

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 654 of 2020

[Arising out of Order dated 09.07.2020 passed by the National Company Law Tribunal, Chandigarh Bench, Chandigarh in IA No. 225/2020 in CP(IB) No.42/Chd/Hry/2017.)

IN THE MATTER OF:

Deccan Value Investors L.P

**Through its authorised representative,
850 New Burton Road, Suite 201,
Dover, Delaware – 19904, USA**

....Appellant

Versus

- 1. Dinkar T. Venkatasubramanian
Resolution Professional (Amtek Auto Ltd.)
EY Restructuring LLP,
Gold View Corporate B, Sector 42,
Gurugram, Haryana.**

....Respondent No.1
- 2. State Bank of India
Lead Lender Bank for the Committee of Creditors
For Amtek Auto Limited
12th Floor, Jawahar Vyapar Bhawan, 1,
Tolstoy Road, HC Mathur lane,
New Delhi, Delhi 110001.**

....Respondent No.2
- 3. Union Bank of India
(Erstwhile Corporation Bank of India)
Original Applicant in present Company Petition
M-93, Connaught Place, Outer Circle,
Delhi – 110001.**

....Respondent No.3
- 4. Mr. Arvind Dham
Suspended Director/ Promoter for
Amtek Auto Limited
3 Lower Shopping Complex (LSC),
Pamposh Enclave, Greater Kailash 1,
Delhi-110048.**

....Respondent No.4

Present

For Appellant: Mr. Vikram Nankani, Sr. Advocate with Mr. Dinesh Pednekar, Mr. Chanakya Keswani, Mr. Kumar Anurag Singh, Mr. Anando Mukherjee and Mr. Arpan Behl, Advocates.

For Respondent: Mr. Sumant Batra, Mr. Sanjay Bhatt and Ms. Niharika Sharma, Advocates for R-1 (RP).

Mr. Tushar Mehta, SGI, Mr. Abhinav Vasisht, Sr. Advocate with Ms. Misha, Mr. Anoop Rawat, Mr. Siddhant Kant, Ms. Charu Bansal and Ms. Prabh Simran Kaur, Advocates for R2 (CoC).

Mr. Sumesh Dhawan, Advocate for R-4.

Mr. Sudhir K Makkar, Sr. Advocate with Ms. Anindita Roychowdhury, Ms. Vatsala Rai, Ms. Saumya Gupta, Mr. Bharat Makkar and Ms. Yogita Rathore, Advocates for Vistra ITCL (India) Ltd.

Mr. Arun Kathpalia, Sr. Advocate with Mr. Kaushik Moitra, Ms. Shreya Sircar, Ms. Ishita Jain, Mr. Anurag Tandon, Ms. Sanjukta Roy, Advocates for Kotak Mahindra Bank (Intervenor).

J U D G M E N T

BANSI LAL BHAT, J.

Appellant – ‘Deccan Value Investors LLP’ is aggrieved of impugned order dated 9th July, 2020 passed in I.A. No.225 of 2020 in CP(IB)No.42/Chd./Hry/2017 passed by the Adjudicating Authority (National Company Law Tribunal), Chandigarh Bench, Chandigarh whereby and whereunder the Adjudicating Authority inter alia approved the Appellant’s Resolution Plan dated 17th January, 2020 read with its addendum dated 7th February, 2020 in respect of ‘Amtek Auto Limited’ (Corporate Debtor). The impugned

order is assailed on the ground that the Adjudicating Authority (for short 'AA') has gone beyond its jurisdiction in concluding that the requirement of the prior written consent of the mortgagee of the Ace Complex Limited as provided in the Resolution Plan has been rendered infructuous. This conclusion is said to be erroneous as the same is against the agreed terms of the Resolution Plan between the Appellant and Respondent No.2 – Committee of Creditors (for short 'COC'). It is urged in Appeal that the AA while approving the Resolution Plan cannot re-write the same nor can it waive any condition of the Resolution Plan, that too without the express consent of the Appellant. It is further urged that the execution of the long term lease (20 years) of the Ace Complex Land was a condition precedent and the integral part of the Resolution Plan and the business of the Corporate Debtor as a going concern is dependent on the availability of this leased land as admitted by Respondents No.1 and 2. It is further urged that the AA failed to consider that the parties had agreed that the long term lease they executed over the Ace Complex Land for 20 years and prior written consent of the mortgagee was to be acquired and orders to be obtained with respect to the same in terms of Section 9 of the Resolution Plan. It is urged that the AA, on consideration of the Resolution Plan, arrived at an erroneous conclusion that the requirement of prior consent of mortgagee was infructuous and that the grant of prayers in Section 9 were not conditions precedent for approval of Resolution Plan and that the issue of validity of lease deed dated 20th January, 2020 could be left open. It is further urged in Appeal that as a consequence of wrong findings recorded by AA, an

additional burden has been placed on the Appellant to invest huge sums to furnish the balance Performance Bank Guarantee (PBG) of Rs.150 crores. It is further urged that as a consequence of wrong findings recorded by AA the Resolution Plan as approved is bound to fail. It is further urged that the AA had noted that the mandatory pre-condition of issuance of Letter of Intent (LOI) was unfulfilled while Respondent No.1 had, vide email dated 11th June, 2020, stated that Resolution Plan could not be filed without issuance of LOI and PBG. The Hon'ble Apex Court did not negate this requirement in its orders passed in Civil Appeal No.6707 of 2019 preferred by Respondent No.2 (COC) against order of liquidation of Corporate Debtor dated 16th August, 2019. It is urged that the AA cannot waive this pre-condition as it does not have the power to re-write the Resolution Plan. It is urged that the AA failed to address the contention of Appellant that Respondent No.2 could not have got the balance PBG in absence of an application on record to this effect.

