



**IN THE NATIONAL COMPANY LAW TRIBUNAL  
NEW DELHI (COURT III)**

**I.A-3593/2021**

**In**

**Company Petition No. (IB)-2130(ND) 2019**

Under Section 60(5) of the Insolvency and Bankruptcy Code, 2016

**IN THE MATTER OF:-**

M/s. Dynacon Projects Pvt. Ltd

..... Applicant/Operational Creditor

**Versus**

M/s. Today Homes & Infrastructure Pvt. Ltd

..... Respondent/Corporate Debtor

**AND**

**IN THE MATTER OF:-**

RKG Asset Management LLP

.....Applicant

**Pronounced on 01.08.2023**

**CORAM:-**

**SHRI ATUL CHATURVEDI  
MEMBER (TECHNICAL)**

**SHRI BACHU VENKAT BALARAM DAS  
MEMBER (JUDICIAL)**

**PRESENT:-**

For the Applicant : Adv. Malak Bhatt in IA-3593/2021.

For the Respondent :

**ORDER**

**Per Shri Bachu Venkat Balaram Das, Member (J)**

- 1.** The present application has been filed by RKG Asset Management LLP, who is an Investment Manager of RKG Trust, a category II Alternative Investment Fund registered with SEBI, seeking directions to the Resolution Professional who has issued Request For Resolution Plan (RFRP) Document dated 29.12.2020. The Applicant's contention is that the said RFRP document contains onerous and discriminatory clauses that have skewed the resolution process of the Corporate Debtor in favour of some Resolution Applicants and thereby vitiated the Resolution Process.
- 2.** It is submitted that the Request For Resolution Plan document provided for extremely onerous and discriminatory terms and conditions in respect of deposit for Earnest Money Deposit and Performance Security Guarantee



amounts. The relevant clauses pertaining to deposit of Earnest Money Deposit and Performance Security in the Request For Resolution Plan dated 29.12.2020 are reproduced below.

**“3.13.1 Submission of Earnest Money Deposit**

A. *For Registered Association/Society or consortium of registered association/societies of unit-holders/allottees of one or more of the Projects of the Corporate Debtor: Rs.10,00,000.*

B. *For consortium of registered association/society of unit holders/allottees of one or more projects of the CD with any third-party entities, EMD to be deposited by the consortium shall be as per clause C below as multiplied the ratio of share of such third-party entity. The EMD shall be in the form and manner as prescribed in the clause C below.*

C. *For all other Resolution Applicants: All other Resolution Applicants shall deposit Rs.5,00,00,000/- as an Earnest Money Deposit (EMD), either in the form of Bank Guarantee (BG) with any Scheduled Commercial Bank (the validity period of Bank Guarantee for earnest money should not be less than one year.”*

**“3.13.3 Submission of Performance Security**

*The Successful Resolution Applicant shall furnish Performance Security within seven days of issuance of letter of intent (LoI) by the Resolution Professional. The amount of such Security shall be:*

A. *For registered Association/Society or consortium of registered association/societies of unit-holders/allottees of one or more of the projects of the Corporate Debtor: Rs.10,00,000/-.*

B. *For consortium of Registered Association/society of unit-holders/allottees of one or more of the projects of the Corporate Debtor with third party entities. Performance Security shall be as per clause C below as multiplied by the ratio of shareholding of such third-party entity in the consortium.*

C. *For all others: 15,00,00,000/- or 10% of the bid amount, whichever is higher.*

3. The Applicant is aggrieved with the Clause 3.13.1. to 3.13.3, in the Request For Resolution Plan document which provides for hugely discriminatory amounts for Registered Associations/Societies and other class of Resolution Applicants. While the Earnest Money Deposit was set at Rs.10,00,000/- for the Registered Associations, the same was set at



Rs.5,00,00,000/- for all other Resolution Applicants. Similarly, while the Performance Security was set at Rs.10,00,000/- for Registered Associations, the same was set at Rs.15,00,00,000/- for all other Resolution Applicants. It is also submitted that artificial distinction created by the Resolution Professional between homebuyers/Registered Associations and other Resolution Applicants distorts the level playing field between the Resolution Applicants.

4. The Applicant submitted an initial Compulsory Deposit of INR 10,00,000/- on 09.01.2021. However, it was communicated to the Applicant that it will have to deposit an EMD of Rs. 5 crores to be eligible for being considered as a Resolution Professional in line with the RFRP document. The Applicant duly requested the Resolution Professional of the Corporate Debtor to reduce the EMD and PBG to the limit set for Registered Associations but to no avail.
5. The Applicant submitted that the provisions contained in Section 25(2)(h) of the IBC, 2016 read with Regulation 36A of the CIRP Regulations, 2016 permits different categories based on the type of Resolution Plans, but there cannot be any distinction based on the nature of the Resolution Applicants. Therefore, the distinction created by Clauses 3.13.1 to 3.13.3 of the Request For Resolution Plan (RFRP) Document dated 29.12.2020 is liable to be set aside.
6. The Resolution Professional at the outset raised a preliminary and technical objection that the Applicant has not impleaded either the Resolution Professional or the Committee of Creditor as parties to the present application even though the Applicant has sought directions to be issued to the Resolution Professional or the Committee of Creditors. The present reply is being filed in compliance with the directions of this Tribunal dated 30.11.2021. The said order is extracted below: -

