

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

**I.A.(IB) No. 251/KB/2022**

**in**

**C.P (IB) No.148/KB/2018**

In the matter of:

An application under section 60(5) of the Insolvency and Bankruptcy Code, 2016.

In the matter of:

State Bank of India

... Financial Creditor

-Versus-

Tantia Construction Limited

... Corporate Debtor

And

In the matter of:

EDCL Infrastructure Limited and Upendra Singh Constructions Private Limited

... Applicant

versus

1. Monitoring Committee

represented by Mr. Ksitiz Chhawchcharia

2. State Bank of India

**Coram:**

**Shri Rohit Kapoor, Member (Judicial)**

**Shri Harish Chander Suri, Member (Technical)**

**Appearances (via hybrid mode):**

For the Applicant : Mr. Swatarup Banerjee, Advocate

Mr. Avishek Guha, Advocate

Mr. Sariful Haque, Advocate

Ms. Neha Dutt, Advocate

For the Respondent No. 1 : Mr. Deep Roy, Advocate

For the Respondent No. 2 :Mr. Ajay Gaggar, Advocate  
Ms. Rakhi Purnima, Advocate

Date of Hearing: 29.03.2022

Date of pronouncing the order: 05.05.2022

### **ORDER**

**Per : Rohit Kapoor, Member (Judicial):**

1. This I.A. has been filed by EDCL Infrastructure Limited and Upendra Singh Constructions Private Limited, the successful Resolution Applicant against the Monitoring Committee to allow the Resolution Applicant to execute the project being Tender no. 4290-GRC-CE-C-HQ-212.2021 of South Eastern Railways which was awarded to the Corporate Debtor on 01 March 2022 and to approve the procurement of the Performance Bank Guarantee from the Union Bank of India for RS.1,26,55,748.42.

***Contentions of applicant:***

- i. Resolution Plan of applicant was approved by this Adjudicating Authority on 24 February 2020. In compliance with the Resolution Plan, the Resolution Applicant had made the upfront payment of Rs.3.5Crore on 03 October 2020 and an additional amount of Rs.10 Crore was paid by the Resolution Applicant.
- ii. In the 5<sup>th</sup> Monitoring Committee Meeting, all the members of the Monitoring Committee present at the meeting allowed the Corporate Debtor to bid for new projects.
- iii. It is further contended by applicant, the Corporate Debtor had been executing several projects after the approval of the Resolution Plan, and it was discussed in the 12<sup>th</sup> Monitoring Committee Meeting.
- iv. On March 1, 2022, the Corporate Debtor received a Letter of Acceptance from South Eastern Railways to the Bid dated 19 August 2021 for project value of Rs.42Crore.
- v. The Resolution Applicant submitted an undertaking indemnifying the Corporate Debtor and the Financial Creditors with regard to any loss caused in execution of the proposed projects. *Vide* an email dated 11

March 2022, other than State Bank of India all the other members of the Monitoring Committee approved execution the project by the Corporate Debtor, Union Bank of India had agreed to provide the Performance Bank Guarantee for the said project.

- vi. The Monitoring Committee is failing to implement the Resolution Plan due to the objection of the State Bank of India (SBI).
- vii. The applicant stated that the Monitoring Committee has failed to honour its commitment in terms of the resolution plan for transfer of some shares in its favour and thus it could not meet its obligation to pay entire amount of Rs. 75 crores in terms of Resolution plan.

***Contentions of the Respondents***

- i. Applicant/Resolution Applicant has failed and defaulted in implementing the resolution plan. The Resolution Applicant had to make a payment of Rs.75Crore in various tranches but the Resolution Applicant has failed to comply with the terms of payments.
- ii. According to the timeline specified in the Resolution Plan, upfront payment of Rs.44 Crore was to be paid within 90 days from the date of approval of the Resolution Plan, Rs.15 Crore within 9 months from the date of approval of the Resolution Plan and Rs.16 Crore within twelve months from the date of approval of the Resolution Plan i.e. 24 February 2020.
- iii. The Resolution Applicant since the day of approval of Resolution plan has paid merely Rs.3.50Crore in the escrow account and that does not form a part of the payment schedule as per the resolution plan. The Resolution Applicant is trying to operate the Corporate Debtor without making any payments.
- iv. Applicant wants to take control of Corporator Debtor without implementation of resolution plan (Paragraph d of reply affidavit of SBI).
- v. At this juncture if the Resolution Applicant is issued with a Performance Bank Guarantee in the name of the Corporate Debtor, the process will

increase the liability of the Corporate Debtor making the Corporate Debtor financially vulnerable.

