

NATIONAL COMPANY LAW TRIBUNAL

KOLKATA BENCH

KOLKATA

CP(IB) No. 1439/KB/2018

CA(IB) 1205/KB/2019

In the matter of:

Hemant Khaitan

..Operational Creditor

Versus

M/s. Alex Green Energy Pvt. Ltd., MMS Chambers, Room No. B-41<sup>st</sup>  
Floor, 4A, Council House Street, Kolkata -700001

.. Corporate Debtor

M/s. Kundan Care Products Ltd., 3, Scindia House, 2<sup>nd</sup> Floor, Janpath,  
Cannaught Place, New Delhi -110001

.. Applicant

Coram: Shri Jinan K.R., Member(Judicial)

For the Resolution Professional:

1. Mr. Ramesh Ch. Prusti, Advocate
2. Ms. Mahuya Ghosh, Advocate

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Mr. Surya Kanta Satpathy, Resolution Professional

For Kundan Care Products Ltd.:

1. Mr. Ratnanko Banerjee, Senior Advocate
2. Mrs. Manju Bhuteria, Advocate
3. Mr. Deepak Agarwal, Advocate
4. Mr. Pritu Garg, Advocate
5. Mr. prasad Mukherjee, Advocate

For Respondent No. 3&4 in CA(IB) No. 1286/KB/2019:

1. Ms. Urmila Chakraborty, Advocate
2. Mr. A Agarwalla, Advocate

For Respondent No. 2 and 3 in CA(IB) No. 1205/KB/2019:

1. Mr. Rahul Das, Advocate
2. Mr. B Sharma, Advocate

Date of Pronouncement of the Order : 25-11-2019

ORDER

Per Shri Jinan KR, Member(Judicial)

1. The CP(IB) No. 1439/KB/2018 was filed by Mr. Hemant Khaitan/ Operational Creditor, an ex employee of the Corporate

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Debtor Company, who was working as a Business Development Manager claiming that an unpaid operational debt to the tune of Rs.10,00,800/-(Rupees Ten Lakh Eight hundred only) is due from the Operational Creditor (In short OC) as arrears of his salary and filed this application for initiating CIRP as against the Corporate Debtor (In short CD) M/s. Alex Green Energy Pvt. Ltd..

2. M/s. Alex Green Energy Pvt. Ltd., seems to have been incorporated in the year 2012, was engaged in the business of solar power generation. As per the power purchase agreement (PPA) with GRIDCO, the Corporate Debtor supplied its entire production of power generated at GRIDCO. While so, the control room and inverter room of the Corporate Debtor Company was damaged due to a storm and became non operational. The Corporate Debtor could not restore the plant and hence, the Company was not a going concern and thereby, was not able to pay its debts to its creditors. It is at this juncture, the Application was filed by Mr. Hemant Khaitan under section 9 of the Code.

3. This Application was allowed vide Order dated 18-02-2019, by appointing Mr. Surya Kant Satapathy, as IRP. His name was subsequently approved by the Committee of Creditors as the resolution professional (RP) and the Resolution Professional continued the CIRP process by issuing public announcement on 21-02-2019. He issued publication for inviting of EOI twice, firstly, on 04-05-2019 and subsequently, on 31-08-2019 and also called for Resolution Plan from the list of eligible prospective Resolution Applicants, firstly, on 08-06-2019 and secondly, on 28-09-2019 by

fixing last date of submission of the Resolution Plan as on 29-10-2019.

4. The Ld. Counsel, appearing for the Resolution Professional, submitted that the Information Memorandum and the Request For Resolution Plan (RFRP) and all other documents provided to the prospective Resolution Applicants, lastly on 28-09-2019, and EOI was published on 31-08-2019. The RP was in receipt of six Resolution Plans. Those Resolution Plans were, according to the RP, opened in the 11<sup>th</sup> meeting of the COC held on 30-10-2019. At the request of the COC, the Resolution Plans were evaluated in accordance with the mandate prescribed as per the RF-RP and on completion of evaluation, the Resolution Applicants were conveyed their individual ranking and marks, as per evaluation criteria, to the respective Resolution Applicants on 01-11-2019. The Committee of Creditors decided, as per RF-RP, to call for the three top prospective Resolution Applicants for negotiation and thereby, the top three Resolution Applicants were called for negotiation on 04-11-2019.