2. For appreciating the contentions raised on behalf of Appellant reference to the factual matrix is inevitable. Corporation Bank, now merged with and known as Union Bank of India (Financial Creditor) filed Application under Section 7 of Insolvency and Bankruptcy Code, 2016 (for short 'the I&B Code') before AA for initiating Corporate Insolvency Resolution Process (for short the 'CIRP') against the Corporate Debtor - Amtek Auto Limited (for short 'CD' or 'AAL'). The Application came to be admitted in terms of order dated 24th July, 2017 and CIRP commenced. Respondent No.1 came to be appointed as Interim Resolution Professional (IRP). Public announcement

was made and Committee of Creditors came to be constituted. IRP was replaced by RP after the appointment of Mr. Dinkar T. Venkatasubramaniam was confirmed. In its meeting held on 2nd April, 2018 after extension of CIRP period by 90 days, the COC approved the Resolution Plan of Liberty Housing Group (for short 'LHG'). The RP approached the AA with application under Section 31(1) of I&B Code for approval of Resolution Plan of LHG. Same was allowed by AA in terms of common order dated 25th July, 2018. CA No. 140 of 2018 filed by the Appellant came to be dismissed by virtue of the same order. All Financial Creditors of the Union Bank of India filed Application under Section 60 (5) read with Section 74(3) of the Code seeking to declare that the Resolution Applicant LHG and its promoters have knowingly contravened the terms of Resolution Plan and failed to implement the same. The Application came to be disposed of by holding that the Resolution Plan submitted by LHG was not capable of implementation due to default in adhering to the payment schedule. The COC came to be restored for considering the Plan of Appellant. Some period came to be excluded from the CIRP. However, the AA dismissed the Application to the extent it raised allegations of vitiation of CIRP of CD by misrepresentation/ fraud. This Appellate Tribunal in Appeal, vide order dated 16th August, 2019 ordered liquidation of the Corporate Debtor. COC filed Appeal against the order passed by this Appellate Tribunal before the Hon'ble Supreme Court which stayed the liquidation proceedings in terms of order dated 6th of September, 2019 and subsequently vide order dated 24th September, 2019 permitted the Resolution Professional to invite fresh offers

from prospective Resolution Applicants within a period of 21 days. COC was directed to take a final call within two weeks thereafter. The Hon'ble Apex Court, vide order dated 13th September, 2019, while extending time by three weeks for taking decision by the COC ordered that the consideration be confined to five offers received within time. This order was subsequently recalled on 2nd December, 2019 and the Hon'ble Apex Court directed the Resolution Professional to invite fresh offers within 30 days of the order. COC was granted three weeks' time to evaluate the Plans. COC evaluated Resolution Plans of four prospective Resolution Applicants. Appellant was declared as H1 bidder subject to its addressing the key commercial and legal issues as highlighted by COC. The Hon'ble Apex Court, vide order dated 20th January, 2020 granted further time of two weeks for concluding voting on Resolution Plan of Appellant. The time was further extended by Hon'ble Apex Court to enable COC to complete the voting process. Finally, the Resolution Plan dated 17th January, 2020 read with addendum dated 7th February, 2020 submitted by Appellant in respect of CD came to be approved by COC by a majority of 70.07% votes in its meeting held on 7th February, 2020. On 8th June, 2020 the Hon'ble Apex Court passed order relegating the matter to AA to consider the same and pass appropriate orders after hearing the parties within 15 days. The Adjudicating Authority listed all pending Applications for hearing. Meanwhile, RP filed Application under Section 31 (1) of I&B Code for approval of the Resolution Plan of Appellant, which was considered along with all pending Applications, which

came to be disposed off in terms of the impugned order assailed in this Appeal.

3. Respondent No.1 contested the Appeal by pleading that the rejection of claim of Vistra was known to the Appellant and the same formed part of the Information Memorandum shared with the Appellant. It is pleaded that Vistra has not filed any Appeal against the rejection of its claim and Appellant is not entitled to contest the liabilities arising out of the claim of Vistra, which had been rejected by Respondent No.1 and affirmed by AA in the approval order. It is denied that the finalization and execution of the LOI was a material requirement for filing of the approval Application. It is also denied that issuance of LOI by Respondent No.2 was a necessary pre-condition for filing of the approval Application. It is further pleaded that the Interim Monitoring Committee (IMC) was to be constituted in terms of the approval order of the Resolution Plan submitted by the Appellant, on the day of approval of Resolution Plan by AA. However, the Appellant vide email dated 14th July, 2020 refuted its participation in the IMC claiming that the same was premature despite the fact that the Resolution Plan submitted by the Appellant envisaged constitution of IMC upon the approval order.