*“IA-3593/2021: -*

*None appears for the Applicant. Therefore, the IA is dismissed as withdrawn.*

*Later on, subsequently, Ld. Counsel for the Applicant appears and submits that he was disconnected for which he could not present at the time of hearing of the application. He further submits that let the application be treated as objections to the Resolution Plan. Ld. Counsel for the RP appears and accept*



*the notice of this application. He is directed to file reply within two weeks. Rejoinder, if any, within a week thereafter. List on 20.01.2022.”*

- 7.** It is also submitted that the present application has become infructuous in view of the fact that the Resolution Plan submitted by a Consortium of Canary Greens Buyers Welfare Association, Callidora Flat Owners Welfare Association and Royal Elegancia Apartment Buyers Association (in short “Consortium RA”) has been approved by the CoC through e-voting concluded on 16.08.2021 with 96.93% votes and the application seeking approval of the Resolution Plan is pending before this Tribunal.
- 8.** It is submitted that the eligibility criteria and RFRP have been duly approved by the CoC in terms of Section 25(2)(h) of the Code read with Regulation 36A & 36B of the IBBI (Insolvency Resolution for Corporate Persons) Regulations, 2016 wherein the CoC has fixed certain criteria having regard to the complexity and scale of operations of the business of the Corporate Debtor. The CoC has further considered the categories of Prospective Resolution Applicants (hereinafter “PRAs”) who may express their interest in the Corporate Debtor and has fixed such criteria. Only after due approval of the CoC on the above aspects, eligible PRAs were invited for submitting Expression of Interest for Resolution Plans of the Corporate Debtor. The said eligibility criteria was placed in third meeting of CoC held on 15.02.2020 and was duly approved by the CoC.
- 9.** Thereafter, the RP published Form G pursuant to which 17 EoIs from PRAs were received. The RFRP including the amount of EMD and Performance Security was placed in the 7<sup>th</sup> meeting of the CoC held on 21.12.2020 and was approved by the CoC through e-voting by majority of 86.35% votes.
- 10.** The RP received Resolution Plans from the following Resolution Applicants, namely:-

  - a. ATS Infrastructure LTD – RA 1
  - b. Consortium of 3 Associations – RA 2
  - c. Krish Infrastructure Pvt Ltd – RA 3
  - d. I & E Advertising Pvt Ltd – RA 4
- 11.** It is further submitted that out of the four PRAs, only RA2 and RA4 submitted the mandatory EMD amount along with their Resolution Plans and the RA1 and RA3 did not submit their EMD. The Plan submitted by all the PRAs was placed before the CoC in the 10<sup>th</sup> meeting held on 27.03.2021 for



considering the agenda and relaxation of submission of EMD. However, the CoC rejected the said proposal.

- 12.** We have heard the submissions made by the Learned Counsel for both the parties and perused the application.
- 13.** We have perused Clause 3.13.1 of RFRP document which deals with submission of Earnest Money Deposit and Clause 3.13.3 of RFRP document which deals with submission of Performance Security. The RFRP document dealing with the said Clauses was placed in the 7<sup>th</sup> meeting of CoC held on 21.12.2020 and was duly approved by the CoC through e-voting by majority of 86.35% and the same was shared with the Applicant on 29.12.2020. The Applicant was required to deposit the amount towards the Earnest Money and Performance Security as per the said Clauses.
- 14.** It is noted that the Applicant never raised any objections either with CoC or Resolution Professional regarding the issues raised in the present application at the time of issue of RFRP. The Applicant also never submitted any Resolution Plan in the CIRP of the Corporate Debtor. It is further seen that the Applicant raised objections with regard to the clauses of the RFRP for the first time on 11.08.2021, after 7 months of the receipt of the RFRP document by RP and after the Resolution Plans received by other Resolution Applicants were already put to vote by the RP in the 12<sup>th</sup> CoC meeting held on 10.08.2021. It is therefore submitted that such belated action on the part of Applicant cannot be considered at this stage. The Resolution Plan has already been approved by the CoC through e-voting concluded on 16.08.2021 with 96.63% votes and an application seeking approval of the Resolution Plan is pending adjudication before the Adjudicating Authority. The RP has also submitted that the Applicant never participated in the Resolution Plan process and therefore is not only a rank outsider but also not qualified to be a Resolution Applicant.
- 15.** It is well-settled proposition of law that the Adjudicating Authority cannot question the commercial wisdom of the CoC. It is up to the Committee of Creditors to decide certain aspects of the CIR Process, subject to the IB Code and Regulations. This includes the eligibility of Resolution Applicants. The IBC does not mandate specific uniform criteria for the invitation of Resolution Plans, and the Committee of Creditors is allowed to set its criteria on a case-by-case basis.



- 16.** Having considered the facts and circumstances of the case and keeping in view of the fact that the RFRP document was placed before the CoC and the CoC in its 7<sup>th</sup> meeting held on 21.12.2020 has approved the RFRP & Evaluation Matrix by majority of 86.35%. Further, The Applicant never raised any objection to the same and deposited a sum of Rs. 10 Lakhs but did not submit the Resolution Plans. We are of the view that the instant application bereft of any merits and the same is **dismissed**.

Sd/-

**(ATUL CHATURVEDI)**  
**MEMBER (TECHNICAL)**

Sd/-

**(BACHU VENKAT BALARAM DAS)**  
**MEMBER (JUDICIAL)**