *"(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of—*
>
> *(a) any application or proceeding by or against the corporate debtor or corporate person;*
>
> *(b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and*
>
> *(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.*

Section 60(5) falls in Chapter VI of the Code, after the chapter dealing the provisions relating to CIRP and Liquidation process. This is a non-obstante clause and the Tribunal is vested with the power to entertain and dispose of any question of law or facts arising out of or in relation to the insolvency process, liquidation proceeding, of corporate person under the Code. The process cannot be kept in a limbo, especially when the approved Resolution Plan has not been implemented and various objections have been raised over various terms and conditions and about the allegations constituting misrepresentation and fraud.

23. The Resolution Plan has been attached as Annexure R-3 with the reply filed by respondent No.1. It would be necessary to deal with some of its salient features. Clause 5 of Part I of the Resolution Plan, refers to the indicative

timeline of events for implementation of the proposed Plan, which reads as under:-

> *5. Indicative timeline of events for implementation of proposed plan*
>
> *On the effective date, upon satisfaction of conditions set out in paragraph 9.1 of this Part I (Business Plan of the Resolution Applicant), the Resolution Applicant (with the assistance of the insolvency professional) shall commence undertaking the actions set out in **Schedule 4** (Implementation Provisions), and all other actions required in relation thereto, in the order provided in **Schedule 4** (Implementation Provisions). It is clarified for the avoidance of doubt that no action in **Schedule 4** (Implementation Provisions) shall be deemed to have been consummated unless all the actions provided in Schedule 4 (Implementation Provisions), in the order set out therein, have been duly consummated. The date on which all actions set out in **Schedule 4 (Implementation Provisions)** have been duly consummated or such other date as may be agreed in writing between the Resolution Applicant, will be the "**Closing Date**". Once the effective date is satisfied, the Closing Date shall be no later than 90 (ninety) days from the date of the NCLT order ("**Closing Period**"); provided however, that if the CCI shall have not granted its approval for the performance of the Plan, in the manner described at Paragraph 9.1.2 of this **Part I** (Business Plan of the Resolution Applicant), the Resolution Applicant shall be entitled to request the COC Nominee to extend the Closing Period by 30 (thirty) days, which grant of extension shall not be unreasonably withheld by the COC Nominee.*

24. The management and control of the corporate debtor during the term until closing date, as provided in Clause 5.1 of Part II of the Plan, reads as under:-

> *5.1 Management and control of the Corporate Debtor during the Term until the Closing Date*
>
> *5.1.1. Pursuant to the approval of the Plan by the NCLT and until the Closing date, Mr. Dinkar Tiruvannadapuram Venkatasubramanian, Ernst & Young LLP, shall be appointed as the "**Insolvency Professional**" of the Corporate Debtor in order to supervise, manage and control all the business and operations of the Corporate*

Debtor in order to supervise, manage and control all the business and operations of the Corporate Debtor from the date of approval of the Plan by the NCLT and until the Closing Date, in accordance with this Plan.

25. In Part IV of the Resolution Plan, the financial proposal of the Resolution Applicant have been stated. The summary of the financial proposal is upfront payment for the financial creditors and Interim Resolution Professional to the tune of ₹3525 Crores and fresh infusion for stabilizing and improving operations to the tune of ₹500 Crores. The total resolution amount is ₹4025 Crores.

26. The provisions of the Code provide for a definite timeline for strict implementation of the Resolution Plan. If the timelines as provided in the Resolution Plan, duly approved by this Tribunal, are not adhered to, the only conclusion would be that there has been a default in implementing the Plan for whatever reason. We are not going into the question of the Resolution Applicant being intentionally or wilfully contravening any of the terms of the Plan, as such the matter is to be tried by Special Court, as the offence under Section 74(3) of the Code, is triable before a Special Court.

27. By virtue of Section 236 of the Code, the cognizance of the offence can be taken on a complaint made by the Board or the Central Government or any person authorized by the Central Government on its behalf.

