

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 141 of 2018

(Arising out of Order dated 6th March, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata in CA. No. 170/KB/2018 in C.P. (IB) No. 244/KB/2017)

IN THE MATTER OF:

Industrial Services

....Appellant

Vs.

Burn Standard Company Ltd. & Anr.

....Respondents

Present:

For Appellant: Mr. Sitesh Narayan Singh, Mr. Joydeep Acharya, Mr. P. Mukherjee and Mr. Prabhat Kumar Rai, Advocates.

For Respondents: Mr. Gaurab Banerjee, Senior Advocate with Mr. Indranil Ghosh and Mr. Kunal Singh, Advocates for Respondent No. 1

Mr. Jagjit Singh, Senior Advocate with Mr. Vipul Ganda, Mr. Ayandeb Mitra, Mr. Ajeyo Sharma and Mr. Rahul Bhardwaj, Advocates for Railways

Mr. T. Harish Kumar, Advocate for Kolkatta Port Trust

Mr. S. Ghosh and Mr. Raza Abbas, Advocate

With

Company Appeal (AT) (Insolvency) No. 142 of 2018

(Arising out of Order dated 6th March, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata in CA. No. 170/KB/2018 in C.P. (IB) No. 244/KB/2017)

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Present

For Appellant:

Mr. Sitesh Narayan Singh, Mr. Joydeep Acharya, Mr. P. Mukherjee and Mr. Prabhat Kumar Rai, Advocates.

For Respondents:

Mr. Gaurab Banerjee, Senior Advocate with Mr. Indranil Ghosh and Mr. Kunal Singh, Advocates for Respondent No. 1

Mr. Jagjit Singh, Senior Advocate with Mr. Vipul Ganda, Mr. Ayandeb Mitra and Mr. Rahul Bhardwaj, Advocates for Ministry of Railways.

Mr. T. Harish Kumar, Advocate for Kolkatta Port Trust

Mr. S. Ghosh and Mr. Raza Abbas, Advocate

With

Company Appeal (AT) (Ins) No. 179 of 2018

(Arising out of Order dated 6th March, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata in CA. No. 170/KB/2018 in C.P. (IB) No. 244/KB/2017)

IN THE MATTER OF:

Burn Standard Ex-Officers Welfare Association

....Appellant

Vs.

Burn Standard Company Ltd. & Anr.

....Respondents

For Appellant:

Mr. Sitesh Narayan Singh and Mr. Aryak Dutt, Advocates.

For Respondents:

Mr. Gaurab Banerjee, Senior Advocate with Mr. Indranil Ghosh and Mr. Kunal Singh, Advocates for Respondent No. 1

Mr. Jagjit Singh, Senior Advocate with Mr. Vipul Ganda, Mr. Ayandeb Mitra and Mr. Rahul Bhardwaj, Advocate for Ministry of Railways

Mr. T. Harish Kumar, Advocate for Kolkata Port Trust

Mr. S. Ghosh and Mr. Raza Abbas, Advocate

With

Company Appeal (AT) (Ins) No. 208 of 2018

(Arising out of Order dated 6th March, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata in CA. No. 170/KB/2018 in C.P. (IB) No. 244/KB/2017)

IN THE MATTER OF:

Burn Standard Ex-Employee Welfare Association

....Appellant

Vs.

Burn Standard Company Ltd.

....Respondent

For Appellant:

Mr. Sitesh Narayan Singh, Advocate.

Mr. M. Qayum-ud-din, Ms. Sabreen Bashir and Ms. Sabyaschi Chatterjee, Advocates.

For Respondents:

Mr. Gaurab Banerjee, Senior Advocate with Mr. Indronil Ghosh and Mr. Kunal Singh, Advocates for Respondent No. 1.

Mr. Jagjit Singh, Senior Advocate with Mr. Vipul Ganda, Mr. Ayandeb Mitra and Mr. Rahul Bhardwaj, Advocate for Ministry of Railways.

Mr. T. Harish Kumar, Advocate for Kolkatta Port Trust

Mr. S. Ghosh and Mr. Raza Abbas, Advocate

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

This appears to be one of the malicious initiation of proceedings initiated by the 'Corporate Debtor' under Section 10 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short) with malicious intent for any purpose other than for the resolution of insolvency, or liquidation.

2. However, the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata, while approving the so-called 'Resolution Plan' which is against the object of the 'I&B Code', observed:

"The Resolution Plan in the case in hand is a unique plan which provides no revival of the corporate debtor but to close it by discharging its debts to all stakeholders inclusive of its staff and workmen."

3. The Appellants have challenged the common impugned order dated 6th March, 2018 passed by the Adjudicating Authority whereby the 'Resolution Plan' submitted by the 'Corporate Applicant'- 'Burn Standard Company Limited'- has been approved which provides for no revival of the 'Corporate Debtor' but closure and retrenchment of all the workmen.

4. Two appeals have been preferred by 'Industrial Services'- ('Operational Creditor') alleging non-consideration of its claim by the 'Resolution Professional'.

5. It is pleaded that the claim of the Appellant- 'Industrial Services' was considered by the 'Resolution Professional' which was initially accepted but subsequently given reference to a suit preferred by the 'Corporate Debtor' against the Appellant, the claim of the Appellant have not been entertained.