5. It is submitted by the Ld. Counsel, appearing for the RP, that on 02-11-2019, one among the lower ranked Resolution Applicants, namely, *Shanti GD Ispat and Power Pvt. Limited* requested for giving them a chance for negotiation as they were earlier top bidders while the EOI was called for the first time. According to him, since the Committee of Creditors already decided to process the Resolution Plan, as per RF-RP, of only top three Resolution Applicants, the request of Shanti GD Ispat & Power Pvt. Ltd. has been declined by the RP. While so, on 04-11-2019, the Applicant in CA(IB) No.

1205/KB/2019, *Kundan Care Products Ltd*, by way of an E-Mail requested the RP for considering them for negotiation. That request of the said applicant also was declined since the Committee of Creditors already decided to process, as per RF-RP, the top three Resolution Applicants only and since the Resolution Plans of, Kundan Care Products Ltd doesn't falls within the three top rank. The top ranked resolution applicants as per the evaluation matrix are the below mentioned Resolution Applicants:-

1. YK Dalmia
2. Fortis Chemicals Private Limited
3. MGM Green Energy Limited

6. According to the Ld. Counsel for the RP, as per the mandate in the RF-RP, M/s. Fortis Chemicals Pvt. Ltd. and M/s. MGM Green Energy Limited, were firstly called for negotiation and as a result of negotiation, Fortis Chemicals Private Limited, offered Rs.11.07 Crores (Rupees Eleven Crores Seven Lakh only) as the resolution bid amount. On getting the plan bid amount from Fortis Chemicals Private Limited, who was ranked as H2, the Committee of Creditors called the H1 bidder, YK Dalmia, for negotiation. The H1 bidder did not agree for raising its financial bid from Rs.11.06 crores, submitted to the Committee of Creditors on 29-10-2019, and thereby, the offer of H2 bidder, Fortis Chemicals Private Limited, became the highest bid amongst the three and the COC further discussed with Fortis

Chemicals Pvt. Ltd. in regard to terms and conditions and regarding the payment of upfront amount and other amount due to the stake holders.

7. The Resolution Plan of Fortis Chemicals Pvt. Ltd., was finally considered by the COC in the evening on 04-11-2019, and the Plan was placed for its approval in the meeting of the Committee of Creditors held on 08-11-2019. After detailed discussions, the COC with 100% voting by both the Financial Creditors deferred the approval of the Resolution Plan and the terms of the Resolution Applicant to the next COC meeting and in the 14<sup>th</sup> COC meeting held on 11-11-2019, the Financial Creditor, State Bank of India, having 95.15% voting share, voted in favour of the Resolution Plan and Exim Bank, who had 4.85 % voting share, abstained from voting for approval of the Resolution Plan. It is the said Plan that comes up for approval before me.

8. At this juncture, the Ld. Senior Counsel, appearing for the Applicant in CA(IB) No. 1205/KB/2019, **Kundan Care Products Ltd.**, who was ranked as H6 bidder as per the evaluation criteria of the COC, circulated and accepted by all the Resolution Applicants, objected to the approval of the Resolution Plan mainly on two grounds. Firstly, it is submitted that the action and conduct of the Ld. RP are violative of the Evaluation Process laid down in the RF-RP, inasmuch as, the Ld. RP has skipped Step -III of the evaluation process i.e. presentation of the Resolution Plan of the Resolution Applicant before the COC, thereby, denying a vital opportunity to the Applicant to understand the concern of the COC and to negotiate and

submit revised offer as may be deemed appropriate, after discussion and deliberations with the members of the COC.

9. Secondly, he submits that calling H1 bidder alone for negotiation, is unfair and unjust and against the statutory mandate of maximising the value of the amounts of the Corporate Debtor through an open and transparent resolution process. According to him, the Applicant has expressed its openness to the adoption of Swiss Challenge Method as contemplated in the RF-RP and non consideration of the request for negotiation and submission of revised bid enhancing the bid amount already offered by the Applicant, is fatal in the nature of the case in hand and therefore, upon the said submissions, prays for issuing direction to the RP to conduct an open and transparent bidding process, disclosing the score allotted to all the Resolution Applicants under each respective head forming part of the evaluation and to permit the Resolution Applicant herein, to negotiate and submit the revised Plan.

