



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

**IA(IBC)/980(KB)2023
in
CP(IB)/128(KB)2020**

In the matter of:

HDFC Bank Ltd.

...Financial Creditor

Versus

Tamra Dhatu Udyog Private Limited
(CIN: U27209BR2006PTC109251)

...Corporate Debtor

And

In the matter of:

Tarun Kumar Singh

...Applicant

Versus

Mamta Binani, Resolution Professional
of Tamra Dhatu Udyog Private Limited & Anr.

...Respondents

Date of Hearing: 19/05/2023

Order Pronounced on: 05/07/2023

Coram:

Smt. Bidisha Banerjee

: Member (Judicial)

Mr. Balraj Joshi

: Member (Technical)

Appearances (through hybrid mode):

For RP

: Mr. Siddhartha Sharma, Adv.
Ms. Shalini Basu, Adv.
Ms. Mamta Binani, RP in person



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For applicant in IA/980/2023 : Mr. Abhrajit Mitra, Adv.
Ms. Sushama Santra, Adv.
Mr. NPS Chawla, Adv.
Mr. Vibhor Kapoor
Mr. Sujoy Dutta, Adv.
Mr. Surekh Kant Baxy, Adv.
Ms. Mahima Shekhawat, Adv.
Mr. Kalpit Khandelwal, Adv.

For Indian Bank : Mr. Santosh Kumar Ray, Adv.
Mr. Rituparna Sanyal, Adv.
Ms. Sumana Mukherjee, Adv.

For Bank of Baroda : Mr. Avishek Guha, Adv.
Ms. Arunika Dutta, Adv.

ORDER

Per: Bidisha Banerjee, Member (Judicial)

1. This Adjudicating Authority convened through hybrid mode.
2. Heard the Ld. Senior Counsel / Ld. Counsel for the parties.
3. This application has been preferred by Mr. Tarun Kumar Singh, Resolution Applicant primarily to seek a direction upon the respondents to consider the enhanced financial proposal submitted by the Applicant and *inter alia* removal of clause pertaining to assignment/extinguishment of third party guarantee including the promoter guarantee.
4. It is the contention of the applicant that Regulations 39(1A) and (1B) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides for modification of the resolution plan. Hence, he seeks to enhance the proposed resolution only to cater to the interests of the financial creditors and in furtherance of the request made by the respondent no.2 through the respondent no.1 by removing the clause for assignment/extinguishment of the third party guarantee including promoter



guarantee, which would be beneficial for the financial creditors and thereby increasing the financial offer for the creditors.

5. Per contra, the respondent no.2 would contend that Regulation 39 (1A) and (1B) inserted w.e.f. 30/09/2021 allows modification of the resolution plan received under sub-regulation (1), but not more than once. The Resolution Plan was submitted on 17/10/2022 and admittedly a revised resolution plan was submitted on 11/01/2023. Therefore, in terms of regulation 39(1A) no further amendment can be allowed.
6. It is alleged that the applicant has wrongly submitted that removing the assignment of rights of personal guarantee is required to be considered and revision in financial offer falls under regulation 39(1A)(a) whereas amendment under regulation 39(1A)(a) is a resolution, which is limited to only once. That, the Personal Guarantee may not fetch any amount to the Financial Creditors and is contingent upon recovery proceedings. Asset held by the personal guarantor and such contingencies cannot be considered as financial enhancement. Thus, this application is liable to be dismissed on the ground that revision as allowed under Regulation 39(1A)(a) has already been invoked once on 11/01/2023. Hence, the second revision to the extent of modifying the plan apart from increasing the financial bid is not permissible under law and as such the application is liable to be dismissed in limine with costs.
7. Ld. Senior Counsel, Mr. Abhrajit Mitra, at the hearing would assert that in terms of regulation 36A(1) of the CIRP Regulations the resolution professional invited expression of interest for resolution plan ('EOI') in Form G vide publication dated 03/08/2022. The last date for submission of EOI was 19/08/2022, while the resolution plan was to be submitted latest by 07/10/2022. The Applicant/PRA submitted its EOI dated 03/08/2022 with resolution professional, followed by submission of resolution plan dated 11/01/2023 for the last date for submission of resolution was extended from time to time by the resolution professional after the approval of CoC for such extension. That during the consideration of the PRA's resolution plan in their meetings, the



CoC had raised their concern on release of third party guarantee including personal guarantees of certain promoters/directors of the corporate debtor. These issues were discussed in detail. By way of e-mail dated 29/04/2023, the PRA requested the CoC, through the resolution professional to allow him to withdraw the clauses of the resolution plan dealing with release / assignment of third party guarantee including promoter guarantee, in view of the recent orders of the Hon'ble National Company Law Tribunal.