- vi. The State Bank of India had raised an objection on 11 March 2022 and was later supported by the other financial creditors except Punjab National Bank in the Joint Lender's Meeting held on 21 March 2022.
- vii. When this IA was reserved for orders, the State Bank of India along with its written notes has placed on record the minutes of the meeting of the Joint Lenders Meeting of Tantia Constructions Limited held on 21 March 2022.
- viii. These minutes of 21 March 2022 appear to have been issued on 28 March 2022 at Mumbai and it is recorded in Item No. 4:

*“Mr. Jayabrata Sinha from Union Bank of India (UBI) informed that the company has approached UBI to provide the bank guarantee against 100% margin for the project where SBI has shown its reservation and further requested lenders to guide whether UBI can issue such BG or not. Mr. Chourasia informed that SBI has already expressed its view and is not in favour to issue such a BG. He further added that it is totally UBI call to have a fresh exposure on the Corporate Debtor and also sought UBI's view on the said matter. Mr. Sinha informed that the SRA proposed to issue Bank guarantee for the new project against 100% cash margin which is proposed to be brought in from the cash flow of the company. Therefore, this will be treated as fresh exposure on the company without implementing resolution plan. Thereafter Mr. Sinha expressed his discomfort and unwillingness to issue such BGs' Subsequently, all lenders except PNB, were of the view that SRA should not be allowed to bid for any project till implementation of Resolution Plan.”*

2. When some other IAs in the matter were listed on 28-04-2022, we sought response from learned Counsel for the Applicant to the minutes dated 21-03-2022. The Ld. Counsel prayed for time to respond to these minutes of meetings dated 21 March 2022 placed on record along with notes of arguments by SBI of which his client had no knowledge. Opportunity as sought was accordingly granted to the learned Counsel for the Applicant and we took up this matter on 29 April 2022.
3. Ld. Counsel for the applicant, when the matter was taken up on 29-04-2022, in response to the above referred minutes drew our attention to minutes of the proceedings of 5<sup>th</sup> meeting of Monitoring Committee of Tania Constructions Private Limited held on 8<sup>th</sup> September, 2020 reproduced herein after.

*“ **RESOLVED THAT** the successful Applicant, be and is hereby allowed to participate in new projects by submission of EOI basis the receipt of tenders, on behalf of the Company, subject to submission of an undertaking (thereby protecting the interests of the Company and the lenders from loss, if any, arising out of such project) and the infusion of INR 3.50 Crore in an Escrow Account or in any other relevant form, to be earmarked towards payment of 1<sup>st</sup> tranche upfront amount, as per the terms of the approved Resolution Plan”.*

The Ld. Counsel argued that in view of this position, there was no reason for the lender Banks to take different view as recorded in the minutes of the meeting dated 28 March 2022.

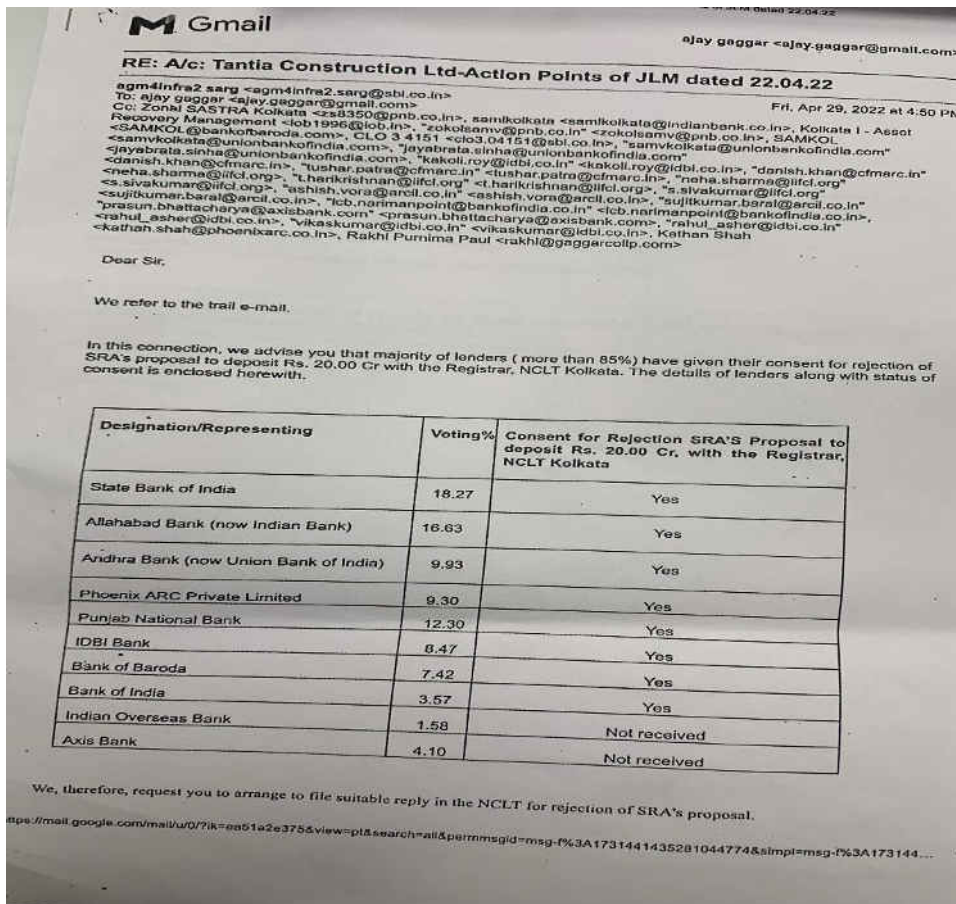
4. Ld. Counsel also argued that the minutes of meeting dated 21 March 2022 referred hereinabove, are not binding on the Monitoring Committee. He also argued the applicant was not a party to these minutes of the meeting.
5. Ld. Counsel further argued that to keep the Corporate Debtor as a going concern, it is