4. Vistra ITCL (India) (in short 'Vistra') Ltd. has filed I.A. No.2072 of 2020 seeking impleadment, whereas Kotak Mahindra Bank sought intervention. They also were heard when the Appeal was taken up for hearing.

5. Mr. Vikram Nankani, Senior Advocate representing the Appellant submitted that the Resolution Plan contains vital conditions precedent

without the fulfilment of which the Resolution Plan cannot be effectively implemented. It is submitted that Clause 2.5.2 (iii) of the Resolution Plan stipulated for execution of a long term lease (subsisting for 20 years or more) for the Ace Complex Land with acceptable terms. With reference to page 487 of Vol. 3 of Appeal Memo, it is submitted that the expression “Acceptable Terms” is defined to mean “*terms relating to the lease of Ace Complex Land and shall be suitable protective terms acceptable to the Resolution Applicants including: (i) confirmation of the validity and subsistence of the lease arrangement by way of prior written consent of Vistra ITCL (India) Ltd. acting as security trustee on behalf of KKR Indian Financial Services Limited and L&T Finance Limited in a form and substance acceptable to the Resolution Applicant; (ii) No right of termination accruing to the lessor as long as lease rentals are paid; and (iii) right of first refusal accruing to the Resolution Applicants, in case of sale of ACE Complex Land*”. It is submitted that the Resolution Plan is contingent on the execution of a long term lease for the Ace Complex Land on Acceptable Terms i.e. with the prior written consent of Vistra ITCL (India) Ltd., the mortgagee of the Ace Complex Land. It is submitted that the prior lease has expired on 31st March, 2019. For maintaining going concern status unhindered access of CD to this land is crucial as nearly 42% of the machining capacity and about 23% of its revenues are generated from the use of this land. It is submitted that the RP executed the lease on 28th January, 2020 without obtaining the prior consent of Vistra. The Appellant called him to comply with the condition in the Resolution Plan. Addendum to the Resolution Plan reiterated the

requirement of execution of the long term lease on the Ace Complex Land. Respondent No.2 approved the Resolution Plan without obtaining the prior written consent of Vistra. It is further submitted that the Appellant has been consistently insisting upon the requirement of Acceptable Terms being fulfilled.

6. Mr. Vikram Nankani, learned Senior Counsel would further submit that the impugned order is contradictory as on one hand it holds that the requirement of Vistra's prior written consent for execution of the sale deed is infructuous while on the other hand the validity of the said lease deed and/or the issue of rights of the third party thereon has been left open.

7. Thus, it is contended that the AA failed to satisfy itself that the Resolution Plan has provisions for effective implementation. It is further submitted that the impugned order is beyond jurisdiction as the scope of enquiry under Section 31 of I&B Code is very limited and the Resolution Plan could either be accepted in whole or rejected, but not modified. It is submitted that the Resolution Plan is to be interpreted strictly without altering the nature of the contract, as it may affect the interest of either of the parties adversely. AA should have directed Respondent No.1 and Respondent No.2 to seek consent of the Appellant before approving the Resolution Plan without modifications. It is submitted that the finding recorded by AA that the execution of long term lease for the Ace Complex Land with Acceptable Terms was not a condition precedent for approval of the Plan, but only an effective date condition precedent. It is submitted that

without execution of long term lease of the Ace Complex Land, the effective date condition precedent cannot come into existence and would result in non-implementation of the Resolution Plan.

8. It is further submitted on behalf of the Appellant that the AA erred in directing the Appellant to furnish PBG of Rs.150 Crores despite concluding that the I&B Code mandates issuance of LOI and PBG as a pre-condition to the very filing of an Application for approval of the Plan. It is submitted that such pre-conditions have not been dispensed with by the Hon'ble Apex Court.

9. It is further submitted on behalf of the Appellant that the AA could not have insisted on immediate implementation of the Resolution Plan as the pendency of Civil Appeal No.6707 of 2019 filed by COC to set aside the order of this Appellate Tribunal directing liquidation of Corporate Debtor would impact the CD. It is further submitted that since the closing date has not occurred, the Appellant is not obligated to make the upfront cash infusion. It is further submitted that the Resolution Plan mandatorily required the approval of the Competition Commission of India (CCI) prior to its approval by COC as the Appellant was the Successful Resolution Applicant in CIRP of Corporate Debtor as well as its subsidiary Castex Technologies Limited conducted simultaneously. Respondent No.1, instead of complying merely informed that the approval of CCI can be obtained after approval of Resolution Plan by COC.

10. Lastly, it is submitted that the Appellant cannot be forced to implement a Resolution Plan, whose approval is under challenge before this Hon'ble Tribunal.