6. The grievance of the Appellant- 'Industrial Services' is that the suits were filed by the 'Corporate Debtor' during the period of 'Moratorium' against the 'Industrial Services' and, therefore, the same cannot be taken into consideration to deny the admissible dues payable to the 'Industrial Services'- ('Operational Creditor').

7. Further, according to the Appellant- 'Industrial Services', the 'Corporate Applicant' being ineligible in terms of Section 29A, the 'Resolution Plan' submitted by the 'Corporate Applicant' was not maintainable.

8. The other two appeals have been preferred by 'Burn Standard Ex-Employee Welfare Association'. While challenging the same very impugned order dated 6th March, 2018, it is submitted that the dues of employees including the revision of pay etc., which was determined pursuant to the Hon'ble Calcutta High Court's order has not been

reflected in the 'Resolution Plan' while, on the other hand, the order of retrenchment has been issued.

9. The grievance of the 'Burn Standard Ex-Employee Welfare Association' is that the 'Corporate Debtor' cannot close the Company nor can deny the dues of Ex-Officers and Ex-Employees of the 'Corporate Debtor'.

10. The case of the 'Corporate Applicant' and the Indian Railway Board is that the 'Corporate Debtor being an undertaking of the Indian Railway it cannot be held to be ineligible in terms of Section 29A. It is accepted that Section 29A was introduced in the Code w.e.f. 23rd November, 2017 and the 'Resolution Plan' submitted subsequently on 24th February, 2018, but plea has been taken that the 'Corporate Debtor' is not an undischarged insolvent nor wilful defaulter. Its account has not been declared as Non-Performing Assets. Thus, the exclusion set out in Section 29A (b) & (c) is not applicable to the 'Corporate Debtor'.

11. The brief history and background of the 'Burn Standard Company Limited'- ('Corporate Debtor'/ 'Corporate Applicant') can be seen from their 'Resolution Plan', as extracted below:

"2.0 Brief History:

2.0.1 Burn & Company came into existence in 1781 at Howrah, West Bengal. The Company with rich legacy had the

experience of building many important structures in Calcutta like St. Andrews Church in 1818, the 152m high Ochterlony Monument (now known as Shahid Minar) in 1828. Subsequently its Construction business was taken over by Sir Rajen Mukherjee's Company Martin & Co (founded in 1890), which has to its credit of building waterworks at Palta, Ahmedabad, Lucknow and Benares. But its major contribution are architectural -marvels like Esplanade Mansion near Raj Bhavan/Great Eastern Hotel, Standard Chartered Building, South Eastern Railway Headquarters in Garden Reach, Tipu Sultan. Mosque, the Victoria Memorial etc. BurnC6 had a major role for construction of Kolkata prestige such St. Xaviers' College, Oriental Seminary, Belur Math, the headquarters of the Ramakrishna Mission, Darbhanga House - the Calcutta residence of Darbhanga Raj, Assembly House, Grand Hotel Arcade, United Bank Building, New Secretariat Building, Club House at Eden Gardens.

2.0.2 The ever-increasing traffic movement between the twin cities of Calcutta (now Kolkata) & Howrah demanded a wider and stronger bridge in replacement of the then existing pontoon bridge. The authorities accordingly decided on building a cantilever bridge across the river Hooghly. The job called greater expertise. So the three engineering giants - Braithwaite, Bum &

Jessop - came together with their vast experiences and floated a new company and constructed today's iconic Howrah Bridge. The Martin Burn company even Operated a line from Dum Baguiati till it closed down in 1955.

2.0.3 Burnpur works, earlier known Indian Standard Wagon Ltd., Burnpur, was founded in 1918. Since its early days the company developed excellence in manufacturing Railway wagons, forged components, Springs etc.

2.0.4 During the early days, Burn & Company undertook building and contracting work. Subsequently in the 1950s of the last century, it ventured into the field of Railway Engineering, altogether new development in the country's economy. With the rapid expansion of Railways, Bum & Company started manufacturing Railway rolling stock at Howrah to cater to the increasing demand.

2.0.5 In 1976 following nationalization of 'Burn & Co.' and 'Indian Standard Wagon Company', 'Burn Standard Co. Ltd.' was incorporated in Dec' 1976.

2.0.6 'Burn Standard Company Ltd.', is one of the oldest and a leading wagon builders in India. The wagon building activities are carried out at two Engineering Units at Howrah and Burnpur situated in West Bengal, India. Several thousand

wagons covering all major designs have been manufactured and supplied to Indian Railways and other Industrial Customers.

2.0.7 The Company has two Engineering units at Howrah & Burnpur and one Foundry unit at the Howrah Works. It also has a Project Division based in their Head Office at Alipore, Kolkata.

2.0.8 Apart from supplies to Indian Railways, the Company also manufactures and supplies special purpose wagons to various core sectors like power, steel plants in India.

2.0.9 The Company has supplied special purpose wagons fitted with Air Fluidising System for bulk movement and quick unloading of Alumina powder to M/s. National Aluminium Co. (NALCO). It has also supplied sophisticated Bottom Discharge Wagons to National Thermal Power Corporation (NTPC), New Delhi for their various plants in the country.