10. This Application was objected to by the RP. According to the Ld. Counsel for the RP, the objection that the RP skipped Step-III of Evaluation Process is devoid of any merit. He would submit that compliance of Step – III is optional and at the discretion of the COC and RP is nothing to do with the skipping. For a better understanding what is Step III it is good to read it. It reads as follows :-

**Step – III:**

***Presentation of Resolution Plans by Resolution Applicants whose compliant Resolution Plans have been submitted by the***

***Resolution Professional to COC as may be deemed necessary and as advised by the COC.***

11. The Ld. Counsel for the RP submits that Step – III is a deemed provision provided in the Resolution Plan Evaluation Profess. Complying Step III is at the discretion of the Committee of Creditors and it depends on the choice of the COC to proceed to negotiate with which Resolution Applicants and the COC having decided to negotiate with top three Resolution Applicants, as per Step-IV of the Evaluation Process non compliance Step III doesn't violate any of the evaluation process. As per Steps IV read below the COC can restrict negotiations with the top three(3) resolution applicants whose resolution plans were rated as highest evaluated compliant Resolution Plans.

**Step-IV:**

***Negotiations by COC with Resolution Applicant(s) having the top three(3) Highest Evaluated Compliant Resolution Plan. Top Three Resolution Highest Evaluated Compliant Resolution Plan will be communicated their individual scores. Resolution Applicant(s) will not be communicated scores of other Resolution Applicant(s).***

12. Reading Step-III and Step-IV together, it appears to me that skipping Step-III, in conformity with compliance of Step-IV, cannot be held as irregular, illegal or unjust or as against the object of the Code. It is understood that the COC has not felt deemed necessary to follow Step-III and has skipped it and proceeded to negotiate with top three Resolution Applicants as per Step-IV of the Evaluation Process. The above referred three top Resolution Applicants alone will be provided the score individually and therefore, the alleged skipping

of Step-III amounts to denial of vital opportunity to the Applicant/Kundan Care Products Ltd, is found to be devoid of any merits.

13. The second objection that the Evaluation Process was not transparent and bidding was done in a closed room by not providing an opportunity to the Applicant for submitting the revised bid after having a negotiation, is also found devoid of any merits.

14. While the process was going on and the ranking process has been completed by the RP on 01-11-2019, the ranking on the basis of the scores of each Resolution Applicants were communicated individually to the prospective six Resolution Applicants, inclusive of the Resolution Applicant/Kundan Care Products Ltd. The score achieved by Kundan Care Products Ltd/Applicant herein, in the CA(IB) No. 1205/KB/2019, is 39.40 out of 100 and the Applicant has been ranked as the 6<sup>th</sup>. The above-said information was received by the Applicant at about 8-59 pm. on 01-11-2019 itself. The Resolution Professional, in the meanwhile, as per the Resolution Plan Evaluation Process (RPEP), has taken steps for negotiation with the top three Resolution Applicants and they were called for negotiation on 04-11-2019 for finalising the bidding process at the 12<sup>th</sup> COC meeting held on 04-11-2019. It is on that day at about 2-02 pm., the Applicant in this CA, sent an E-mail showing their willingness to increase the value of Project by **more than the double near about**. It is good to read the two line E-mail sent by the Applicant to the RP on 04-11-2019, which reads as below :

"Dear Alex Team,

*As discussed in the morning, we are ready to increase the value of project by more than the double near about. Please give us chance to participate in negotiation process and maximise the bank value.*

*Request you not finalize negotiation process before considering our value.*

Regards

Kartik Jain"

15. The RP immediately sent a reply to the said E-mail addressed to the RP, by about 7-29 pm., informing the Applicant that as per the RPEP, the chances for negotiation has been given to top three Resolution Applicants. It is this e-mail reply of the RP is under challenge, contending that the bids have not been open and transparent without giving an opportunity to negotiate or without granting an opportunity of being heard before declaring that the Resolution Applicant is not eligible to participate in the further resolution process.

16. It is argued on the side of the Ld. Counsel, appearing for the RP, that the E-mail addressed to him was informed to the COC but the COC was unwilling to reopen the process because the willingness expressed on the side of the Applicant is vague and the resolution bid amount even, has not been suggested either orally or in writing.

