

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT-II**

**IA No.1857 of 2023
IN
CP (IB) No.1790/MB/C-II/2017**

Under Section 60(5) of the Insolvency and Bankruptcy
Code, 2016 r/w Rule 11 of the NCLT Rules, 2016

State Bank of India

Having its address at Stressed Assets Resolution
Group, 2nd Floor, World Trade Centre,
Cuffe Parade, Mumbai-400005

...Applicant

V/s

Taguda Pte. Limited

having its address at 1, Magazine Road,
#04-11, Central Mall, Singapore-059567

...Respondent

In the matter of

State Bank of India

... Petitioner

Versus

Ushdev International Limited

...Corporate Debtor

Order Delivered on :08.12.2023

Coram:

Hon'ble Member (Technical)

Mr. Anil Raj Chellan

Hon'ble Member (Judicial)

Mr. Kuldip Kumar Kareer

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Appearances:

For the Applicant : Sr. Counsel Mr. Gaurav Joshi a/w Adv. Harit
Lakhani.
For the Respondent : Senior Advocate Zal Andhyarujina i/b
Advocate Ekta Pandey.

ORDER

Per: Anil Raj Chellan, Member (Technical)

1. The present application has been filed by State Bank of India, member of the monitoring agency of Ushdev International Limited (hereinafter referred to as the 'Corporate Debtor') and the member of the erstwhile Committee of Creditor ('CoC') under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 ('the Code') read with Rule 11 of the National Company Law Tribunal Rules seeking the following reliefs:
 - (a) Order and direct the Respondent/Resolution Applicant (RA) to forthwith implement the revised Resolution Plan ('Revised Resolution Plan');
 - (b) Order and direct the Respondent/RA to pay an interest at 10% per annum on the total resolution amount in terms of the Revised Resolution Plan;
 - (c) In the event the Respondent /RA fails to implement the revised Resolution Plan (Resolution Plan), pass the necessary orders and directions with respect to the Corporate Insolvency Resolution Process (CIRP) of the Corporate Debtor.

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- (d) Pending final hearing and disposal of the present application, order and direct the Respondent/ RA to forthwith deposit the total resolution amount in terms of the Revised Resolution Plan in an escrow account with the Applicant bank;
 - (e) Any other order and directions as the Hon'ble Tribunal may deem fit.
2. Before we come to the respective submissions made in the IA filed by the Applicant and the submissions made during the hearing, a brief background leading to the filing of the IA needs to be noted.
- (i) The Corporate Debtor was admitted to CIRP by an order of this Tribunal dated 17.05.2018 and Mr. Subodh Kumar Agarwal was appointed as Interim Resolution Professional(IRP) who was subsequently confirmed as Resolution Professional (RP). Pursuant to the Request for Resolution Plan (RFRP) dated 20.08.2018 issued by the RP, three Resolution Applicants had expressed interest in submitting the Resolution Plan for the Corporate Debtor. The Respondent herein (Taguda Pte. Limited) being the only eligible Resolution Applicant had submitted its Resolution Plan but it could not muster the required percent of votes in favour of the Resolution Plan.
 - (ii) On 07.02.2019, the RP filed an application bearing no. 626/2019 before the Tribunal under Section 33 of the Code, seeking initiation of the liquidation proceedings against the Corporate Debtor. The Respondent objected to the above

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application and sought approval of the Resolution Plan submitted by the Respondent, despite the fact that the CoC had rejected the Resolution Plan. The Tribunal dismissed the application for liquidation vide order dated 07.11.2019 and approved the Resolution Plan proposed by the Respondent.

- (iii) The Applicant preferred an appeal against the order approving the Resolution Plan before the Hon'ble NCLAT which stayed the implementation of the Resolution Plan. During the pendency of the appeal, the Respondent filed an application, wherein it indicated that it was desirous of improving the offer under the Resolution Plan which could be considered by the CoC.
- (iv) As per the order dated 08.04.2021 of the Hon'ble NCLAT, the CoC considered the Revised Resolution Plan of the Respondent as updated/revised on 22.06.2021 (Revised Resolution Plan). The Revised Resolution Plan was approved by 91.06% of the CoC members and approved by the Tribunal vide its order dated 03.02.2022. On an appeal filed by ICICI Bank, another Financial Creditor of the Corporate Debtor, some portion of the order dated 03.02.2022 was modified/deleted on 11.03.2022. Thus the order dated 03.02.2022 as modified by the Hon'ble NCLAT on 11.03.2022 becomes the final Resolution Plan approved in the case of the Corporate Debtor.

