

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH  
KOLKATA**

I.A. (IB) No. 1459 (KB)2023  
And  
I.A. (IB) No. 1444 (KB) 2023  
in  
Company Petition (IB)/128(KB)2020

*An Application under Section 60 of the Insolvency and Bankruptcy Act, 2016*

**IN THE MATTER OF:**

**HDFC BANK LTD.**

**...Financial Creditor**

**Versus**

**TAMRA DHATU UDYOG PRIVATE LIMITED**

**...Corporate Debtor**

(CIN: U27209BR2006PTC109251)

**And**

**I.A. (IB) No. 1459 (KB)2023**

**IN THE MATTER OF:**

**Committee of Creditor of**

Tamra Dhatu Udyog Private Limited  
represented through Bank of Baroda

**...Applicant**

**Versus**

**Ms. Mamta Binani,**

Resolution Professional of  
Tamra Dhatu Udyog Private Limited

**... Respondent No. 1**

**And**

**I.A. (IB) No. 1444 (KB) 2023**

**IN THE MATTER OF:**

**M/s Kedarnath Mining Private Limited**

**... Applicant**

**Verses**

**Ms. Mamta Binani,**

Resolution Professional of  
Tamra Dhatu Udyog Private Limited

**... Respondent No. 1**

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH  
KOLKATA**

I.A. (IB) No. 1459 (KB)2023  
And  
I.A. (IB) No. 1444 (KB) 2023  
in  
Company Petition (IB)/128(KB)2020

**And**

**Committee of Creditor of**

Tamra Dhatu Udyog Private Limited  
represented through Bank of Baroda

**...Respondent No. 2**

**Date of Hearing: August 24, 2023**

**Date of Pronouncement of the Order: August 25, 2023**

**CORAM:**

**SMT. BIDISHA BANERJEE, HON'BLE MEMBER (JUDICIAL)**

**SHRI D. ARVIND, HON'BLE MEMBER (TECHNICAL)**

**Ld. Counsels appeared Physically/ through Video Conferencing:**

Mr. Santosh Kumar Ray, Adv.	] For Indian Bank
Ms. Rituparna Sanyal, Adv.	]
Ms. Shweta Dubey, Adv.	] For the Applicant in IA(I.B.C)/1459(KB)2023
Ms. Kanishka Prasad, Adv.	]
Ms. Ishita Srivastava Adv.	]
Ms. Shweta Dubey, Adv.	] For the R-2 in IA(I.B.C)/1444(KB)2023
Ms. Kanishka Prasad, Adv.	]
Ms. Ishita Srivastava Adv.	]
Mr. Abhrajit Mitra, Sr. Adv.	] For Tarun Kumar Singh
Mr. Kalpit Khandelwal, Adv.	]
Mr. Sujoy Datta, Adv.	]
Mr. Vibhor Kapoor, Adv.	]
Ms. Sejal Sethi, Adv.	]
Ms. Shusna Satra, Adv.	]
Ms. Mamta Binani	] Resolution Professional In Person
Mr. Shaunak Mitra, Adv.	] For Kedarnath Mining Pvt. Ltd.

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH  
KOLKATA**

I.A. (IB) No. 1459 (KB)2023  
And  
I.A. (IB) No. 1444 (KB) 2023  
in  
Company Petition (IB)/128(KB)2020

Ms. Aparajita Rao, Adv. ]  
Mr. S. Tebriwal, Adv. ]  
Ms. Ankana Basu, Adv. ]

Mr. Ratnano Banerji, Sr. Adv. ] For Damodar Das Singhee  
Ms. Urmila Chakraborty, Adv. ]  
Mr. Raghunath Ghose, Adv. ]

**ORDER**

**Per: Bidisha Banerjee, Member (Judicial)**

1. This court is congregated through hybrid mode.
2. This is an application (I.A. (I.B.C)/1459(KB)2023) filed by the COC of the corporate Debtor (Tamra Dhatu Udyog Private Limited) to seek the following relief:
  - a) *To clarify the order dated 03/08/2023 to the extent that all the resolution applicants may be given a last opportunity to revise their resolution plan so that equal and fair opportunity may be given to them to submit a revised resolution plan.*
  - b) *Direction to the RP to cancel the ongoing voting on the resolution plans and to conduct fresh voting on the resolution plans post submission of the revised resolution plans.*

We have heard the Sr. Counsels/ Ld. Counsels of all the sides.