17. The RP also admits that on 05-11-2019, the very same Applicant issued another E-mail objecting to the Evaluation Process and that E-mail has been replied also by the RP on 07-11-2019. It is



significant to note here that the RP has to work in time-bound manner and cannot allow a Resolution Applicant who has submitted its plan quoting resolution bid amount at Rs. 5 Crore to revise its bid without quoting the resolution bid amount. It is also significant to note here that this applicant seems to have waited to know the outcome of the process, and at the fag-end of the finalisation of the approval of the Plan by the COC, coming forward with an application challenging the evaluation process. In none of the E-mails, the Applicant has quoted the revised bid amount. It is at the time of argument that the Ld. Senior Counsel, appearing for the Applicant, showed its willingness to raise the bid amount to Rs.11.50 Crores. The bid amount, here in the case in hand, has been finalised at Rs.11.07 Crores. The above said submission not at all inspires my confidence in this applicant. Because the increase in the bid amount is marginal. That too offered after the date of expiry of 270 days period of CIRP. On perusal of the records, it is understood that the Applicant, Kundan Care Products Ltd., has been given sufficient opportunities to participate in the bidding process by revising its bids. The Applicant has been given about one month to evaluate the Corporate Debtor i.e. from 29-09-2019 to 29-10-2019. They would have applied their mind to what would be the bid amount to be proposed and without suggesting the offer in the E-Mail sent on 04-11-2019, the allegation that the bid was not open and transparent is found devoid of any merit.

18. In view of the above said factors, it appears to me that non consideration of the late request of the Applicant/ Kundan Care Products Ltd., is not unfair or not against the statutory mandate of

maximising the value of the assets of the Corporate Debtor, as attempted to establish on the side of the Applicant.

19. The Ld. Senior Counsel, at this juncture, referring to Binani Cement Limited case (Bank of Baroda Vs. Binani Cement Ltd.) in CP(IB) No. 359/KB/2017, a judgment of this Bench, attempted to highlight an argument that in a similar situations, this Adjudicating Authority, allowed the Application of Ultratech, a Resolution Applicant, who was not an H1 bidder for non consideration of its offer. The facts in the above cited case is not at all similar to the facts in the case in hand. In the above said case, this Bench has observed that *"shutting out an opportunity to a prospective bidder in participating the bidding process which it is otherwise entitled to compete"* is found unjust and found denied an opportunity to the applicant who had offered much more than the bid amount offered by the H1 bidder. The process was not complete in the said case when the offer was made by the applicant and in the said circumstances this Bench ignoring the highest bid of the applicant is unjust and improper and against the objective of the Code.

20. Truly, scoring not as an H1 bidder is not a disqualification in participating the bidding process by below ranked prospective Resolution Applicant. Here, in this case, the Applicant, Kundan Care products Ltd., is not found a bona fide prospective Resolution Applicant. It has come out in evidence that it had offered half the offer of the three top Resolution Applicants who were ranked first to third. Therefore, non consideration of the request of the Resolution Applicant/ Kundan Care Products Ltd. is found, not at all violative of

any of the provisions of the Code and the Regulation, and the RP acted in accordance with the mandate already approved by the COC and evaluated the plans as per the RPEP. In the above said circumstances it appears to me that the majority decision of the Committee of Creditors in choosing the Resolution Plan of M/s. Fortis Chemicals Pvt. Ltd., as a Plan of successful Resolution Applicant, cannot be disturbed.

21. The Hon'ble Supreme Court, in the case of K. Sashidhar Vs. IOB and Others [2019] 148 CLA 497(SC) has observed that :

*"Where the legislator has not envisaged challenge to the commercial/business decision of the Financial Creditors taken collectively, the same cannot be challenged on the ground that reasons therefor were not recorded.*

*It is not open to Adjudicating Authority to entertain a revised Resolution Plan after the expiry of the statutory period of 270 days.*

*It is not the Supreme Court to exercise powers under Article 142 of the Constitution which will result in issuing direction in the teeth of the provisions as applicable in the case on hand."*

22. The above view has been reiterated in the recent decision of the Hon'ble Supreme Court in the **Committee of Creditors of Essar Steel India Limited Trough Authorised Signitary Vs. Satish Kumar Gupta and Others** [Civil Appeal No. 8766-67 of 2019]. In the above referred Essar case, the Hon'ble Supreme Court made it clear that the scope of the judicial review to be exercised by the Adjudicating Authority is limited to see whether the COC has taken into account the fact 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 interest of the stakeholders including the Operational Creditors have been taken care of.