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- (v) Pursuant to the approval of the Revised Resolution Plan by the NCLT and NCLAT, the Implementation and Monitoring Agency (IMA) was constituted with the members of Financial Creditors, Resolution Applicant and the RP. The administrative control of the Corporate Debtor was handed over from the erstwhile RP to IMA w.e.f. 15.03.2022.
- (vi) As per the Revised Resolution Plan, permission of Securities Exchange Board of India (SEBI) and Reserve Bank of India (RBI) are required for the implementation of the Revised Resolution Plan. The said approval from RBI is still pending and hence, the Revised Resolution Plan is yet to be implemented. The inordinate delay in implementation of the Revised Resolution Plan led to the filing of the present application.

Submissions of the Applicant

3. As per the Revised Resolution Plan, the RA proposed a committed payment of Rs. 227 Crores of which Rs. 225.14 Crores will be paid towards the settlement of the Financial Creditors, Rs. 1 Crore is for the CIRP cost, Rs.36 Lakh is for the employee and workmen dues, Rs.25 Lakh is for the Operational Creditors and Rs. 25 Lakh is for meeting the statutory liabilities. The RA should make an upfront cash payment of Rs. 48.14 Crores to the Financial Creditors on the closing date which shall be adjusted against the bid bond furnished as per the RFRP and the balance amount is to be brought in a staggered manner (Rs.50 Crores on 30th day from closing date, Rs.50 Crore on 60th day

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from closing date, Rs. 50 Crore on 90th day from closing date and Rs. 27 Crores on 20th day from closing day). The RA also proposed that the unpaid portion of the admitted financial debt be converted into non-convertible, non-cumulative, redeemable preference shares with zero dividend at their fair value. The value of these preference shares is dependent on the profits that may be made by the Corporate Debtor within three years of the closing date.

4. The structure of the Revised Resolution Plan envisages (a) assignment of financial debt of the Corporate Debtor to the identified affiliate of the RA and (b) issuance of non-convertible preference shares for the unpaid portion of the admitted claim of the financial debt. Since a portion of the financial debt was held by an offshore entity/financial creditor, and the preference shares are to be issued to the foreign financial creditors, the same would require the regulatory approval of RBI.
5. The Learned Senior Counsel appearing for the Applicant submitted that the Revised Resolution Plan was structured by the RA and it was conscious of the fact that such structure requires approval of RBI. Though the Revised Resolution Plan was approved on 03.02.2022, the same has not been implemented on the pretext that the regulatory/RBI approval is a prerequisite for its implementation.
6. The Learned Senior Counsel further submitted that in terms of Section 31(4) of the Code, the RA is required to mandatorily obtain the necessary approvals required under any law within one year from

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the date of approval of the Resolution Plan. Therefore, it is the obligation of the RA to ensure that the necessary approvals, including RBI approval, required for implementing the Revised Resolution Plan are received within the statutory timeline. It has been more than one and half years since the approval of the Resolution Plan and the value of the Corporate Debtor is deteriorating with the delay of each day. The delay in implementation of the Resolution Plan is thereby causing interest loss of Rs. 36.70 Lakh per week for the financial creditor.

7. The Learned Senior Counsel further submitted that the RFRP mandates RA to obtain all approvals required for implementation of the Revised Resolution Plan and absolves the RP and CoC from such responsibility.
8. Based on the above, the Applicant sought granting of the reliefs prayed for in the application.

Submissions of the Respondent

9. The Learned Counsel for the Respondent submitted that the Applicant is one of the creditors and has no locus standi to file this application or seek the relief claimed therein.
10. As per the Revised Resolution Plan, the obligation to implement the Resolution Plan or make payments under the Resolution Plan arises only on the closing date. The closing date as defined in the Revised Resolution Plan means the date falling on the seventh business day after the date on which all the conditions precedent as set out in the

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Revised Resolution Plan have occurred. The conditions precedent includes granting of exemption by RBI from the pricing guidelines prescribed under the Foreign Exchange Management Act, 1999 in relation to the equity investment going to be made by the RA in the Corporate Debtor. It is further contended that no timeline has been specified in the Revised Resolution Plan and the approval is beyond the control of the RA, though it is making constant efforts to obtain the same. Considering the above facts, the Tribunal vide its order dated 14.10.2022 in IA.No.887 of 2022 extended the time period after the closing date for obtaining all approvals.