11. Mr. Sumant Batra, Advocate appearing on behalf of Respondent No.1 submitted that approval of Resolution Plan by AA was not contingent upon satisfaction of conditions precedent. It is submitted that fulfilment of the conditions precedence was neither a pre-condition for filing Application under Section 31 of IBC by RP nor a pre-condition for approval of Resolution Plan. It is submitted that the objections raised by the Appellant before AA in this regard was with ulterior objective to wriggle out of an otherwise binding Resolution Plan. It is further submitted that even the implementation of the approved Resolution Plan is not contingent on fulfilment of the condition precedent as it is clearly provided in the Resolution Plan that the implementation of Resolution Plan shall commence from the date of approval by AA. It is further submitted that the Appellant, under the approved Resolution Plan was to deposit upfront cash infusion of Rs.500 crores in the designated account on or before the effective date. After approval of Resolution Plan IMC was constituted of which Appellant is a Member. However, the Appellant has neither nominated a representative nor participated in any of the IMC meetings. It is further submitted that the Appellant has not implemented any part of the Resolution Plan even though they have no co-relation with the condition precedent.

12. It is further submitted by Mr. Batra that linking of viability of Resolution Plan with Ace Complex Land has no basis. Reference is made to Sl. No.14 at page 485 of Appeal paper-book to demonstrate that the prayers requested to be granted by AA to the Resolution Applicant shall not be construed as conditionalities to the Resolution Plan. Therefore, impugned order was not open to challenge on this ground. It is submitted that the issue in regard to condition precedence of Ace Complex Land raised by DVI is an afterthought and has been raised only after its attempts to wriggle out of Resolution Plan on the ground of pandemic failed. Reference is made to order passed by Hon'ble Apex Court on 18th June, 2020 whereby the Hon'ble Apex Court rejected the Appellant's application seeking withdrawal of the offer and warned that indulging in such practice would be treated as contempt of Court. It was thereafter that the Appellant for the first time raised objection with regard to condition precedents before the AA. Yet another attempt made by the Appellant before Hon'ble Apex Court in the garb of seeking clarification of earlier order met with dismissal with the Hon'ble Apex Court observing that it lacked bonafide.

13. Mr. Batra would further submit that since fresh resolution process of CD was carried out pursuant to the directions of Hon'ble Apex Court, LOI issuance was subjected to directions of Hon'ble Supreme Court. Subsequently, after approval of Resolution Plan by COC the Hon'ble Apex Court relegated the matter of approval of Resolution Plan to AA. RP requested the Appellant to submit the LOI and PBG but the Appellant did

not comply. The RP was duty bound to file Application for approval of Resolution Plan within the limited period of 15 days granted by Hon'ble Apex Court. Appellant did not submit LOI and PBG. RP filed the Application before AA. It is submitted that LOI was not a condition precedent to file the Application for approval of the Resolution Plan and was subject to directions of Hon'ble Supreme Court. It is submitted that the Appellant cannot take shelter under its own wrong in not submitting the LOI and PBG and then claiming that in absence of same the Resolution Plan could not have been approved. Even non-submission of the balance PBG was not an embargo for the RP to not proceed in filing Application under Section 31 of IBC for approval of Resolution Plan.

14. Mr. Batra further submits that the essence of the condition precedent was execution of 20 year long term lease deed on Ace Complex Land between Gateway Impex Private Limited (for short 'Gateway') and AAL and uninterrupted usage of Ace Complex Land on payment of lease rental. Both these conditions were duly satisfied upon execution of the long term lease of 20 years vide lease deed dated 27th January, 2020 between AAL and Gateway. Requirement of NOC from KKR India Financial Service Limited and L&T Finance Limited was not a pre-requisite for approval of implementation of Resolution Plan. It is submitted that objection raised by Vistra before AA in regard to execution of long term lease without such NOC was rejected but the same was not assailed in Appeal. Therefore, the lease deed can continue without prior NOC from KKR and L&T unless set aside by

Court of Law. It is submitted that the Appellant was aware of contingency in respect of NOC but it agreed to submit the Resolution Plan and implement the same, if approved.

15. Mr. Tushar Mehta, learned Solicitor General of India submitted that the Appellant has been playing about the system. Everything is being done under a plan. He invited our attention to para 27 of the order dated 23rd February, 2021 in I.A. No.58156 of 2020 by Hon'ble Apex Court and the observations made in para 38. It is submitted that the Appeal is premature. With reference to page 547 of Vol.III it is submitted that the RP received this letter from Appellant and the COC acted on the assurance contained in para 2(ii). It is submitted that the approval by COC and the AA was not subject to these conditions, which related to acquisition of Corporate Debtor as a going concern. It is further submitted that effective date not having occurred prior to long stop date, which was contemplated to be six months from 17th January, 2020, termination of Resolution Plan would not be attracted. It is submitted that the judicial intervention period has been excluded by the Hon'ble Supreme Court in calculating long stop date. It is further submitted that the RP discharged its obligations and entered into 20 years lease deed with Gateway. It is further submitted that the condition regarding lease remains intact and Vistra has been brought in to picture to resile from the Resolution Plan. Attention is invited to observations of Hon'ble Supreme Court in this regard.