2.1 **Background**

2.1.1 Due to consistent losses and erosion of net worth, Company was referred to BIFR in November 1994 & officially declared sick in January 1995. Rehabilitation package approved by BIFR in April 1999 was declared failed in 2001. Efforts to bring in change in management did not fructify. Then a revival plan was approved by CCEA in August 2010. After revival of package,

Company came under the administrative control of Ministry of Railways (MOR) from Ministry of Heavy Industry & Public Enterprises on 15.09.2010.

2.1.2 The reasons for declaring the scheme as failed were as follows :

- i) Production in the following years did not increase as projected because of dearth of orders of wagons.
- ii) It was observed that the viability of the scheme could be achieved only by further restructuring of GOI liabilities and support from other agencies.

2.1.3 Accordingly, BIFR the Company to submit modified rehabilitation scheme based on the commitments of GOI for additional relief & concessions. Subsequently GOI explored the possibility of divestiture of shares of the company. BIFR directed 1131, the operating agency to advertise for change of management but there was no response in this matter. Subsequently BIFR appointed United Bank of India as the operating agency (OA) on 14.11.2006. The company submitted a modified draft rehabilitation scheme which was discussed in a special joint meeting held on 30.05.2007.

2.1.4 Subsequently the Case was reviewed by BIFR on 28.11.2007 and after deliberations it was directed to submit

another draft rehabilitation scheme to OA After incorporation of various views and decisions, McDermott International Inc prepared Modified Draft Rehabilitation Scheme (MDRS) which the company submitted to OA on 19.02.08. There were further developments and another Consultant, LB. Jha & Co, Chartered Accountant & Management Consultants, was engaged to revise the MDRS on the basis of developments in the meantime. Subsequently GOI mooted a proposal for transfer of Engineering units at Howrah and Burnpur to Ministry of Railways (MOR) and the Refractory Unit at Salem to Steel Authority of India Ltd (SAIL).

2.1.5 Refractory unit at Salem to SAIL and the company, excluding refractory unit at Salem was transferred to MOR on 15.09.2010. However, SAIL did not accept the transfer on that date and ultimately the Deed of Transfer was signed on 16.12.2011.”

12. As noticed, ‘Burn Standard Company Limited’- (‘Corporate Debtor’/ ‘Corporate Applicant’) approached the ‘Board of Industrial and Financial Reconstruction’ (“BIFR”) in the year 1994 by filing a reference under Section 3(1)(0) of the ‘Sick Industrial Companies (Special Provisions) Act, 1985’ and got an order declaring the ‘Corporate Applicant’ as a Sick Company vide ‘BIFR’s’ order dated 20th January, 1995. While so, upon enactment of the ‘I&B Code’ w.e.f. 1st December, 2016, the ‘Corporate Applicant’ filed application under Section 10 of the

'I&B Code' for initiation of the 'Corporate Insolvency Resolution Process'.

13. Vide order dated 31st May, 2017, the application filed by the 'Corporate Applicant' was admitted and one 'Resolution Professional' was appointed, which constituted a 'Committee of Creditors'.

14. There is nothing on the record that any 'Information Memorandum' was published or 'Resolution Plan' was called for in terms of Section 25 (2)(h) of the 'I&B Code'. No details have been shown to suggest that the 'Operational Creditors' or their representative were called for in the meeting of the 'Committee of Creditors' in terms of Section 24 of the 'I&B Code'.

15. The 'Corporate Applicant' submitted the plan in question as noticed which does not provide revival of the 'Corporate Debtor' but to close it by discharging its debts to all stakeholders including its staff and workmen.

16. The 'Committee of Creditors' was happy as they were getting full payment, therefore, they approved the plan without going through the question as to whether the plan in question is in conformity with Section 30(2) (e) of the 'I&B Code' and achieves the Objects of the 'I&B Code'.

17. The plan filed by the 'Corporate Applicant' shows that the Ministry of Railways (Railway Board), Government of India made provision to pay total outstanding dues of Rs. 417.10 Crores which means that the 'Corporate Debtor' on receipt of amount is in a position to pay the total dues of all the creditors, as appears from proposed strategy of 'Resolution Plan', which is as follows:



CHAPTER – III
RESOLUTION PLAN

3.0 Main strategy proposed

- 3.01. Ministry of Railways (Railway Board), Government of India, has communicated vide letter no. No.: 2018/M (W)/300/2 dated 12th Feb 2018 (Copy enclosed as **annexure – A**) that the revival plan submitted by the company, vide their letter no. CMD: MOR:136 dated 29/09/2016, was examined by the competent authority. The company has been incurring losses in spite of efforts and financial assistance provided to the company. Further, the performance of the company over the years has shown decline and there seems no prospect of revival/turn around in future as BSCL is engaged in mainly wagon manufacturing for which there is an already developed competitive market.
- 3.02. In view of the above, Ministry of Railways (Railway Board) has recommended closure of M/s Burn Standard Company Limited.
- 3.03. Meanwhile a provision of Rs 417.10 Crore has been made in Budget 2018 – 19 for settlement of liabilities of BSCL so that the closure of the company can be effected. Break up of fund provision is as under:

S.N	Item	Fund provided (in Rs Crore)
1	Statutory and contingent liabilities (including payment to operational creditors)	Rs. 172.55 Crore
2	Bank loan (Financial creditor dues)	Rs. 85.47 Crore
3	VRS package and other dues of employees	Rs. 112.37 Crore
4	Other Govt dues (ED)	Rs. 46.71 Crore

- 3.04. Fund will be made available in April'18 and onward after Budget is passed by the Parliament. Provision of fund in Railway budget for the financial year 2018 -19 is enclosed as **Annexure – B**.