8. The financial sponsor has also agreed to remove the clause on extinguishment / assignment of third party guarantees. The resolution professional, in pursuance of the discussions and instructions issued by the CoC member in the 14th meeting dated 04/05/2023, issued an email on the same day, thereby calling upon the PRAs, including the querist herein to further enhance the financial proposals in their respective plans latest by 10/05/2023. It has been specifically mentioned in the email that *"It is hereby clarified that the enhancement in the financial proposal shall mean only an increase in the offer to Creditors in due compliance with the provisions of the Insolvency and Bankruptcy Code, 2016 and no other change in the existing Resolution Plan shall be allowed. It may be noted that such enhancement shall not be construed as a change in the Resolution Plan"*.
9. That the Prospective Resolution Applicant of Tamra Dhatu Udyog Private Limited submitted its revised financial proposal and proposed to enhance its Resolution Plan submitted on 11/01/2023 ("Resolution Plan") by removing the clause pertaining to release / assignment of third party guarantees including promoter guarantees ("Guarantee Clause") as it would not only enhance the value to the creditors but also safeguard the resolution plan from being perceived as contrary to some of the recent decisions passed by this Adjudicating Authority which are currently appealed before the Hon'ble NCLAT in cases of resolution plan seeking extinguishment of personal guarantees. That the Resolution Plan contains Severability clause (14.7 clause in Resolution Plan) which states that if any part of the Resolution Plan is



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- prohibited or held to be unenforceable then such part of the Plan shall be deemed to be ineffective without rendering the remaining Resolution Plan to be ineffective or illegal. In view of the aforesaid severability clause, section 3.1(e), sub-clauses (iv), (v), (xvii) and any related clause to Guarantee Clause contained in the Resolution Plan shall stand updated.
10. Further, that removal of the Guarantee Clause should not be considered as modification, it is merely to bring ample clarity to the terms of the Resolution Plan and enhance the value offered to the creditors.
 11. It was vociferously contended by the Ld. Counsel for the respondent no.2, Union Bank of India that 4 (four) plants have already been sent to vote. This applicant is an alter ego of the Corporate Debtor, a second revision contrary to the spirit of Regulation 39(1A)(a) should not be allowed.
 12. We have considered the rival contentions and perused the records.
 13. We have perused the RP's mail dated 04/05/2023, which says –

This is in line with the request of CoC members as emanated from the fourteenth meeting held on 04/05/2023. In this regard, it may be noted that with an objective to maximize the value of the Corporate Debtor, a final opportunity is being given to all the Resolution Applicants to further enhance only the financial proposal of their respective Resolution Plans in the enclosed format, in conformity with the provisions of the Insolvency and Bankruptcy Code, 2016

It is hereby clarified that the enhancement in the financial proposal shall mean only an increase in the offer to Creditors in due compliance with the provisions of the Insolvency and Bankruptcy Code, 2016 and no other change in the existing Resolution Plan shall be allowed. It may be noted that such enhancement shall not be construed as a change in the Resolution Plan.

It is pertinent to mention that such enhanced financial proposal shall have to be mandatorily & strictly in the enclosed format (Appendix 1) and be submitted on the letterhead of the Resolution Applicant duly signed & executed by the authorised signatory in the manner



prescribed in RFRP, alongwith the necessary source of funds towards the enhanced financial proposal, through email to the Resolution Professional (tamracirp@gmail.com) by Wednesday, 10.05.2023 by 6.00 pm. Any such enhanced financial offer received beyond such time shall not be considered atall. Please note that any other comments outside the prescribed table or on the face of the format will disqualify the Resolution Applicant's revised offer. Sources of Funds submitted by the Resolution Applicant will be duly discussed and scrutinized by CoC and RP.

The original copy of the aforesaid enhanced financial proposal along with the supporting documents also have to be submitted to the following address of the Resolution Professional on or before 10.05.2023 by 06.00 pm.”

14. Keeping objective of the Code in primacy, we would note that in *Vistra ITCL (India) Ltd. and Ors. Vs. Torrent Investments Pvt. Ltd. and Ors* [Company Appeal (AT) (Insolvency) Nos. 132, 133, 134 and 139 of 2023] decided on 02/03/2023 NCLAT says that –

“53.Regulation 39(1A) contemplate modification of Resolution Plan and improvement of Resolution Plan at the instance of Resolution Applicant. The above modification or improvement in the Plan cannot be confined only to Plan value, rather, it shall cover the entire Plan and if it is held that any modification or improvement is not permissible after conclusion of process under Regulation 39(1A), it shall become handicap in successful resolution of the Corporate Debtor, since CoC may opine that certain modification and improvement in Plan are necessary for successful resolution of the Corporate Debtor. Thus, we are of the considered opinion that Regulation 39(1A) does not prohibit CoC from negotiating with Resolution Applicants or asking Resolution Applicants to further increase the Plan value.” (emphasis added)

“The Hon’ble NCLAT referred to the judgment of Hon’ble Supreme Court in MANU/SC/0257/1993 : (1993) 1 SCC 71 – Food Corporation of India vs. M/s. Kamdhenu Cattle Feed Industries that “The object of inviting tenders for



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disposal of a commodity is to procure the highest price while giving equal opportunity to all the intending bidders to compete. Procuring the highest price for the commodity is undoubtedly in public interest since the amount so collected goes to the public fund.” (emphasis added)

“The Hon’ble NCLAT held that CoC is fully empowered as per the Clauses of RFRP to further negotiate with one or more Resolution Applicants, even after completion of Challenge Mechanism on 21/12/2022 and the decision of CoC taken on 06.01.2023 to undertake an Extended Challenge Mechanism is not violative of Regulation 39(1A).”

15. In view of the above, we allow the present application. A fresh timeline shall be indicated by the RP to allow all the participating Resolution Applicants to enhance their Resolution Plan in terms of the e-mail dated 04/05/2023.
16. With the above directions, IA is accordingly disposed of.
17. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.
18. Certified Copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

Balraj Joshi
Member (Technical)

Bidisha Banerjee
Member (Judicial)

Signed on this, the 5th day of July, 2023.



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