16. Mr. Abhinav Vasisht, Senior Advocate also representing Respondent No.2 – COC submitted that the present Appeal is in contravention of the Hon'ble Supreme Court order dated 18th June, 2020 wherein the Hon'ble Apex Court, while dismissing the application of Appellant observed that any attempt on the part of Appellant to withdraw from its Resolution Plan would be treated as contempt of the Hon'ble Supreme Court. It is submitted that the Appellant, instead of taking steps towards the implementation of the Resolution Plan approved by the Adjudicating Authority has now filed the Appeal seeking setting aside the impugned order which inter alia approves the Appellant's own Resolution Plan unconditionally. It is submitted that the Appeal is nothing more than an attempt by the Appellant to renege from its solemn commitments and indirect attempt to subvert the directions of Hon'ble Apex Court. It is further submitted that the Appellant has now issued an email seeking forthwith termination of the Amtek Resolution Plan on the pretext that its business has been materially affected. It is further submitted that the plea for force majeure sought to be raised by Appellant has already been rejected by the Hon'ble Apex Court. The Appellant cannot be permitted to re-agitate the issues already rejected by the Hon'ble Apex Court, same being barred by res-judicata. As regards the execution of long term lease of 20 years of the Ace Complex Land, it is submitted that the COC and the Appellant mutually agreed for inclusion of execution of long term lease of 20 years with respect to Ace Complex Land on acceptable terms as a condition precedent to the implementation of approved Resolution Plan only after taking into account the criticality of the piece of

land owned by Gateway, but the said condition was not a condition precedent to the approval and acceptance of the Resolution Plan. It is further submitted that out of these conditions two have already been satisfied by lease deed executed on 28th January, 2020. In so far as, obtaining Vistra consent is concerned, the Appellant should have taken steps towards negotiating with Vistra for obtaining their no objection and not challenged the approval of Resolution Plan. It is further submitted that 2020 lease has been entered into in accordance with law renewing the existing lease hold rights at the prevailing market rates. It is further submitted that the Appellant itself has contemplated a situation for the buy-out of the Ace Complex Land in terms of approved Resolution Plan to ensure continued availability of the same for the operations of the Corporate Debtor.

17. It is further submitted on behalf of COC that the condition for issuance of LOI was stipulated only as an added measure to ensure accountability on the part of Resolution Applicant, whereas the condition of submission of PBG under the CIRP regulations is a requirement of law and the two conditions cannot be interlinked. Under the process note Appellant was required to submit the PBG of Rs.300 crores in two tranches. This condition was agreed to and the Appellant had undertaken to place PBG of Rs.300 crores, which was only subject to approval of the Resolution Plan by the COC (refer page 543 of Vol.3 of the Appeal). Thus, the Appellant was bound to submit the PBG immediately after hearing before Hon'ble Apex

Court. It is further submitted that since the resolution process was carried out pursuant to the directions of Hon'ble Apex Court, certain steps were stipulated to be taken post approval of Resolution Plan by COC. However, the Hon'ble Apex Court vide order dated 8th June, 2020 relegated the matter of approval of Resolution Plan to AA within 15 days and the RP had to immediately file the application for approval of Resolution Plan. Therefore, the issuance of LOI became nugatory as the Appellant, being a party to the proceedings before the Hon'ble Apex Court, was aware of the approval of Resolution Plan by COC. It is submitted that under Section 9 of the Resolution Plan prayers sought therein shall not be construed as conditionalities to the implementation of Resolution Plan. It is further submitted that the PBG of Rs.150 crores provided by the Appellant upon approval of Resolution Plan by the COC could be invoked by the COC in the event of breach of any of the conditions. It is further submitted that the Appellant is in breach of terms of the approved Resolution Plan insofar as submission of balance PBG of Rs.150 crores, submission of application before CCI, nomination of representative of IMC and taking up steps for implementation of all provisions of Resolution Plan are concerned. Thus, the COC was right in invoking the PBG. It is submitted that PBG provided by Appellant is payable on 1st written demand made by the creditor and the moment such written demand is made on the guarantor bank pursuant to breach of any condition, the guarantor Bank is duty bound to honour the payment under the Bank Guarantee.

18. As regards impleadment sought by Vistra it is submitted that the Appeal arises out of proceedings under Section 31 of I&B Code to which Vistra was not even a party. It is submitted that Vistra had filed CA No.62 of 2020 and CA No.237 of 2020, which was disposed off in terms of the impugned order. Vistra has only challenged order passed in CA No.62 of 2020 and no challenge has been raised in regard to order passed in CA No.237 of 2020. Once Appeal has not been filed, Vistra cannot seek impleadment in the instant Appeal. Otherwise also, the impugned order, taking note of 2020 lease while approving the Resolution Plan, sufficiently safeguards and satisfies the concerns of Vistra.