CERTIFIED AS TRUE COPY

M. Asad Alam
(MD, ASAD ALAM)
Chairman & Managing Director
Burn Standard Co. Ltd.
(A Govt. of India Undertaking)
Ministry of Railways

08/02/18



3.1 Resolution Plan

3.1.1 Sources of finance for the Resolution Plan

For financing the Resolution Plan, Fund of Rs. 417.10 Crore will be provided by Ministry of Railways (Railway Board), Government of India through Railway Budget for which provision has already been made in the Railway Budget for the financial year 2018 -19 (Copy enclosed as Annexure -B).

3.1.2 Company proposes the following Plan of action:

- Financial creditor due (Bank loan) will be paid on receipt of the fund from the GOI in the 1st Qtr of 2018 -19.
- After submission of claim by trade creditors, the same has been verified and admitted claims (party wise) have been uploaded in the company website. Payment of all such admitted dues will be paid in the 1st Qtr of 2018 -19 on receipt of fund from the Government of India (GOI).
- All employee dues for gratuity and leave encashment as well as pending salary of one month will be paid in the 1st Qtr of 2018 -19 on receipt of fund from the Government of India (GOI).
- Arrear payment for all concerned officers against 1992 pay revision which has been admitted will be paid in the 2nd Qtr of 2018 -19 on receipt of fund from the Government of India (GOI).
- All Government (dues of Government of India as well as dues of Government of West Bengal) will be paid within the 2nd Qtr of 2018 -19 on receipt of fund from the Government of India (GOI).
- Voluntary Retirement Scheme (VRS) is to be introduced. All the 500 employees on roll of the company will be offered VRS and final settlement will be done within 1st Qtr of 2018 - 19 and effort will be made to pay all dues within in the 1st Qtr of 2018 -19 on receipt of fund from the Government of India (GOI). Balance payment if any will be paid in the 2nd Qtr of 2018 -19

CERTIFIED AS TRUE COPY

Md. Asad Alam
 (MD. ASAD ALAM)
 Chairman & Managing Director
 Burn Standard Co. Ltd.
 (A Govt. of India Undertaking)
 Ministry of Railways
 22 B, Park Street Road

copy
 16/10/18



3.1.3 Schedule of payment for the Resolution Plan:

Particulars	Amt. (Rs./Cr)		Payment schedule
	As provided by Management	As considered in the plan	
➤ Cost of Insolvency Resolution Process (approved by COC)	0.17	0.00	Fully paid
➤ Pending dues to the employees:			
✓ Gratuity & leave encashment & pending salary for one month	13.50	13.50	Effort will be made to pay early after fund is received from GOI and to be paid within 1 st Qtr of 2018 -19
✓ Arrear of 1992 pay revision	19.34	19.34	-do-
➤ Bank loan (Cash credit account and bank loan)	65.47	65.47	Effort will be made to pay early after fund is received from GOI and to be paid within 1 st Qtr of 2018 -19
➤ Outstanding to Suppliers	36.90	36.90	Effort will be made to pay early after fund is received from GOI and to be paid within 1 st Qtr of 2018 -19
➤ Other Govt. Dues (GOI)	44.22	44.22	Rs. 21.20 Crore will be paid within 1 st Qtr of 2018 -19 and balance of Rs.23.02 Cr will be paid within 2 nd Qtr of 2018 -19.
➤ Other Govt dues (Govt of WB)	38.09	38.09	Rs. 4.10 Crore will be paid within 1 st Qtr of 2018 -19 and the balance amount will be paid within 2 nd Qtr of 2018 -19
➤ Other dues (Municipal Taxes)	3.50	3.50	Due amount will be paid within 2 nd Qtr of 2018 -19
➤ Other dues (KoPT license fees)	7.00	7.00	Due amount will be paid within 2 nd Qtr of 2018 -19.
➤ Misc. other dues	10.00	10.00	Due amount will be paid within 2 nd Qtr of 2018 -19.
➤ Other Govt of India due (ED).	66.71	66.71	Due amount will be paid within 2 nd Qtr of 2018 -19.
➤ VRS of all employees	112.37	112.37	Effort will be made to complete payment within 1 st Qtr. and balance due amount will be paid within 2 nd Qtr of 2018 -19.
TOTAL	417.27	417.10	

3.1.4 Management of the affair of the Corporate debtor after approval of the plan:

The Management of the affair of the Corporate Debtor will be managed by its Board of Directors.

3.1.5 Supervision and Implementation:

Supervision and implementation of the resolution plan will be done by the Board of Directors of the Company as "going concern".

AS TRUE COPY



CHAPTER – IV

CONCLUSION

As observed by the Ministry of Railways (Railway Board), Government of India that the company has been incurring losses in spite of efforts and financial assistance provided to the company. Further, the performance of the company over the years has shown decline and there seems no prospect of revival/turn around in future as BSCL is engaged in mainly wagon manufacturing for which there is an already developed competitive market.