28. When the matter was listed for arguments on 23.01.2019, the following order was passed:-

> *"Arguments of applicant have been heard. The learned Senior Counsel for the applicant submits that presently he is confining his contention for restarting the process of Corporate Insolvency Resolution Process seeking reasonable time for conclusion of the Corporate Insolvency Resolution Process as there has been a default in implementing the plan, with liberty to the applicant for raising the issue before the IBBI or the Central Government. The learned Senior Counsel for respondent No.1 has vehemently opposed the contention that there has been a wilful or intentional default by respondent No.1 but for exclusion of time for counting 270 days in completion of CIR Process and restarting the process and extension of time is not opposed though the respondent No.1 would press application CA No. 601/2018 separately filed. Mr. Sumant Batra, Advocate for the Resolution Professional, also does not oppose the prayer made on behalf of the applicant."*

29. There being a clear default in implementing the Plan within the time stipulated in the Resolution Plan, the instant application deserves to be allowed with liberty to any Member of the Committee of Creditors or the Resolution Professional file a complaint before the Insolvency and Bankruptcy Board of India or the Central Government with a prayer to file the criminal complaint on the ground of corporate debtor having intentionally and wilfully contravened the terms of the Resolution Plan, for which we are restraining ourselves from making any observation either way. However, for LHG to say that the Tribunal was not properly assisted at the time of hearing on the application for approval of the Resolution Plan, would be a misplaced allegation. The order dated 25.07.2018 by which the Resolution Plan was approved shows that DVI had raised the issue of eligibility of LHG, which was opposed by LHG tooth and nail.

30. With the aforesaid background, the only issue that requires consideration is the exclusion of time in calculating the maximum period of 270

days permissible under Section 12 of the Code for completion of the Insolvency Resolution Process. As we are not going into the question and detailed assertions of the parties with regard to the wilful or intentional contravention of the terms of the approved Resolution Plan in view of the ultimate submissions made at the stage of final arguments.

31. The learned Senior Counsel for the applicant who is supported by learned counsel for the Resolution Professional vehemently contended that the object of the Code is that the corporate debtor continues to be a going concern and shall maximize its assets value. The prayer in the application has been made for reconstituting the Committee of Creditors, remitting the matter to it and to grant adequate time of minimum 90 days to the Committee of Creditors and Resolution Professional for making attempt on the fresh process of Resolution rather than forcing the corporate debtor into liquidation on account of fraud committed by respondent No.1. This aspect has to be dealt with in view of the settled law on the issue.

32. Reference may be made to the judgment in ***Company Appeal (AT) (Insolvency) No.185 of 2018***, reported as ***Quinn Logistics India Pvt. Ltd. Versus Mack Soft Tech Pvt. Ltd***., passed by Hon'ble National Company Law Appellate Tribunal, wherein it was held that if an application has been filed by the 'Resolution Professional' or the 'Committee of Creditors' or 'any aggrieved person' for justified reasons, it is always open to the Adjudicating Authority/Appellate Tribunal to 'exclude certain period' for the purpose of counting the total period of 270 days, if the facts and circumstances justify

exclusion, in unforeseen circumstances. It is admitted proposition of fact that LHG being the highest bidder, DVI did not participate in the later proceedings before the Committee of Creditors for seeking a chance to modify its Plan.