19. Mr. Sudhir K. Makkar, Senior Advocate representing Vistra seeking impleadment as Party Respondent submitted that Vistra is not assailing the impugned order but seeking to enforce its right to be heard being a necessary as well as an effected party insofar as any modification of the impugned order with respect to the subject land which Vistra is holding as mortgagee may affect its legal rights. It is submitted that Vistra is not assailing the impugned order and there is no occasion for filing an independent Appeal by Vistra. However, since the outcome of the Appeal may affect the legal rights of Vistra, it is seeking impleadment in Appeal to safeguard its interest. It is submitted that COC is trying to indirectly agitate an issue which is already settled and since COC has not filed an Appeal challenging the impugned order, an apprehension is created in the mind of Vistra that in absence of Vistra as party Respondent actual facts including

the rationale behind the passing of impugned order qua the Vistra's secured asset, i.e. subject property would be placed before this Appellate Tribunal.

20. We have given our anxious consideration to the submissions, oral and written made by learned Counsel for the parties and those seeking impleadment and intervention. We have also gone through the record.

21. Appellant is the Successful Resolution Applicant whose Resolution Plan in respect of Corporate Debtor – 'Amtek Auto Limited' came to be approved by the Committee of Creditors by a majority of 70.07% votes in its meeting held on 7th February, 2020. The Resolution Professional filed IA No.225/2020 under Section 30(6) read with 31(1) of I&B Code for approval of Resolution Plan. Same was heard along with other IAs. Meanwhile, IA in Civil Appeal No.6707/2019 filed by the Appellant before Hon'ble Apex Court seeking withdrawal of its offer (Resolution Plan) came to be dismissed vide order dated 18th June, 2020. The Hon'ble Apex Court, while rejecting the prayer for withdrawal of the offer, warned the Appellant that if he indulged in such kind of practice, it will be treated as Contempt of Court in view of various orders passed at his instance. Apart from rejection of Appellant's prayer for withdrawal of the Resolution Plan, the order passed by the Hon'ble Apex Court gives a loud and clear message that any further attempt made by the Appellant to enact a U-turn and try to wriggle out of the obligations under the offer would be treated as contumacious conduct inviting action for Contempt of Court. This appears to have been done to deter the Appellant from resiling from its offer. The order dismissing the

Application is final and has to be construed as a bar precluding the Appellant from seeking exit from its own offer. It also emerges from the order that the Hon'ble Apex Court, while rejecting the withdrawal offer emanating from Appellant, took notice of the various orders passed by it at the instance of Appellant. The tone and tenor of this order leaves no scope for the Appellant to resile from and wriggle out of the implication of the offer made by him, i.e. the Resolution Plan, which has been approved in terms of the order impugned in this Appeal. It is therefore manifest that the Appellant would not be permitted to backtrack and seek exit from its Resolution Plan on any pretext whatsoever. This is a closed chapter and cannot be permitted to be reopened. The question for consideration, however, is whether the issue raised in this Appeal, in the context of prayer sought for setting aside of impugned order dated 9th July, 2020 (in terms whereof the Resolution Plan submitted by Appellant came to be approved), can be looked into when curtain has been drawn on the endeavours of Appellant to seek withdrawal of its offer by declining the same. For determining the issue raised viz. whether the lease could be extended without the prior written consent from mortgagee, it is inevitable to peep into the development during CIRP, which ultimately culminated in approval of Appellant's Resolution Plan for the Corporate Debtor and rejection of various IAs.

22. CIRP against Corporate Debtor/AAL was initiated by Corporation Bank now known as Union Bank of India by filing Application under Section

7 of I&B Code. AA admitted the Application on 24th July, 2017. Thus, CIRP qua CD/AAL was commenced. IRP was appointed and public announcement was made. COC was constituted on 17th August, 2017. IRP was confirmed as RP in the first meeting of COC. CIRP period was extended by 90 days. COC in its meeting held on 2nd April, 2018 approved Resolution Plan of LHG, which was placed by the RP for approval before AA, who allowed CA No.114/2018 approving the Resolution Plan submitted by RP. CP No.112/ 2018 also came to be disposed of while CA No.140 of 2018 filed by the Appellant herein came to be dismissed in terms of the same order. Subsequently, all Financial Creditors of CD filed CA No.567 of 2018 through Union Bank of India urging the AA to declare that the Resolution Applicant M/s LHG has knowingly contravened the terms and failed to implement the Resolution Plan. This came to be disposed off by holding that the Resolution Plan submitted by LHG was not capable of implementation due to default in adhering to the payment schedule. COC was restored for considering the plan of Appellant. Sometime was excluded from CIRP. CA No.601/2018 filed by LHG alleging vitiation of CIRP of the CD on account of fraud etc. came to be dismissed in terms of the same order. In Appeal, this Appellate Tribunal ordered for liquidation of CD. The order of this Appellate Tribunal dated 16th August, 2019 was assailed in Appeal before Hon'ble Apex Court by the COC. In Civil Appeal No.6707/2019, the Hon'ble Apex Court initially stayed the liquidation proceedings, thereafter permitted RP to invite fresh offers from prospective Resolution Applicants. COC was directed to take a final call thereafter. Subsequently, the Hon'ble Apex Court