23. Bearing in mind the above said propositions, settled by the Hon'ble Supreme Court, it appears to me that the approval of the Resolution Plan, in the case in hand, could not be disturbed for the reason highlighted on the side of the unsuccessful Resolution Applicant/ Kundan Care Products Ltd. In view of the aforesaid position of law, and the circumstances discussed above, I can rightly hold that the application filed by the Kundan Care Products Ltd requires no consideration. If it is allowed after completion of 270 days no doubt it would amount to interference with the commercial decision taken by 95.15% vote share of the members of the COC. Therefore, this application CA(IB) 1205/KB/2019 is liable to be dismissed.

24. In the light of the law and the circumstances above discussed, let me now examine the Resolution Plan of the Corporate Debtor approved by the COC. The successful Resolution Applicant, Fortis Chemicals Pvt. Ltd., is a Company incorporated in the year 2009, engaged in manufacturing and supplying of synthetic resins, specialty chemicals and alternate fuels to steel plant, automobile industries, refractories industries, foundries, graphite, infrastructure project(Road sector) etc. It is also argued on the side of the RP that the Resolution Applicant is a reputed Company known for its quality, health and safety standards and is a competent bidder who has proved that it is capable of taking over of the stressed assets of the Corporate Debtor. None of the Objectors, other than the

unsuccessful Resolution Applicant/Kundan Care products Ltd., came forward challenging the approval of the Resolution Plan. On an overall screening of the Resolution Plan, it is understood that it is a Plan wherein the Operational Creditors have been given 100% of their claim and the Financial Creditors have agreed for 39.50% of their claim. On perusal of the Resolution Plan, inclusive of form H and the compliance certificates of the Ld. RP, I am fully satisfied that the RP complies with all the provisions of the Insolvency & Bankruptcy Code, 2016 and the CIRP Regulations, 2016 and does not contravene any of the provisions of the law, for the time being in force. The affidavit, in compliance of Section 29(A) of the Code, has also been submitted by the successful bidder, Fortis Chemicals Ltd., in compliance of Section 30(1) of the Code. The corporate debtor company was not a going concern when the CIRP has been initiated. As per the report it is understood that the successful resolution applicant has undertaken to run the plant within 6 months from the date of approval of the resolution plan by this AA after taking immediate steps for repair and maintenance of plant. As held in the Essar Steel Case above referred, the COC in the instant case has evidently taken into account all the facts that the Corporate Debtor needs to see in operation, that it needs to maximise the value of its assets and interest of the stake holders including the Operational Creditors have been taken care of. That being so, I do not find any justifiable reason to interfere with the selection of the Resolution Applicant by the COC with majority vote share.

25. Keeping in view the above mentioned facts and circumstances, I am of the considered opinion that the resolution plan of the corporate debtor approved by the COC by 95.15% vote share is liable to be approved. Accordingly the Resolution Plan is approved, upon the following among:-

#### ORDERS

- i) The Resolution Plan submitted by **Fortis Chemicals Pvt. Ltd.**, which has been approved by the CoC by **95.15%** voting share, is hereby approved under provisions of sub-section(1) of Section 31 of the Insolvency and Bankruptcy Code, 2016, which shall be binding on the Corporate Debtor, **M/s. Alex Green Energy Pvt. Ltd.**, its employees, members, creditors, guarantors, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such authorities to whom statutory dues are owed and other stakeholders involved in the Resolution Plan;
- ii) The moratorium order passed under Section 14 shall cease to have effect.
- iii) The Resolution Professional shall forward all records relating to the conduct of the Corporate Insolvency Resolution Process and the Resolution Plan to the Insolvency and Bankruptcy Board of India to be recorded in its database.

- iv) CA(IB) No. 1205/KB/2019, is dismissed. However no order as to cost.
- v) CP(IB) No. 1439/KB/2018 is disposed of as above,

26. The free copy/certified copy of the Order may be issued to all the concerned Parties, if applied for, upon compliance with all requisite formalities.

A pink sticky note with handwritten text in blue ink. The text reads "sd" followed by "11/19". There is a signature above the note.

(Jinan K.R.)

Member(Judicial)

Signed this, the 25<sup>th</sup> day of November, 2019

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