33. The Hon'ble Appellate Tribunal in ***Quinn Logistics India's case (supra)*** held that the following good grounds and unforeseen circumstances, the intervening period can be excluded for counting of the total period of 270 days of resolution process:-

> *(i) If the corporate insolvency resolution process is stayed by 'a court of law or the Adjudicating Authority or the Appellate Tribunal or the Hon'ble Supreme Court.*
>
> *(ii) If no 'Resolution Professional' is functioning for one or other reason during the corporate insolvency resolution process, such as removal.*
>
> *(iii) The period between the date of order of admission/moratorium is passed and the actual date on which the 'Resolution Professional' takes charge for completing the corporate insolvency resolution process.*
>
> *(iv) On hearing a case, if order is reserved by the Adjudicating Authority or the Appellate Tribunal or the Hon'ble Supreme Court and finally pass order enabling the 'Resolution Professional' to complete the corporate insolvency resolution process.*
>
> *(v) If the corporate insolvency resolution process is set aside by the Appellate Tribunal or order of the Appellate Tribunal is reversed by the Hon'ble Supreme Court and corporate insolvency resolution process is restored.*
>
> *(vi) Any other circumstances which justifies exclusion of certain period.*

The facts of the present case are not covered under various circumstances from Point No. (i) to (v) as laid down by the Hon'ble National Company Law Appellate Tribunal, but the matter in this case is required to be

considered under principal Point No. (vi) to see whether the circumstances in the present case are such which would justify the exclusion of certain period.

34. The learned Senior Counsel for the Applicant has also referred to judgment passed by the Hon'ble Supreme Court in ***Arcelormittal India Private Limited Versus Satish Kumar Gupta and Others***, ***Civil Appeal Nos.9402-9405 of 2018***, wherein the Hon'ble Supreme Court held that the time taken by a Tribunal should not set at naught the time limits within which the Corporate Insolvency Resolution Process must take place. It was further observed that consequence of the chopper falling is corporate death. The only reasonable construction of the Code is the balance to be maintained between timely completion of the Corporate Insolvency Resolution Process, and the corporate debtor otherwise being put into liquidation. The Hon'ble Supreme Court further observed that it cannot forget that the corporate debtor consists of several employees and workmen, whose daily bread is dependent on the outcome of the Corporate Insolvency Resolution Process. If there is a Resolution Applicant who can continue to run the corporate debtor as a going concern, every effort must be made to try and see that this is made possible. A reasonable and balanced construction of this statute would therefore, lead to the result that, where a Resolution Plan is upheld by the Appellate Authority, either by way of allowing or dismissing an appeal before it, the period of time taken in litigation ought to be excluded.

35. The Hon'ble Supreme Court further held in ***Arcelormittal India Private Limited's*** case *(supra)* as under:-

> *"A reasonable and balanced construction of this statute would therefore lead to the result that, where a resolution plan is upheld by the Appellate Authority, either by way of allowing or dismissing an appeal before it, the period of time taken in litigation ought to be excluded. This is not to say that the NCLT and NCLAT will be tardy in decision making. This is only to say that in the event of the NCLT, or the NCLAT, or this Court taking time to decide an application beyond the period of 270 days, the time taken in legal proceedings to decide the matter cannot possibly be excluded, as otherwise a good resolution plan may have to be shelved, resulting in corporate death, and the consequent displacement of employees and workers".*

36. The principle laid down thus emerges is that certain period can be excluded from the total period of 270 days permissible under Section 12 of the Code for the purpose of exclusion, and there is no scope of granting extension beyond 270 days under any circumstances. The contention of Learned Senior Counsel for the applicant and that of the learned counsel for the Resolution Professional that there are so many prospective applicants, who now intend to jump into the field and that there are bright chances of a much better Resolution Plan therefore, the Committee of Creditors, be reconstituted and the matter be remitted for starting fresh process of advertisement, inviting expression of interest etc., is not permissible. There is no dispute of the fact that originally Insolvency Resolution Process was concluded within a period of 270 days. The Committee of Creditors fixed the evaluation matrix of inviting expression of interest, and the proposed applicants were supposed to fulfil the condition of the bond to make other eligible for submitting the Resolution Plan. As already discussed, there were only two binding Resolution Plan, one submitted by respondent No.1 (LHG) and other by DVI. DVI only backtracked

because there was some better amount of bid offered by respondent No.1-LHG. Since the approved Resolution Plan cannot be now implemented because of the default in making payment as per the terms of the Resolution Plan, the period when the Resolution Plan was submitted by DVI till the disposal of the instant application can only be reconsidered by the Committee of Creditors by reconstituting it and not by initiating fresh process, which would defeat the fresh binding timelines provided under the Code to complete the process. No matter if the corporate debtor ultimately has to face liquidation, but the permission to restart the process, make advertisement and invite fresh plans etc., would defeat the very mandate of Section 12 of the Code. The Committee of Creditors can only discuss the Resolution Plan which was submitted by DVI only by exclusion of certain period of time while calculating 270 days.