extended time by three weeks to enable COC to take decision. It further ordered that consideration be confined to five offers received within time. Subsequently, earlier order was recalled and RP was directed to invite fresh offers within thirty days of advertisement. COC was directed to evaluate the Plans within three weeks thereafter. COC after evaluation of Plans submitted by four prospective Resolution Applicants declared Appellant as H1 bidder. The Hon'ble Apex Court extended time by two weeks for concluding the voting on Resolution Plan of Appellant. The Resolution Plan with its addendum was placed before COC which was approved by it within the further extended time by 70.07% votes. Vide order dated 8th June, 2020, the Hon'ble Apex Court, keeping in view this development, relegated the matter of IA No.48906/2020 in Civil Appeal No.6707/2019 to AA for consideration and appropriate orders within fifteen days. It emerges from the impugned order that this IA, filed by COC, sought approval of Resolution Plan on account of special process having been undertaken under the inherent powers of Hon'ble Apex Court and since the issuance of LOI and the underlying purpose thereto in terms of RFRP became nugatory, such process was not required to be followed prior to filing of Application for approval of Resolution Plan. Thereafter, Application being IA No.225/2020 came to be filed by the Resolution Professional for approval of Resolution Plan of Appellant, which was allowed in terms of the impugned order.

23. Appellant assails the impugned order primarily on the ground that declaration of critical parts of the Resolution Plan affecting its feasibility and

viability as being infructuous or redundant was beyond the scope of jurisdiction of the AA. The ground of challenge is that the Resolution Plan is contingent on the execution of a long term lease for the Ace Complex Land on acceptable terms defined in the Resolution Plan, i.e. with the prior written consent of Vistra, the mortgagee of Ace Complex Land. Prior lease of CD in respect of Ace Complex Land is said to have expired on 31st March, 2019. The submission on behalf of Appellant is that for maintaining going concern status of Corporate Debtor unhindered access of CD to this land is crucial. Thus, this condition stated to be condition precedent of the execution of lease on acceptable terms is said to be vital and included in the Resolution Plan but RP executed the said lease on 28th January, 2020 without obtaining prior written consent of Vistra. Thus, the approval of the Resolution Plan is said to be without complying with the requirement of obtaining prior written consent of Vistra in respect of execution of the lease of Ace Complex Land and without obtaining approval of CCI. It is contended on behalf of Appellant that the AA failed to satisfy itself whether the Resolution Plan was compliant as regards vital conditions and whether it had provisions for its effective implementation.

24. This is seriously contested by the Respondents, it being pointed out that the COC and the Appellant had mutually agreed for inclusion of execution of long term lease of 20 years with respect to the Ace Complex Land on Acceptable Terms as a condition precedent to the implementation of the approved Resolution Plan only after taking into account the criticality of

the piece of land measuring 21.11 acres located at Dharuhera, Haryana (Ace Complex Land) owned by Gateway. However, it is submitted that this condition was not a condition precedent to the approval and acceptance of the Resolution Plan. Sub-clause 2.5.2 of the approved Resolution Plan replaced by the addendum (page 550,551 of Vol. 3 of Appeal paper-book) brings it to fore that the Resolution Plan envisaged acquisition of the CD by the Appellant as a going concern and contingent on conditions including execution of a long term lease (subsisting for 20 years or more) for the Ace Complex Land with Acceptable Terms. At page 547 of the same Volume, we find Clause 2 substituting sub-section 1.8(iii), 1.6(vi) and insertion of 1.9 on the commercial proposal of Appellant for running the Corporate Debtor as going concern, wherein provision has been made to include purchase of Ace Complex Land. It is provided that the Appellant proposes to negotiate with Vistra for purchase of Ace Complex Land through its subsidiaries etc. The Appellant undertook to infuse purchase funds for purchase of Ace Complex Land at its discretion. Upon its purchase, Appellant would retain the right to not require the sale of the vacant area by the Corporate Debtor for six months from the date of purchase of Ace Complex Land. It would therefore emerge that the said condition of including execution of long term lease of 20 years with respect to Ace Complex Land on Acceptable Terms was a condition precedent to the implementation of the approved Resolution Plan and not to the approval of the Resolution Plan. Therefore, the impugned order approving the Resolution Plan cannot be assailed on such ground. Implementation of the approved Resolution Plan is only subsequent to the

approval of Resolution Plan at the hands of AA and cannot operate as a condition precedent before its approval. The necessary steps for implementation including execution of long term lease with respect to the Ace Complex Land on Acceptable Terms are postulated to be taken only after approval of the Resolution Plan and not before its approval. Moreover, execution of long term lease of 20 years qua the Ace Complex Land would be dependent upon subsistence of the lease Agreement by way of prior written consent of Vistra, no right of termination accruing to the lessor as long as lease rentals are paid and right of first refusal accruing to the Resolution Applicant in case of sale of Ace Complex Land. This is covered under the definition of Acceptable Terms at page 487 of Vol. 3 of Appeal. Appellant is required to take appropriate steps towards negotiating with Vistra/ creditor for obtaining their no objection in terms of the impugned order. The Appellant can demonstrate that the 2020 lease has not been extinguished and all rights enjoyed by Vistra/ creditors are intact as against its borrowers as well as Gateway. The 2020 lease ensures continuance of revenue for Gateway to service the debt of creditors and there is no compromise on the lease rentals stipulated to be paid in terms thereof and that the 2020 lease must be continued as the piece of land is otherwise of no use. 2020 lease has been entered into in accordance with law for renewing the existing lease hold rights. It ensures a long time lease for the constructed area of Ace Complex Land from where the Corporate Debtor is operating its manufacturing activities. In so far as the remaining land is concerned, the agreement provides for lease of the said land on mutually agreeable terms.