11. The Learned Counsel for the Respondent further submitted that the implementation of the Revised Resolution Plan without RBI approval would trigger a Material Adverse Effect under clause 9.1 (iv) of the Revised Resolution Plan and the RA has been pursuing the RBI approval since the day of the approval of the Revised Resolution Plan.

Analysis and Decision

12. We have heard the learned senior counsels appearing for the parties and also perused the records.
13. The present application is seeking, inter alia, forthwith implementation of the Revised Resolution Plan and is filed by one of the members of the Monitoring Agency and erstwhile member of the CoC. The Respondent, therefore, raised a preliminary objection that the Applicant has no locus standi to file this Application. With respect

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to the said objection, it can be seen that as per Section 60(5) of the Code, notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of, inter alia, any question of priorities or any question of law or facts, arising out of in relation to the insolvency resolution or liquidation proceedings of the Corporate Debtor or corporate person under this code. A plain reading of Section 60 makes it clear that the legislative intention is to confer upon the Tribunal all powers to entertain or dispose of any question of law or facts arising out of or in relation to the insolvency resolution of the Corporate Debtor. We cannot consider that, once the Resolution Plan is approved by the CoC and the Tribunal, the lenders/ Financial Creditors who were members of the CoC lose all rights to approach the Tribunal for implementation of the very same Resolution Plan which has been voted upon and approved by it. Additionally, the lender who has beneficial interest under the Revised Resolution Plan cannot be left remediless. It is also pertinent to observe here that the Tribunal while approving the Revised Resolution Plan in its order dated 03.02.2022, granted liberty to move any application if required in connection with implementation of the Revised Resolution Plan (para 8 of the operative portion of the order). In view of the above, we have no hesitation to hold that the application filed by the Applicant under Section 60(5) is maintainable.

14. The premise of the present application is that the structure of the Revised Resolution Plan has been formulated by the Respondent in a

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manner to suit its requirements, thereby inviting the necessity of obtaining the approval of RBI and, hence, the Respondent cannot take an excuse for the delay in implementation of the Revised Resolution Plan on the ground that the RBI approval is still awaited. The Applicant further contended that the responsibility/ obligation to obtain the approvals for the due implementation vests with the Respondent. The Respondent countered that the requirement to obtain the approval of RBI is a prerequisite and is in the terms of the Resolution Plan. In the circumstances, the definition of 'closing date' as contained in the Revised Resolution Plan derives importance. The conditions precedent incorporated in the definition of closing date make it clear that the implementation of the Revised Resolution Plan is dependent upon the regulatory approvals from RBI. While there can be no dispute about the requirement of obtaining approval of RBI, most of the argument was on the question of whose obligation it is to obtain the approval from RBI. The Applicant relied upon para 3.1 of the RFRP which reads as under:

‘The Successful Resolution Applicant is expected to obtain all the relevant statutory and regulatory approvals required under applicable law for the proposed transaction upon acceptance of the Resolution Plan by Adjudicating Authority, including but not limited to, approvals required from the Competition Commission of India, under the Competition Act, 2002/ any other regulatory approvals, within a period of one year from the date of approval of the Resolution Plan by the Adjudicating Authority or within such period as provided for under applicable law, whichever is later. It is

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hereby clarified that neither the Resolution Professional nor the CoC shall be responsible in any manner whatsoever for obtaining these approvals.'

On the other hand, the learned senior counsel for the Respondent argued that it is also the responsibility of the Applicant/CoC/MA. It is observed that the Respondent, while submitting the Resolution Plan, categorically stated that the Resolution Plan is submitted in accordance with the RFRP which is also in conformity with Section 31(4) of the Code. In terms of Section 31(4) of the Code, the Resolution Applicant shall, pursuant to the Resolution Plan approval, obtain the necessary approval required under any law for the time being in force within a period of one year from the date of approval of the Resolution Plan by the Adjudicating Authority or within such period as provided for in such law, whichever is later. In the above background, the argument that the provisions of Section 31(4) of the Code is only directory in nature, cannot be accepted. It would not be out of place to mention here that the object of stipulating a time period under the Code for obtaining all necessary approvals is to ensure timely implementation of Resolution Plan. Undue delay in implementation of the Resolution Plan would discompose the commercial considerations including time value of money of the stakeholders and thereby defeat the very object of maximization of value contemplated under the Code. If the implementation of the Resolution plan is delayed for whatever reason, in addition to value erosion of the Corporate Debtors, it precludes the creditors to explore alternate opportunities. The

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implementation of the Resolution Plan cannot, therefore, be kept in limbo for an indefinite period for any reason whatsoever including but not limited to want of approval from RBI.