37. From the order dated 25.07.2018, passed in CA No.114/2018, by which the Resolution Plan was approved, it was observed in Paragraph No.10 that only two bindings Resolution Plans were received from two applicants namely LHG and DVI. So if that was the state of fact, there is no question of giving opportunity to so many interested persons, who may join at this stage as they had not submitted the binding Resolution Plan within the period already fixed by the Committee of Creditors. It was also observed in the said order that there were four more Resolution Applicants, who neither submitted the Resolution Plan nor bid bond guarantee. So looking into the object of the Code and the principle laid down by the Hon'ble Supreme Court, the prayer made in

the instant application for starting the fresh process for resolution of the corporate debtor cannot be accepted. However, in the facts of this case, the Committee of Creditors is reconstituting for the purpose of making a decision on the plan submitted by DVI.

38. With the aforesaid discussion and holding that the approved Resolution Plan submitted by LHG is not capable of implementation due to default in adhering to the payment schedule, we dispose of this application by directing that the period from the date when DVI submitted its final plan i.e. on 05.03.2018 as given in Paragraph No.8 of CA No.140 of 2018 upto the date of the receipt of copy of this order be excluded while calculating the period of 270 days for completion of the Resolution Plan with liberty to the financial creditor and/or Resolution Professional to make appropriate complaint with the Insolvency and Bankruptcy Board of India or the Central Government on the allegation of wilful or intentional default and to pursue the appropriate remedy for the offence, if any, committed by the respondent with right to respondent No.1 to defend the action. The period of 10 days in addition would also stand excluded for serving the notice to DVI for representing its case before the Committee of Creditors and for which the Committee of Creditors is reconstituted. The Resolution Professional and the Committee of Creditors would take a final decision and report to the adjudicating authority about the final outcome. The progress reports shall be sent by the Resolution Professional regularly after 10 days from the date of receipt of copy of this order. Rest of the prayers are declined.

With the aforesaid observations and directions, CA No.567/2018 stand disposed of.

CA No.601/2018

The instant application has been filed by successful Resolution Applicant, namely, Liberty House Group Pte Limited (LHG), under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (hereinafter to be referred as the '**Code**') with a prayer that the Corporate Insolvency Resolution Process (**CIRP**) in respect of Amtech Auto Limited, commencing on 24.04.2017 and culminating into order of approval of Resolution Plan on 25.07.2018 by this Tribunal, is vitiated by misrepresentation/fraud/mistake of fact. The background of the case is that a petition, being **CP (IB) No.42/Chd/Hry/2017**, ***Corporation Bank Versus Amtech Auto Limited***, under Section 7 of the Code, was admitted by this Tribunal on 27.07.2017, declaring moratorium in terms of sub-section (1) of Section 14 of the Code. Mr. Dinkar T. Venkatasubramanian, was appointed as Interim Resolution Professional with necessary directions. The Interim Resolution Professional was confirmed as Resolution Professional by the Committee of Creditors. In the meanwhile, certain miscellaneous applications came to be filed, which were disposed off from time to time.

2. The Resolution Professional filed CA No.8 of 2018, seeking extension of time in completion of the Resolution Process as borne out from the order dated 17.01.2018. The initial period of 180 days, prescribed for completion of the Resolution Process under Section 12(1) of the Code, expired on 19.01.2018. For the reasons stated in the application, the period of completion

of Resolution Process was extended by 90 days. As such, the total period of CIRP process would have expired in the middle of April, 2018.