Appellant is shown to have contemplated a situation for the buyout of the Ace Complex Land in terms of the Resolution Plan for ensuring continued availability of land for operations of the Corporate Debtor. Thus, there was no impediment in implementing the Resolution Plan and assailing of the approved Resolution Plan by Appellant who itself is the Successful Resolution Applicant is unwarranted. LOI may have been stipulated to ensure that the Resolution Applicant is rendered accountable. Requirement of submission of PBG is in consonance with Regulation 36B of the CIR Regulations. The submission of PBG was a condition prefaced upon approval of the CoC and passing of directions by Hon'ble Apex Court. It is significant that the Appellant had undertaken to place PBG of Rs.300 Crore in the Resolution Plan itself. Thus, it was bound to comply with the requirement and not hide behind the issue raised in respect of LOI to not adhere to the requirement of submission of PBG. After approval of Resolution Plan by the CoC, the Hon'ble Apex Court vide order dated 8th June, 2020 relegated the matter to NCLT for approval of Resolution Plan. The Appellant was a party to the proceedings before the Hon'ble Apex Court and question of intimating it by way of issuance of LOI became irrelevant. Appellant cannot be heard to backtrack from its Resolution Plan on account of non-grant of prayers under Section 9 of the Resolution Plan which cannot be construed as conditionalities to the implementation of the approved Resolution Plan.

25. Appellant, as the Successful Resolution Applicant, would suffer invoking of PBG of Rs.150 Crores for breach of any of the conditions of Resolution Plan as provided under Clause 8.18 of the Resolution Plan (Page 480 of appeal paper book). The Respondents have been able to demonstrate that the Appellant has breached the Resolution Plan by not submitting PBG in respect of balance amount of Rs.150 Crores prior to submission of Resolution Plan before the Adjudicating Authority. It has also not initiated process of submission of application for seeking approval of CCI. It has also failed to nominate its representative to the Interim Monitoring Committee and abstained from meetings of the IMC. The Resolution Plan is binding on all stakeholders including the Appellant - Resolution Applicant, who is bound to take necessary steps for implementation of all provisions of the Resolution Plan but has failed to do so. Thereby contravening terms of the Resolution Plan and providing justification for CoC to invoke PBG. The Guarantor Bank is bound to honour the written demand placed on it by the CoC for breach of any condition which does not brook any interference. Thus viewed, the CoC has rightly invoked the PBG which is beyond the pale of challenge.

26. Vistra was not a party to proceedings arising out of application filed by the Resolution Professional for approval of Appellant's Resolution Plan. Admittedly, Vistra has not filed an appeal against the impugned order. It had filed CA No. 62 of 2020 and CA No. 237 of 2020 before the AA which came to be disposed off in terms of the impugned order. Admittedly, no

appeal has been filed in respect of order passed in CA No. 237 of 2020. In the given circumstances, it cannot be permitted to seek impleadment as a necessary party in these appeal proceedings. Vistra is a mortgagee with Ace Complex Land mortgaged in its favour by Gateway. The Adjudicating Authority has taken note of the 2020 lease and approved the Resolution Plan submitted by Appellant which protects the legitimate interests of Vistra. Since the present appeal lacks merit, Vistra cannot be permitted to introduce a case beyond the scope of examination of legality of the Resolution Plan of Appellant under the garb of seeking impleadment. Same is true in respect of intervention sought by Kotak Mahindra Bank.

27. For the foregoing discussion, we are of the considered view that the execution of long term lease for the Ace Complex Land with Acceptable Terms was not a condition precedent in regard to approval of Resolution Plan but only in regard to effective date. The impugned order does not travel beyond the scope of enquiry under Section 31 of I&B Code. The condition in regard to execution of a long term lease for the Ace Complex Land having already been complied with by RP who executed the lease on 28th January, 2020, when the prior lease has expired on 31st March, 2019 and Vistra not having assailed the impugned order for any material irregularity in the insolvency resolution process resulting in prejudice, the Appellant would not be justified in assailing the impugned order which, in effect, is nothing but yet another effort to wriggle out of its obligations and seek withdrawal of Resolution Plan in a different garb. The appeal not only lacks merit but also

is frivolous. We, while dismissing the appeal, impose costs to the tune of Rs.1/- Lakh (Rupees One Lakh Only) on the Appellant which shall be deposited in this Appellate Tribunal within 15 days.

**[Justice Bansi Lal Bhat]
Acting Chairperson**

**[Justice Anant Bijay Singh]
Member (Judicial)**

**[Dr. Ashok Kumar Mishra]
Member (Technical)**

NEW DELHI

16th April, 2021

Ash