3. The prayer has been vehemently opposed by the PRA H1 bidder on the following ground:
  - i. After the said PRA has been declared as H1 Bidder and the same is made public, no further opportunity can be given to other PRAs to enhance their plan;

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH  
KOLKATA**

I.A. (IB) No. 1459 (KB)2023  
And  
I.A. (IB) No. 1444 (KB) 2023  
in  
Company Petition (IB)/128(KB)2020

- ii.** Regulation 39(1A) (a) of the IBBI (CIRP) Regulation 2016 bars the applicant as he was allowed by the RP twice to enhance his plan.
- 4.** The Prayer is also opposed by the PRA Mr. Tarun Singh who has availed of the opportunity granted by the RP twice, once on January 11, 2023 and for a record time after an email dated May 04, 2023 was issued by the RP. The move of COC resisted on identical ground as H1 Bidder.
  - 5.** The move is supported by the PRA M/s Kedar Nath Mining Private Limited.
  - 6.** Initially, the Lead Bank (Union Bank of India), one of the members of COC had some reservations but later on it agreed to the proposal.
  - 7.** The issue that cropped up for determination is whether the COC can be permitted to go ahead with its decision to allow all the PRAs to enhance their plan with an object of maximization of value of assets.
  - 8.** It is evident from the records placed that vide email dated May 04, 2023. The RP has permitted the PRAs to enhance their Plans financially and whether such enhancement would be violation of Regulation 39(1A) (a) of the IBBI (CIRP) Regulation, 2016 is questioned to be considered.
  - 9.** At hearing Ld. Counsel Ms. Sweta Dubey for the Applicant in this Application would vociferously contend that the COC is empowered to seek enhancement as its commercial wisdom is no to be questioned in any forum.
  - 10.** This Adjudicating Authority therefore proceeds to consider whether single modification to a Resolution Plan is practicable to get an optimum value.
  - 11.** Regulation 39(1A) (a) of IBBI (CIRP) Regulation, 2016 reads as:  
*“The resolution professional may, if envisaged in the request for resolution plan- (a) allow modification of the resolution plan received under sub-regulation (1), but not more than once;”*
  - 12.** The Preamble of the Insolvency and bankruptcy Code, 2016 envisages that:

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH  
KOLKATA**

I.A. (IB) No. 1459 (KB)2023  
And  
I.A. (IB) No. 1444 (KB) 2023  
in  
Company Petition (IB)/128(KB)2020

*“An Act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in **a time bound manner for maximisation 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.”*

13. A brief outlay of the Judicial Precedents would be thus:

i. In ***Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta*** reported in **MANU/SC/1577/2019**, the Hon’ble Apex Court has emphasised on giving paramount importance to the commercial wisdom of COC and has opined that only a limited judicial review is available for reopening issues decided by COC. The Hon’ble Apex Court held that:

*“There is no doubt whatsoever that the ultimate discretion of what to pay and how much to pay each class or subclass of creditors is with the Committee of Creditors, but, the decision of such Committee must reflect the fact that it has taken into account maximising the value of the assets of the corporate debtor and the fact that it has adequately balanced the interests of all stakeholders including operational creditors. This being the case, judicial review of the Adjudicating Authority that the resolution plan as approved by the Committee of Creditors has met the requirements referred to in Section 30(2) would include judicial review that is mentioned in Section 30(2)(e), as the provisions of the Code are also provisions of law for the time being in force. Thus, **while the Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of***

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH  
KOLKATA**

I.A. (IB) No. 1459 (KB)2023  
And  
I.A. (IB) No. 1444 (KB) 2023  
in  
Company Petition (IB)/128(KB)2020

**Creditors, the limited judicial review available is to see that the Committee of Creditors has taken into account the fact that the corporate debtor needs to keep going as a going concern during the insolvency resolution process;** that it needs to maximise the value of its assets; and that the interests of all stakeholders including operational creditors has been taken care of. If the Adjudicating Authority finds, on a given set of facts, that the aforesaid parameters have not been kept in view, it may send a resolution plan back to the Committee of Creditors to re-submit such plan after satisfying the aforesaid parameters. The reasons given by the Committee of Creditors while approving a resolution plan may thus be looked at by the Adjudicating Authority only from this point of view, and once it is satisfied that the Committee of Creditors has paid attention to these key features, it must then pass the resolution plan, other things being equal.”