3. CA No.114/2018 was filed by the Resolution Professional for approval of the Resolution Plan, submitted by the applicant (LHG). The period of 270 days was expiring on 20.04.2018 and the said application was filed before the expiry of 270 days. Soon thereafter, the Resolution Professional filed CA No.112/2018 under Section 60(5) read with Sections 12 and 31 of the Code and Regulation 39 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, (for brevity the '**Regulations**'), stating therein that the Resolution Professional has come across the news item in "The Economic Times" dated 17.04.2018 that M/s ABG Shipyard Limited, a company undergoing Corporate Insolvency Resolution Process, that the Resolution Professional in that case has declared Liberty Housing Group (LHG) ineligible under Section 29A of the Code. It was thus, prayed that since the issue of LHG's disqualification and ineligibility has cropped up, a prayer was made for suitable directions from the Adjudicating Authority. It was also prayed that Resolution Professional may be permitted to decide on the eligibility of the Resolution Applicant in a time bound manner and to place the decision before the Adjudicating Authority and in the meanwhile, to permit DVI, the second Resolution Applicant to submit the Resolution Plan and hold negotiations with the Resolution Professional or the Committee of Creditors.

4. CA No.140/2018 was filed by DVI as the applicant No.1 and DVI (Mauritius) Limited as applicant No.2, under Section 60(5) (a) and (c) read with Section 31 of the Code. It was averred that the applicant submitted EOI as prospective Resolution Applicant and participated in the process in good faith with complete confidence as set out in the information memorandum.

5. All these applications were decided by order dated 25.07.2018 and CA No.114 of 2018 for approval of the Resolution Plan submitted by LHG was accepted and the Resolution Plan was approved with the modification that the timelines given in the Resolution Plan shall stand extended during the period CA No.114/2018 remained pending i.e. 16.04.2018 upto the date of decision of the application.

6. CA No.112/2018 of the Resolution Professional seeking clarification etc. was also disposed of. Similarly, CA No.140/2018 filed by DVI was also dismissed for the detailed reasons mentioned in the order dated 25.07.2018. It was further directed as under:-

> *"It is further directed that the resolution plan so approved shall be binding on the Corporate Debtor, its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan. With the approval of the resolution plan, the moratorium order passed by this Tribunal under Section 14 of the Code shall cease to have effect. The Resolution Professional is directed to forward all the record relating to the conduct of the corporate insolvency resolution process and the resolution plan to the IBBI to be recorded on its database".*

7. It is pertinent to note here that though the Resolution Professional had received the Expression of Interest from 27 potential investors, but ultimately,

the binding Resolution Plans were received only from two applicants namely LHG and DVI as observed in the said order dated 25.07.2018.

8. With the aforesaid background the facts of the instant application need to be narrated. It is stated that the information provided in the information memorandum on the basis of which the applicant submitted the Resolution Plan was substantially different/incorrect/inflated, which came to the light only after the approval of the Resolution Plan. There was a misinformation/inflated value, provided to the Resolution Applicants under the Information Memorandum, valuation reports and other information shared in Virtual Data Room (**VDR**) on the basis of which prospective Resolution Applicants were to submit the plans.

9. It is stated that the Resolution Professional had appointed two Valuers namely BDO India LLP (**BDO**) and RBSA Valuation Advisors LLP (**RBSA**) to determine the liquidation value of the corporate debtor in accordance with Regulation 35 of the Regulations. These reports were mentioned in the Information Memorandum supplied to the Resolution Applicants. The valuation reports were prepared in about four months by these registered Valuers. The valuation reports were made available to the applicant through Virtual Data Room (VDR). The applicant initially submitted the Resolution Plan on 28.12.2017, which was subsequently revised upto 05.03.2018. It is stated that the Resolution Professional issued process note on 07.12.2017 and then the applicant had only 20 days to submit the plan, despite there being complexity of the business of the corporate debtor. One of the conditions of the process note

was submission of Bond Guarantee, in the form of a Bank Guarantee to the tune of ₹50 Crores in favour of the Corporation Bank.