Ministry of Railways (Railway Board) has recommended closure of the company. Fund provision of Rs. 417.10 Crore already made in the Railway Budget for the financial year 2018 -19 ((copy enclosed as **Annexure-B**) for settlement of liabilities of company so that the closure of the company can be effected.

In view of the above, Resolution Plan has been prepared for ensuring settlement of dues of the creditors on receipt of fund as proposed in payment Schedule of the Resolution Plan. Supervision & implementation of the resolution plan will be done by the Board of Directors of the Company as "going concern".

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Md. Asad Alam
(MD. ASAD ALAM)
Chairman & Managing Director
Burn Standard Co. Ltd.
(A Govt. of India Undertaking)
Ministry of Railways
22-B, Raja Santosh Road
Kolkata - 700027

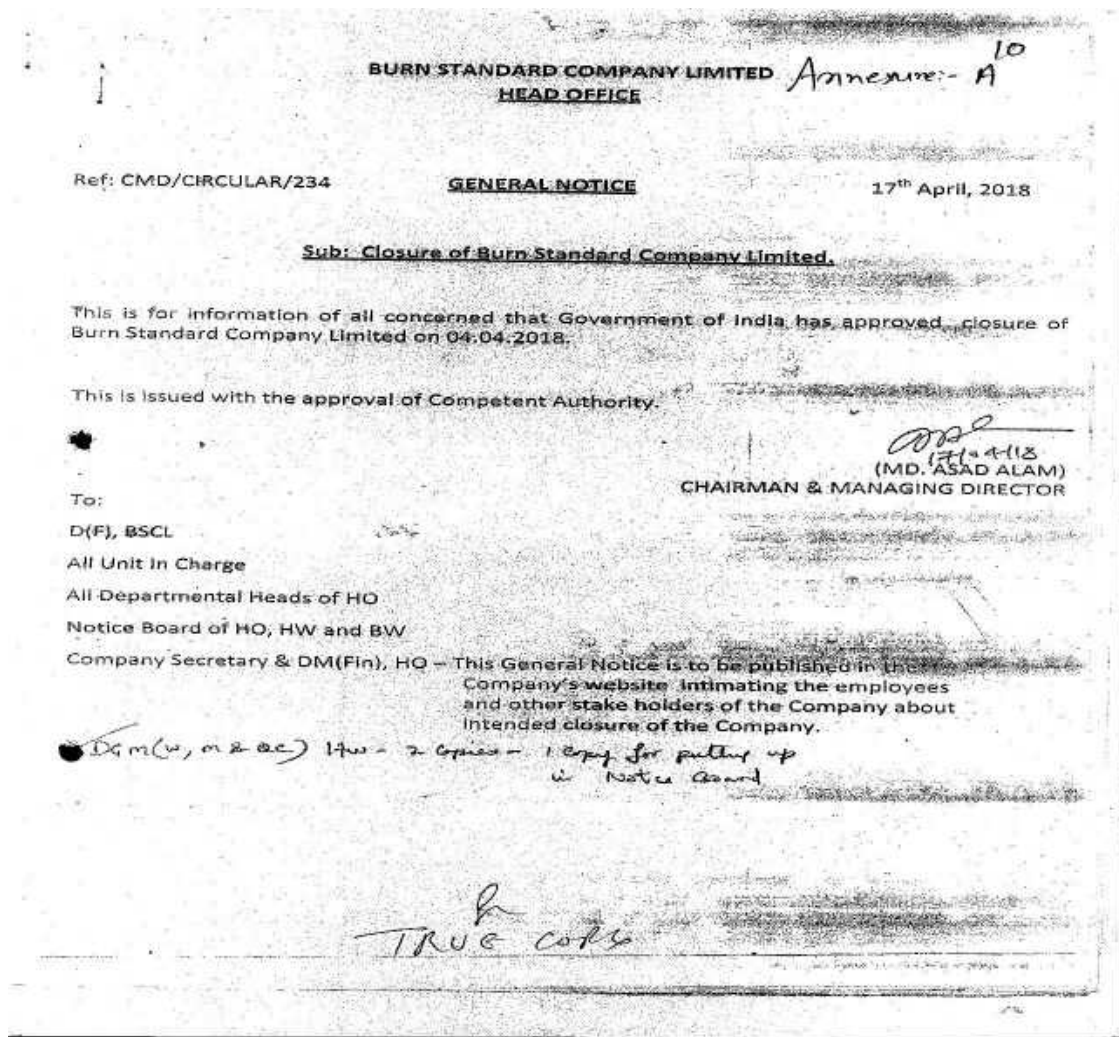
Md. Asad Alam
16/02/18
MD ASAD ALAM

Chairman and Managing Director
Burn Standard Co Ltd

(MD. ASAD ALAM)
Chairman & Managing Director
Burn Standard Co. Ltd.
(A Govt. of India Undertaking)
Ministry of Railways
22-B, Raja Santosh Road
Kolkata - 700027

18. Though during the 'Resolution Process', and thereafter, the 'Resolution Applicant' is required to ensure that the company remains as a going concern but contrary to the provisions of the 'I&B Code', closure of the 'Corporate Debtor' has been proposed and approved by the Adjudicating Authority.