essential to furnish this bank guarantee for which only the State Bank of India is putting spanner.

6. Ld. Counsel appearing for the Respondent No.2 i.e. State Bank of India in rebuttal, brought our notice the undertaking of the resolution applicant, which is a part of the resolution plan in the same is reproduced as under: -

*“ 16.1 – Notwithstanding anything contained in the Resolution Plan, including the process of implementation and the timeline thereof, the Resolution Applicant hereby undertakes and confirms that (a) the Financial Creditors Upfront Payment shall be made within a period of 90 days from the Effective Date, (b) the Employees Upfront Payment shall be made within a period of 75 days from the Effective Date, (c) the Deferred payment shall be made within the timelines specified in Clause 12.2.2.and no delay in the timelines will result in delay in the payment of the Upfront Payment or the Deferred Payment.”*

7. It is the stand taken by SBI, out of 75 Crores to be paid by the resolution applicant, 71.50 Crores remains unpaid and Rs.3.50 Crore in escrow account. The last date of the schedule of the entire payment to be made by the resolution applicant/ the applicant herein was until February 2021.
8. When this matter was being heard on 29-04-2022, heard, the Ld. Counsel for the applicant stated that his client is ready to pay an amount of Rs. 20 Crore immediately towards balance of Rs.75Crore and deposit it before the Registry of the NCLT provided the bank agrees to enable him to furnish the Bank guarantee required to execute the project being Tender no. 4290-GRC-CE-C-HQ-212.2021 of South Eastern Railways which was awarded to the Corporate Debtor on 01 March 2022.
9. In response to the above proposal, an email was placed on record on 04 May 2022 before this Adjudicating Authority wherein the majority of the lenders (more than 85%) have rejected the proposal of the applicant to deposit Rs.20,00,00,000/- (Rupees Twenty Crore only) with the Registry, NCLT, Kolkata Bench.



10. Perused the pleadings and record before us. Heard the Ld. Counsel for the parties.

11. As per minutes of meeting dated 21 March 2022 referred hereinabove, it is apparent it was not only the State Bank of India out of ten lenders of the Joint Lenders Forum, as contented by the applicant, but including State Bank of India, eight others (Except PNB out of ten) are not in favour to provide the bank guarantee against 100% margin for the project. We also take note of reasons are recorded in these minutes for not providing this bank guarantee.

12. Ld. Counsel for applicant strenuously argued, this Bank guarantee is absolutely necessary for the obtaining a contract and in turn to keep the corporate debtor a going concern. The submission sounds quite attractive. However, the fact remains the joint lender forum in its meeting 21 March 2022 decided not to *provide the bank guarantee as sought by the applicant in this IA. for the reasons recorded therein.*

13. We have also observed from the record, some of these lenders including SBI are members of Monitoring Committee appointed for implementation of Resolution plan.

14. The implications of decision taken on 21-03-2022 in Joint Lender Forum meeting is something this Adjudicating authority is not empowered to determine. It's purely a matter of commercial wisdom and therefore we decline to interfere. This IA is hereby rejected.

15. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

**Harish Chander Suri**  
**Member (Technical)**

**Rohit Kapoor**  
**Member (Judicial)**

Order signed on the 05<sup>th</sup> day of May, 2022