10. Reference has also been made to Regulation 25 and 29 of the Regulations, relating to duties of the Resolution Professional and preparation of information memorandum, respectively. The Resolution Professional circulated the Information Memorandum dated 21.09.2017 as periodically updated upto 12.04.2018 to the Resolution Applicants to enable them to formulate a Resolution Plan, which contained the liquidation value as on 24.07.2017 at ₹4129 Crores and the liquidation value for the fixed assets was provided as ₹1635 Crores; the book value for the corporate debtor as on 24.07.2017 was ₹15,189 Crores and the book value for fixed assets/tangible assets as on 24.07.2018 was ₹9753 Crores.

11. As per Clause 1.1.2 of the Process Note dated 07.12.2017 (Annexure A-3), the applicant's representative was allowed to visit the sites of the Corporate Debtor (including the plants), and that too only few sites only once before submission of its Resolution Plan. The applicant had also submitted the detailed bid bond Bank Guarantee dated 23.01.2018 for ₹50,00,00,000/-. As on 06.03.2018, the Committee of Creditors, shortlisted the applicant as the preferred bidder and the Resolution Plan was approved in the meeting dated 04.04.2018 and 05.04.2018 by the Committee of Creditors by overwhelming majority of 94.20%. It is also stated that in complete departure from the conditions, mentioned in the Resolution Plan which provided for an escrow on mutually acceptable terms and conditions between the applicant and the

Resolution Professional, the latter insisted that the escrow should be in such form as was acceptable to the Committe of Creditors and their counsel. Further, the applicant was threatened that the non-acceptance of escrow account in the manner suggested by the Committee of Creditors, would result in severe consequences *inter alia,* forfeiture of existing securities.

12. While negotiations were going on between the applicant and the Resolution Professional on the manner and nature of escrow, vide email dated 14.09.2018, the applicant (LHG) wrote a letter to the Resolution Professional stating therein that it was willing to show its bona fides by agreeing to the conversion of the BBG into a performance guarantee by amending its terms and conditions. However, vide letter dated 21.09.2018, the Resolution Professional rejected the request of the applicant to convert the BBG into a performance guarantee. The Resolution Professional in its letter dated 21.09.2018, imposed a condition of provision of a performance guarantee from a scheduled commercial bank in India immediately thereof, in addition to the escrow arrangement. This condition was completely contrary to the terms under the Resolution Plan and Process Note. Copy of the correspondence exchanged for finalization of the letter of intent is at Annexure A-5.

13. Parallelly, pursuant to approval of the Resolution Plan by the Approval Order, as per Paragraph 5.1.1 of Part II of the Resolution Plan, the RP assumed the role of “Insolvency Professional” of the Corporate Debtor in order to supervise, manage and control all the business and operations of the Corporate Debtor. As per Paragraph 5.1.3 of Part II of the Resolution Plan, the

Insolvency Professional is mandated to act on the instructions of a committee comprising of (a) a representative or an advisor of the CoC; (b) a representative of the Resolution Applicant (to be appointed on receipt of approval from Competition Commission of India for performance of the Resolution Plan); and (c) the Insolvency Professional ("Monitoring Committee"). Further, the Resolution Applicant has the right to appoint an observer in the Monitoring Committee.

14. The applicant appointed an observer on the Monitoring Committee and its authorised representatives, started attending meetings of the Monitoring Committee as well as various operational review meetings conducted by the Resolution Professional.