It is therefore imperative that COC would negotiate a resolution plan in a manner so as to get better commercial terms towards value maximization and negotiate with all PRAs. Whereas, if the COC is allowed only one opportunity to negotiate, it may avail of the other option to restart the CIRP by re-issuing RFRP which will cause a re-running of the entire CIR Process which is not only time consuming but also put the Corporate Debtor at a risk of being liquidated.

- ii. Recently in ***Aditya Kumar Tibrewal vs. Om Prakash Pandey*** reported in **MANU/NL/0226/2022** the Hon’ble NCLAT has declared that the time lines prescribed under regulation 35A is directory and not mandatory, as actions taken by RP after the prescribed timelines if annulled will cause injustice to the Corporate Debtor and such treatment may be fraught with

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH  
KOLKATA**

I.A. (IB) No. 1459 (KB)2023  
And  
I.A. (IB) No. 1444 (KB) 2023  
in  
Company Petition (IB)/128(KB)2020

serious consequences to all the stakeholders. The Hon'ble NCLAT held that:

**“The expression "shall" in regulation 35A (1), 35A(2) and 35A(3) is not mandatory and requirement of "forming an opinion" under Section 35A(1) "make a determination" under Section 35A(2) and "shall apply to the Adjudicating Authority for appropriate relief on or before 135th day of the Insolvency Commencement Date" are only directory.”**

- iii. In *Bank of Maharashtra v. Videocon Industries Ltd.* reported in MANU/NL/0010/2022 Hon'ble NCLAT has held that CoC, the custodian of the public trust, it is entrusted with the duty of determining feasibility, viability and commercial aspects of a plan, while treating all the stakeholders fairly, in the process. The Hon'ble NCLAT held that:

**“The CoC, majority of which are public sector banks and financial institutions dealing with public money is acting as the custodian of public trust and discharging statutory role. The CoC is vested with a duty of trust and care. The CoC power is not without responsibility and even Hon'ble Apex Court has made the CoCs decision on commercial matters as non-justiciable. Keeping in view these factors in mind, the public sector banks and financial institutions etc., constituting approx. 95% of the CoC (out of 95.09% voted in favour) have resolved to request this Tribunal to remand the matter back to the CoC for its reconsideration through an affidavit. We agree that the CoC, if it has power to approve the plan, has also power to reconsider and review its own decisions on Resolution Plan. Power to approve, no doubt, carries with it power to reconsider. As stated supra, the 'Board of Directors' of the Companies who approves**

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH  
KOLKATA**

I.A. (IB) No. 1459 (KB)2023  
And  
I.A. (IB) No. 1444 (KB) 2023  
in  
Company Petition (IB)/128(KB)2020

*the proposal also at a later date review and even annulled the approvals in the course of the implementations, if observed and pointed out by the implementers, the difficulty and its economic or otherwise impact. What to say of the 'Board of Directors' in corporate management even the shareholders sometimes review its own approvals, based on Board Of Directors recommendations and if required, passes by appropriate majority under the relevant Act, the same approval is revoked.”*

- iv. In *Ebix Singapore Private Limited v. Committee of Creditors of Educomp Solutions Limited* reported in MANU/SC/0628/2021 the Hon’ble Supreme Court observes that

*“144. The analysis of the statutory framework governing the CIRP and periodic reports of the Insolvency Law Committee indicates that it is a creditor-driven process. The aim of the process, in preferential order, is to: first, enable resolution of the debt by maintaining the corporate debtor as a going concern, in order to preserve the business and employment of the personnel; second, maximize the value of the assets of the corporate debtor and enable a higher pay-back to its creditors than under liquidation; and third, enable a smoother and faster transition to liquidation in the event that a time bound CIRP fails, in a bid to avert further deterioration of value.”*