19. That immediately after approval of the 'Resolution Plan', on 17th April, 2018, the 'Corporate Debtor' informed closure of 'Burn Standard Company Limited', which is as follows:



20. Simultaneously, order of retrenchment was issued on 25th September, 2018, as extracted below:

BURN STANDARD COMPANY LIMITED
(A Govt. of India Undertaking)
22-B, Raja Santosh Road,
Kolkata - 700 027

OFFICE ORDER

No. CMD: C.C. 574

DT- 25.09.2018

In view of the closure of company approved by Government of India on 4th Apr 2018, total 57 employees (Workmen, Staff & Officers) of the company on roll who have not opted for Voluntary Retirement/Voluntary Separation and become wholly redundant or surplus to the requirement of the company are hereby retrenched from the service of the company with effect from 25th Sep 2018 (AN) and thereby the names of those 57 employees are struck off from the roll of the company immediately thereafter 25th Sep 2018 (AN):

A) WORKMEN

S.No.	TKT.No	Name	Designation
1	1512	Susanta Roy	Grinder
2	2203	Parneshwar Mondal	Crane Driver
3	2301	Sisir Kr. Hazra	Slinger
4	2484	Ekram Khurshid	Slinger/Crane Driver
5	3445	Debashis Nandy	B/Smith
6	3504	Inamul Haque	Helper
7	3543	Satyanarayan Singh Yadav	H./ Man
8	4627	Krishna Ch. Karan	Filter
9	5448	Gautam Dey	Filter
10	7001	Lakshman Yadav	Erec.
11	7008	Bala Krishna Sundara	Crane Driver
12	7009	Panchanan Bag	Welder
13	7038	Uday Narayan Gond	Tool Issuer
14	7057	Md. Sawood Khan	Co2 Weld/Auto Opt.
15	7064	Farooque Ahmad	Co2 Weld.
16	7065	Jhantu Kumar Bayen	Fitter
17	7075	Shiva Sankar Mondal	Co2 Weld
18	7428	Ash. Mohammad	Mech.

DDP
25/09/18

TRUGCO

S.No	TKT.No	Name	Designation
19	7765	Jahangir Mistry	Mech.
20	7769	Shyamal Kumar Sarkar	Mech.
21	7771	Sujoy Kumar Das	Slinger
22	7772	Tapan Hazra	Mech.
23	7774	Matloob Ahamed	Mech.
24	7777	Sandip Sarkar	Mkr./ Fitter
25	8172	Sk.Md. Ayub	Fitter
26	8242	Sudama Yadav	H/Man/Ch.
27	8703	Sanjoy De	Lt./Man
28	8715	Braja Gopal Naskar	Lt./Man
29	8763	Prosanta Kumar Jana	Welder
30	9396	Kanhaya Choudhury	Engg./ Attdn.
31	9807	Tarun Karmakar	Elect.
32	10022	Dhruba Kumar Roy	Carpenter/ P.M.
33	10911	Rajdeo Ram	Fitter
34	10952	Subodh Panja	Tool Issuer
35	10966	Jamil Ahamed Ansari	Elect.
36	14158	Gopal Chandra Das	Mkr. / Fitter
37	14181	Pradip Kumar Sarkar	Exc./ Fitter
38	15475	Himadri S. Jana	Fitter
39	15478	Gopal Byaborta	Siling man
40	15479	Basu Ch. Dey	Fitter

B) STAFF

S.No	Card No.	Name	Designation
1	1206	Amal Bhattacharjee	Clerk
2	1505	Faiyaz Ahamed	Tech. Staff
3	1507	Susanta Roy	Tech. Staff

copy
25/10/18

TRG codes

-13

S.No.	Card No	Name	Designation
4	1509	Chittaranjan Maity	Tech. Staff
5	1511	Swapan Kr.Manna	Tech. Staff
6	1513	Asit Kumar Naskar	Tech. Staff
7	1514	Tarak Koley	Tech. Staff
8	1540	Bikash Das	Tech. Staff
9	1565	Tapan Kumar Paul	Tech. Staff
10	1567	Prasun Kumar Bose	Tech. Staff

C) SUB-STAFF

S.No.	Belt/Card No	Name	Designation
1	27	Kamalesh Prasad Saroj	Security Constable
2	33	Nakul Kumar Maharana	Security Constable
3	292	Ranjit Nath	Bearer
4	559	Bidya Debi Mali	Bearer

D) OFFICERS

S.No.	P.No	Name	Designation
1	270	Aditya Mahato	JM(Engineer)
2	272	Sama Das	JM(Engineer)
3	283	Shrabani Pal	JM(F & A)

2018
28/05/18
(MD ASAD ALAM)
CHAIRMAN & MANAGING DIRECTOR

Copy to

Unit In-charge/HW CM(F&A)/HO, PI Section, Notice Board.