15. The applicant discovered blatant discrepancies in the condition of machineries, valuations and representations made in the Information Memorandum and Valuation Reports, from which the applicant became aware that the information contained in the Information Memorandum was incorrect, false, and reflecting inflated values and information. By making further assertions, it was alleged that the applicant immediately wrote a letter dated 06.11.2018, stating that in view of the developments regarding discovery of serious irregularities in the information shared with the applicant during the bidding process, it was necessary that a meeting be held with the Committee of Creditors, to find a way to discuss and agree to a suitable resolution plan where the true valuation of the corporate debtor is reflected, but no response was received.

16. The application further received letter dated 19.11.2018, wherein the Resolution Professional relied on the Process Note and essentially stated that the applicant ought to have done its own due diligence for making the Resolution Plan and that the information shared with the Applicant during the bidding process was merely for reference and not reliance. It is further stated that the Resolution Professional or the Committee of Creditors did not make any representations regarding the status of the business or business prospects of the Corporate Debtor. The Resolution Professional did not even claim that the Information Memorandum, Valuation Reports or the information shared in the VDR reflected true and proper valuation and information in relation to the Corporate Debtor.

17. It is stated that the duties cast upon the Resolution Professional under Section 25(2)(g) read with Section 29 of the Code, was to prepare an information memorandum, with the relevant information including the liquidation value of the Corporate Debtor as per Regulation 36 of the un-amended CIRP Regulations. Reference is also made to the paragraph 5.3.2 of the Bankruptcy Law Reforms Committee Report 2015, ("**BLRC Report**") which requires the Resolution Professional to provide most updated information about the entity as accurately as is reasonably possible to this range of solution providers. In order to do this, the Resolution professional has to be able to verity claims to liabilities as well as the assets disclosed by the entity. The Resolution Professional has power to appoint whatever outside resources that it may

require, in order to carry out this task, including the accounting and consulting services.

18. It is also stated that the corporate debtor has 21 sites and pursuant to Clause 1.1.2 of the Process Note, the applicant was permitted only one visit to the sites of the corporate debtor by the Resolution Professional prior to the approval of the Resolution Plan. There was limited amount of time available to the applicant to discover by reasonable due diligence the irregularities which have been discovered.

19. What has been discovered by the application is an information received in the Monitoring Committee meetings, pursuant to the information received by applicant in the Monitoring Committee Meeting, plant reviews organized to 25 July order and the publication of the standalone unaudited financial statements of the corporate debtor for the quarter and half year ended September 2017, on 21.08.2018. It was discovered that the investments of the corporate debtor were overvalued in the Liquidation Reports. As the result, the applicant had acted in good faith by relying information set out in the Liquidation Reports. Thereafter, the corporate guarantee was invoked which was fraudulent, dishonest, and in blatant breach of the terms of the Bank Guarantee. Letter of Intent was admittedly under negotiation and had not been executed. The Corporation Bank made a dishonest statement in the Notice of Invocation that the LOI had been approved by the 25 July order, with a view to unjustly enrich itself despite the parties still being in discussion over the terms of the LOI. The applicant has also filed Civil Suit, being CS (Comm) 1245 of

2018 before the Hon'ble Delhi High Court, for seeking appropriate injunctive relief against invocation/encashment of the Bank Guarantee. Copy of order dated 30.11.2018 in CS (Comm) 1245 of 2018 filed before the High Court of Delhi is at Annexure A-12.

20. It is stated that the main misrepresentations in the information memorandum is with regard to the significant downward adjustments in the unaudited financial statements, published as on 21.08.2018. The standalone unaudited financial results for the quarter and half year ended 30.09.2017, was supposed to be published within 45 days ending the quarter, but the same was done as on 21.08.2018 and made available to the applicant in the last wek of August, 2018, post submission of the Resolution Plan.

21. It is stated that for filing the financial statements for the aforesaid period, the Resolution Professional sought extension from the National Stock Exchange of India Ltd. and the same was published on 21.08.2018. The Fixed Assets and capital work in progress as per information memorandum was ₹9774 Crores, which has now been significantly written down to ₹2661 Crores.