*“153. Regulation 38(3) mandates that a Resolution Plan be feasible, viable and implementable with specific timelines. A Resolution Plan whose implementation can be withdrawn at the behest of the successful Resolution Applicant, is inherently unviable, since open-ended clauses on modifications/withdrawal would mean that the Plan could fail at an undefined stage, be uncertain, including after*

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH  
KOLKATA**

I.A. (IB) No. 1459 (KB)2023  
And  
I.A. (IB) No. 1444 (KB) 2023  
in  
Company Petition (IB)/128(KB)2020

*approval by the Adjudicating Authority. It is inconsistent to postulate, on the one hand, that no withdrawal or modification is permitted after the approval by the Adjudicating Authority Under Section 31, irrespective of the terms of the Resolution Plan; and on the other hand, to argue that the terms of the Resolution Plan relating to withdrawal or modification must be respected, in spite of the CoC's approval, but prior to the approval by the Adjudicating Authority. The former position follows from the intent, object and purpose of the IBC and from Section 31, and the latter is disavowed by the IBC's structure and objective. The IBC does not envisage a dichotomy in the binding character of the Resolution Plan in relation to a Resolution Applicant between the stage of approval by the CoC and the approval of the Adjudicating Authority. The binding nature of a Resolution Plan on a Resolution Applicant, who is the proponent of the Plan which has been accepted by the CoC cannot remain indeterminate at the discretion of the Resolution Applicant. The negotiations between the Resolution Applicant and the CoC are brought to an end after the CoC's approval. The only conditionality that remains is the approval of the Adjudicating Authority, which has a limited jurisdiction to confirm or deny the legal validity of the Resolution Plan in terms of Section 30(2) of the IBC. If the requirements of Section 30(2) are satisfied, the Adjudicating Authority shall confirm the Plan approved by the CoC Under Section 31(1) of the IBC.”*

In *Ebix Singapore* (supra), it has been further held that a resolution plan cannot be withdrawn while it is pending for approval of Adjudicating Authority. It appears that the *Ebix Singapore* (supra) discusses three phases where a resolution plan may be withdrawn:

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH  
KOLKATA**

I.A. (IB) No. 1459 (KB)2023  
And  
I.A. (IB) No. 1444 (KB) 2023  
in  
Company Petition (IB)/128(KB)2020

- (i) Firstly, before approval by COC.
  - (ii) Secondly, after approval by the COC and while it is pending before AA for approval.
  - (iii) Lastly, after approval by AA.
- v. In *Hem Singh Bharana vs. Pawan Doot Estate Private Limited* reported in **MANU/NL/0019/2023**, the Hon'ble NCLAT held that once the COC has approved a resolution plan, such direction is finally upon them and the approval cannot be subjected to any reconsideration. The Hon'ble NCLAT held that
- “27. There cannot be any dispute to the proposition laid down by the Hon'ble Supreme Court in the above case. In the present case, decision of the CoC to approve the Resolution Plan on 17.01.2020 was taken in its commercial wisdom. Whether the CoC can rescind from its decision and accept Settlement Proposal of Ex-Promoter submitted after two and a half years of approval of Resolution Plan, is a question which has arisen in the present case. The present is not a case where the Adjudicating Authority has interfered with any decision of the CoC.”*
- vi. In *Maharashtra Seamless Limited vs. Padmanabhan Venkatesh* reported in **MANU/SC/0066/2020** it was held that, withdrawal of an approved plan while it is pending approval of AA has been denied. Hon'ble Apex Court held that: “29.... *The procedure envisaged in the said provision only applies to applicants invoking Sections 7, 9 and 10 of the code. In this case, having appealed against the NCLAT order with the object of implementing the resolution plan, MSL cannot be permitted to take a contrary stand in an application filed in connection with the very same appeal. Moreover, MSL has raised the funds upon mortgaging the assets of the corporate*