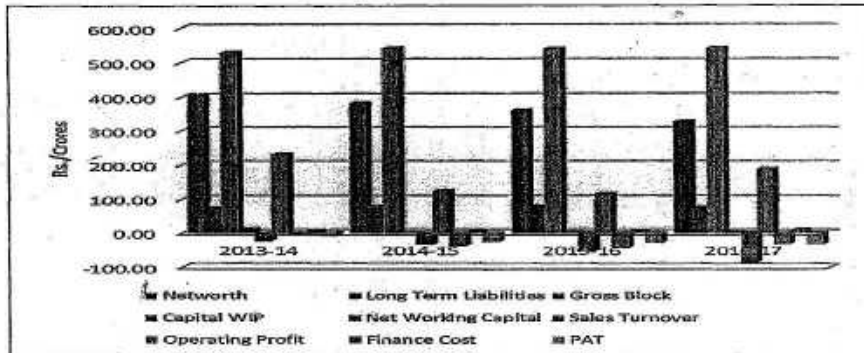
21. The Indian Railway was impleaded as party Respondent. When we asked to reply as to how Indian Railway can guide the 'Corporate Applicant' to file 'Resolution Plan' with proposal to close the 'Corporate Debtor', no satisfactory reply has been shown by the Indian Railway.

22. The past performance of the 'Corporate Debtor' has been shown in the 'Resolution Plan' which is as follows:



2.2 Past Performance of the Company

	2013-14	2014-15	2015-16	2016-17
Net worth	404.79	382.13	360.75	327.24
Long Term Liabilities	74.40	78.18	78.99	75.13
Gross Block	529.21	541.45	541.26	541.50
Capital WIP	10.57	0.19	1.76	1.83
Net Working Capital	-22.83	-32.57	-53.70	-86.23
Sales Turnover	230.52	124.56	116.50	187.99
Operating Profit	-5.83	-37.39	-43.33	-31.40
Finance Cost	4.73	5.43	5.76	10.62
PAT	-8.28	-24.54	-28.38	-33.51



Year wise production from 2011-12 to 2017 – 18 (upto January 2018) of the different products is tabulated below: -

ITEMS	11-12	12-13	13-14	14-15	15-16	16-17	17-18 (Up to Jan 2018)
Wagons (Nos)	1208	1482	1483	707	318	545	780
Bogie (Nos)	1750	2182	2557	1768	1568	1912	1204
Coupler (Nos)	91	92	420	1141	1945	2494	1898
Draft Gear (Nos)	0	0	0	252	485	903	894
Molten Material (MT)	3032	5049	6232	4887	4965	5970	3842
Wagon Repair (Nos)	-	-	-	-	2305	4028	4117
Fabrication of Barges (MT)	-	-	-	-	400	400	100

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As per A/c

Q. 114

23. It shows that the 'Corporate Debtor' was a going concern and produced 780 Wagons; 1204 Bogie; 1898 Coupler; 994 Draft Gear; 3842 Molten Material (MT); 4117 Wagon Repair and 100 Fabrication of Barges (MT) during the period 1st April, 2017 to January, 2018.

24. The key financial indicators have been shown in the 'Resolution Plan' which are as follows:



Key Financial Indicators

	14-15	15-16	16-17	17-18 (Projected)
Gross Sales	124.56	116.50	187.99	250.10
Net Sales	117.02	115.50	183.15	250.10
Cost of Sales/Net Sales	126.87%	127.99%	107.28%	96.97%
Operating Cost/Net Sales	129.76%	136.21%	116.71%	106.62%
Operating Profit	-37.39	-43.33	-31.40	-16.55
Profit before Tax	-24.66	-28.38	-33.51	-15.28
Net Profit	-24.54	-28.38	-33.51	-15.28
Depreciation	3.94	2.52	2.39	1.72
Cash Accruals	-20.60	-25.85	-31.12	-13.56
Interest	5.43	5.78	10.62	8.04
PBDIT	-15.29	-20.08	-20.51	-5.52
PBDIT / Sales	-13.07%	-17.38%	-11.20%	-2.21%
PBT / Net Sales	-21.08%	-24.57%	-18.30%	-6.11%
Net Profit / Net Sales	-20.97%	-24.57%	-18.30%	-6.11%
Net Profit / Gross Sales	-19.70%	-24.36%	-17.83%	-6.11%
Total Outside Liabilities	189.38	215.91	270.05	270.44
Paid-up Capital	177.63	184.63	184.63	184.63
Net Worth	382.13	360.75	327.24	311.96
TNW	382.13	360.75	327.24	311.96
TOL / TNW	0.50	0.60	0.83	0.87
Net Profit / Net Worth	-6.42%	-7.87%	-10.24%	-4.90%
TTL / TNW	0.20	0.22	0.23	0.24
Net DSCR	N.A.	N.A.	N.A.	N.A.
Current Assets	78.63	83.21	106.69	94.57
Current Liabilities	111.20	136.92	194.92	195.31
NWC	-32.57	-53.70	-86.23	-100.74
Current Ratio	0.71	0.61	0.56	0.48

CERTIFIED AS TRUE COPY

Md. Asad Alam
(MD. ASAD ALAM)
Chairman & Managing Director
Burn Standard Co. Ltd.
(A Govt. of India Undertaking)
Ministry of Railways
22-B, Raja Santosh Road

Handwritten signature and date: 16/04/18

25. Therefore, the question arises for consideration in these appeals are:

- (i) Whether the 'Resolution Plan' is against the statement of objects and reasons of the 'I&B Code'? and;
- (ii) Whether application under Section 10 was filed by the 'Corporate Applicant' with malicious intent for any purpose other than for the resolution of insolvency, or liquidation of the 'Corporate Debtor', which on the facts and circumstances of the case as detailed above, we have hold that it was filed with intent for a purpose (i.e. closure of the 'Corporate Debtor') which is other than for the resolution of insolvency and Section 65 of the 'I&B Code'.