15. It is relevant to observe from the e-mail from RBI dated 10.08.2023 addressed to the authorized dealer of the Corporate Debtor that the Indian parent company (Ushdev International Limited) may be in contravention of Reg. 6(3) (c) (b) of Notification No. FEMA 120/RB-2004 dated July 7, 2004, amended from time to time and in view of the above, the AD Bank was advised to approach Overseas Investment Division, FED, Co with compliance details of the issued guarantee against Foreign Exchange Management (Transfer or issue of Any foreign security) (Amendment) Regulation, 2004. Based on the examination of OID, if the transaction is found to be in contravention of FEMA Regulation, it would require regularization by the Reserve Bank, only after which the AD Bank may approach ECBD for approval regarding issuance of non-convertible, redeemable preference shares. Thus, it appears that the delay in obtaining approval of RBI is not solely on account of the structure/payment mechanism comprised in the Resolution Plan, but also on matter relating to the guarantee issued by the India parent company of the RA. In the circumstances, we are of the considered view that the obligation remains with the RA to obtain, within a reasonable time, the necessary approval from RBI.
16. In prayer (a) of the application, the Applicant has sought direction to the Respondent to forthwith implement the Revised Resolution Plan. It is observed that the Revised Resolution Plan was approved on

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03.02.2022 and its implementation is still pending. The delay of this nature is neither permitted under Section 31(4) of the Code nor envisaged under the RFRP or Revised Resolution Plan. In this connection, the learned counsel placed reliance on the decision of Hon'ble NCLAT in Arcelormittal India Pvt. Ltd v. Abhijit Guhathakurta and Others; 2019 SCC OnLine NCLAT 920 to contend that Section 31(4) is directory in nature, but the said decision would not be applicable in the present case as CoC, in its commercial wisdom stipulated a term, in conformity with Section 31(4) of the Code, as regards obtaining of necessary approvals in RFRP and CoC has never agreed to relax/extend the same. Further, the delay has an adverse impact on the commercial decision of the financial creditors who voted in favour of the Revised Resolution Plan.

17. After considering the facts and sequence of events in the present case, we deem it appropriate to direct the Respondent/the Resolution Applicant to implement the Revised Resolution Plan in a time frame not later than two months from the date of this order. It is further made clear that the obligation to comply with all prerequisites for due implementation of the Revised Resolution Plan rests with the Respondent, and the Monitoring Agency, where the Applicant is a member, shall extend full cooperation for obtaining approvals, as may be required for implementation of the Revised Resolution Plan. Accordingly, prayer (a) is allowed.
18. As regards the relief prayed for in the application to direct Resolution Applicant to pay an interest at 10% p.a. of the resolution amount and also to issue direction to deposit the total resolution amount in an

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escrow account with the Applicant Bank, it is observed that the Revised Resolution Plan envisaged staggered payments from the closing date and it is categorically stated in the Resolution Plan that the Resolution Applicant is not liable to make any payment over and above the total resolution amount and that the Corporate Debtor shall neither be bound by or be liable to pay an amount as part of any settlement terms relating to an issue that has arisen prior to the closing date nor the Resolution Applicant shall be liable to make any such payments on behalf of the Corporate Debtor. In the circumstances, we do not consider it appropriate to order immediate deposit of total resolution amount or payment of interest on the resolution amount. Therefore, prayers at (b) to (d) cannot be allowed.

19. In view of the above discussion, **the prayer (a) in IA.No.1857 of 2023 is allowed to the aforesaid extent and the other prayers are declined.**

Sd/-

**ANIL RAJ CHELLAN
MEMBER (TECHNICAL)**

Sd/-

**KULDIP KUMAR KAREER
MEMBER (JUDICIAL)**