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH  
KOLKATA**

I.A. (IB) No. 1459 (KB)2023  
And  
I.A. (IB) No. 1444 (KB) 2023  
in  
Company Petition (IB)/128(KB)2020

*debtor only. In such circumstances, we are not engaging in the judicial exercise of determining the question as to whether after having been successful in a CIRP, an applicant altogether forfeits their right to withdraw from such process or not.”*

- vii.** However, in ***Bank of Maharashtra v. Videocon Industries Ltd.*** (Supra) and ***Ebix Singapore*** (Supra) in fact, discusses the prospect of withdrawal of approved plans in the second phase by the Successful Resolution Applicant and not by the COC.
- 14.** It is settled position of law that Adjudicating Authority can return the plan for reconsideration, to the COC albeit on limited grounds. This Adjudicating Authority cannot remain oblivious of the fact that under Section 31 of the Insolvency and Bankruptcy Code, 2016, a Resolution Plan attains finality and becomes binding only after approval by the Adjudicating authority and no such application is pending with this Adjudicating authority.
- 15.** In terms of the ***Bank of Maharashtra v. Videocon Industries Ltd. (Supra)*** judgment, any better offer received from any PRA will constitute a changed circumstances which should allow the COC to seek approval to give a fair chance to all other PRAs to enhance their plan provided the timelines are adhered to.
- 16.** Therefore, the Adjudicating Authority should have the power to allow the prayer of the COC of the Corporate Debtor of permitting all the PRAs to enhance their plans financially giving them a level playing field.
- 17.** It is submitted that the COC of the Tamra Dhatu kept the voting lines open till 31.08.2023. The CIRP period will come to an end on 15.09.2023. We have perused our previous order dated **15.07.2023** and **03.08.2023** whereby and whereunder a final opportunity was allowed in terms of the RP’s e-mail dated **04.05.2023**. Not all the PRAs have availed of this opportunity.
- 18.** The instant application is filed by COC of the Corporate Debtor. We are mindful of the objective of the Code and commercial wisdom of COC being of paramount

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH  
KOLKATA**

I.A. (IB) No. 1459 (KB)2023  
And  
I.A. (IB) No. 1444 (KB) 2023  
in  
Company Petition (IB)/128(KB)2020

importance. Hence, we allow this application and allow all the Participating Resolution Applicants by giving a last, equal and fair opportunity to submit their revise and/or enhanced resolution plans to the RP of the Corporate Debtor. If required fresh timelines may be provided to all the Participating Resolution Applicants who wish to enhance and/or revise their resolution plans, keeping in view the prescribed timelines of completion of the CIR Process and voting period may also be extended if necessary.

19. This matter was heard on 24/08/2023 and the Ld. Counsels for the both parties were directed to file written submission by the evening on 24/08/2023. However, no written submission had not been filed by any of the parties. As the Code provides that CIRP is a time bound process, we are passing this order accordingly.
20. Accordingly, this **I.A. (IB) 1459/KB/2023** is **disposed of** in terms of order above.
21. **I.A. (IBC) No. 1444/KB/ 2023** filed by one M/s Kedarnath Mining Private Limited seeks the following relief:
  - a) *Direct the respondent to consider the proposal made by the applicant for enhancement in their resolution plan vide email dated 05/08/2023*
  - b) *Extend the voting period by such time as deemed fit and proper, for consideration of the plans submitted in consequence of the order dated August 03, 2023;*
  - c) *Any other order as deem fit and proper.*
22. The aforesaid order will govern this I.A. too and accordingly, this **I.A. (IBC) No. 1444/KB/ 2023** is also **disposed of** in terms of order above.

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH  
KOLKATA**

I.A. (IB) No. 1459 (KB)2023  
And  
I.A. (IB) No. 1444 (KB) 2023  
in  
Company Petition (IB)/128(KB)2020

- 23.** Certified copy of this order may be issued by the Registry, if applied for, upon compliance of all requisite formalities.

**D. Arvind**  
**Member (Technical)**

**Bidisha Banerjee**  
**Member (Judicial)**

**This Order is signed on the 25<sup>th</sup> Day of August, 2023**

Bose, R. K. [LRA]