26. In "**Swiss Ribbons Pvt. Ltd. & Anr. vs. Union of India & Ors.— 2019 SCC OnLine SC 73**", the Hon'ble Supreme Court noticed the Preamble of the Code and held that the primary focus of the legislation is to ensure revival and continuation of the 'Corporate Debtor' by protecting the 'Corporate Debtor' from its own management and from a corporate's death by liquidation, as quoted below:

"19. The Preamble of the Code states as follows:

An Act to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership

firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto.”

20. As is discernible, the Preamble gives an insight into what is sought to be achieved by the Code. The Code is first and foremost, a Code for reorganization and insolvency resolution of corporate debtors. Unless such reorganization is effected in a time-bound manner, the value 38 maximization of value of the assets of such persons so that they are efficiently run as going concerns is another very important objective of the Code. This, in turn, will promote entrepreneurship as the persons in management of the corporate debtor are removed and replaced by entrepreneurs. When, therefore, a resolution plan takes off and the corporate debtor is brought back into the economic mainstream, it is able

to repay its debts, which, in turn, enhances the viability of credit in the hands of banks and financial institutions. Above all, ultimately, the interests of all stakeholders are looked after as the corporate debtor itself becomes a beneficiary of the resolution scheme – workers are paid, the creditors in the long run will be repaid in full, and shareholders/investors are able to maximize their investment. Timely resolution of a corporate debtor who is in the red, by an effective legal framework, would go a long way to support the development of credit markets. Since more investment can be made with funds that have come back into the economy, business then eases up, which leads, overall, to higher economic growth and development of the Indian economy. What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are 39 not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern. [See ArcelorMittal (supra) at paragraph 83, footnote 3].

21. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters / those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests. The moratorium imposed by Section 14 is in the interest of the corporate debtor itself, thereby preserving the assets of the corporate debtor during the resolution process. The timelines within which the resolution process is to take place again protects the corporate debtor's assets from further dilution, and also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through 40 its entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends.”

27. In “**Y. Shivram Prasad Vs. S. Dhanapal & Ors. – Company Appeal (AT) (Insolvency) No. 224 of 2018 etc.**” this Appellate Tribunal by its judgment dated 27th February, 2019 while referring the decision of the Hon’ble Supreme Court including the provisions of the ‘I&B Code’ held that the ‘Resolution Professional’ and the ‘Liquidator’ are to ensure that the company remains a going concern. Steps should be taken for resolution at different stages including the liquidation stage to keep the Company a going concern in the interest of the employees. On failure, at the last stage the death of the ‘Corporate Debtor’ be made by liquidation.

28. The Hon’ble Supreme Court in “**Swiss Ribbons Pvt. Ltd. & Anr. vs. Union of India & Ors**” (*Supra*) specifically held that the closure of the Company is against the Preamble of the Code, which reads as follows:

21. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the corporate debtor have, therefore, been bifurcated and separated from that of

its promoters / those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests. The moratorium imposed by Section 14 is in the interest of the corporate debtor itself, thereby preserving the assets of the corporate debtor during the resolution process. The timelines within which the resolution process is to take place again protects the corporate debtor's assets from further dilution, and also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through 40 its entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends."

29. In view of the aforesaid fact, as the 'Resolution Plan' is against the object of the Code and the application under Section 10 was filed with intent of closure of the 'Corporate Debtor' for a purpose other than for the resolution of insolvency, or liquidation, we hold that the part of the 'Resolution Plan' which relates to closure of the 'Corporate Debtor'/'Corporate Applicant' being against the scope and intent of the 'I&B Code' is in violation of Section 30(2)(e) of the 'I&B Code'.

30. With a view to give a quietus to the matter, we set aside the part of the approved 'Resolution Plan' in so far as it relates to closure of the

‘Corporate Debtor’/ ‘Corporate Applicant’ but uphold the rest part of the ‘Resolution Plan’, as approved.

31. In view of such findings, the consequential orders, including the order of closure of the Company and the order of retrenchment dated 6th March, 2018 are also set aside.

32. The ‘Corporate Debtor’ is directed to ensure that the company remains a going concern and employees are not retrenched.

33. So far as claim of the employees and their associations are concerned, with regard to their salary and other service benefits as the issue cannot be decided by this Appellate Tribunal, they are given liberty to raise all such issues before the ‘Corporate Debtor’ who will decide the same.

34. The case is remitted to the Adjudicating Authority, Kolkata Bench, to make necessary correction in the ‘Resolution Plan’ by asking the ‘Corporate Debtor’ to delete the portion of the plan which proposes closure of the Company. In case, the ‘Corporate Applicant’ refuses to do so, then the plan approved be treated to have been set aside by this Appellate Tribunal and the Adjudicating Authority will proceed afresh asking the ‘Resolution Professional’ to call for ‘Expression of Interest’ and the ‘Resolution Plans’ and proceed in accordance with law.

All the appeals are allowed with aforesaid observations and directions. No costs.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

NEW DELHI
13th May, 2019
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