22. The Investment and other financial assets, which was valued at ₹1755 Crores has been reduced to ₹494 Crore in the Financial Statements. The non-current assets have been valued at ₹715 Crores for the financial statements, which is ₹259 Crores higher than the valuation report. It was however, not clear if these current and non-current assets are good and realizable. This shows the unreliable data with respect to the asset valuation of the corporate debtor and

the inflated nature of the values discussed in the Balance Sheet for the year ending 31.03.2017 and the information memorandum. These write downs were not brought to the notice of the applicant prior to submission of the plan. The writing down of the values in the financial statements published only after approval of the resolution plan directly impacts the Resolution Plan which was prepared taking into consideration the asset valuation as provided in the Information Memorandum. Therefore, the instant is a case of gross fraud played upon the applicant.

23. The other aspect relates to the discovery regarding inflated valuation of plant and machinery in the Information Memorandum and Valuation Reports; discrepancies in projected capacity of the plants; irregularity in relation to information about the extent of inter dependency of the group companies and specific uncertainties which may materially affect the Resolution Plan, for which the facts have been mentioned in detail.

24. To elaborate these assertions, it is stated that high liquidation value was assessed for the plant and machinery, but the applicant sought the quotation which were showing about 30% to 60% lower than the liquidation value and the quotations obtained by the applicant are at Annexure A-16. Even the projected capacity of the plant, as disclosed in VDR, was found to be impossibility.

25. It was also represented that the dependency of the corporate debtor with the group companies was 43%, where it was found in the meeting of the

Monitoring Committee that inter-dependency was to the extent of 66% i.e. nearly 50% higher than as implied by the data shared by the VDR.

26. Further, there are several uncertainties with regard to the total liabilities/claim amount against the corporate debtor, which have arisen since the approval of the Resolution Plan.

27. It is stated that the un-matured claims are likely to be admitted as claims against the corporate debtor. In view of the admission dated 14.08.2018, the Hon'ble National Company Law Appellate Tribunal ('**NCLAT'**) in **Company Appeal (AT) (Ins.) No. 302 of 2017** held that even unmatured claims are to be considered as financial debts. The claims which are likely to be accepted pertains to four banks on the basis of invocation of the corporate guarantee in the case of Kotak Mahindra Bank, Central Bank and two cases of IDBI Bank.

28. We have heard the learned Senior Counsel for the applicant (LHG) and have carefully perused the record at the preliminary stage.

29. In view of the contentions raised by the learned Senior Counsel for the applicant-LHG, learned Senior Counsel for the financial creditor and the learned counsel for the Resolution Professional at the time of hearing application, being CA No.567/2018 and the order disposing of the same in which the right has been kept open to the applicant to defend any action, the prayer made in this application would not survive.

30. The learned Senior Counsel for the applicant-LHG however, contended that the Adjudicating Authority must lay down the guidelines for compliance by the Resolution Professionals in such matters and the adjudicating authority is vested with such a right. We have already held that there has been a default in implementing the Resolution Plan submitted by the applicant. The application of the financial creditor has been disposed of with liberty to the Resolution Applicant or the financial creditors to file a complaint before the Insolvency and Bankruptcy Board of India or the Central Government, claiming that the LHG intentionally and wilfully contravened the terms of the Plan. No effective order therefore, can be passed in this application as the matter would be within the purview of the Competent Authority. The Adjudicating Authority under the Code without passing an effective order cannot lay down the guidelines in the exercise of its jurisdiction, which is to adjudicate the matters under the Code and the Rules and Regulations framed thereunder.

In view of the above, we reject this application in limine. CA No.601/2018 stands disposed of.

Copy of this order be communicated to the parties.

Pronounced in open Court.

Sd/-
(Pradeep R. Sethi)
Member (Technical)

Sd/-
(Justice R.P. Nagrath)
Member (Judicial)

February 13, 2019
Mohit Kumar