

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH, HYDERABAD**

IA No.325/2021
In
CP(IB) No.492/07/HDB/2019

In the matter of:-
M/s. KSK MAHANADI POWER COMPANY LIMITED

Between:

M/s Riddhi Siddhi Gluco Biols Limited
10, Abhishree Corporate Park,
NR. Swagat Bungalow BRTS Bus Stop,
Ambli-Bopal Road, Ahmedabad-380058.

...Applicant

And

1. Mr. Sumit Binani
Resolution Professional
M/s KSK Mahanadi Power Company Limited
R/o 4th Floor, Room No.6, Commerce House,
2A Ganesh Chandra Avenue,
Kolkata – 700013, WEST BENGAL.
2. Committee of Creditors of
M/s KSK Mahanadi Power Company Limited,
8-2-293/82/A/431/A, Road No.22,
Jubilee Hills, Hyderabad-500033,
Telangana.

...Respondents

Date of order: 23.09.2021

Coram: Shri Madan B. Gosavi, Member Judicial.
Dr. Binod Kumar Sinha, Member Technical.

Parties/Counsel(s) present:

- For the Applicant : Mr. L. Ravichander, Senior Advocate &
Mr. Mayur Mundada, Advocate.
- For the RP : Mr. Shankarnarayana, Senior Advocate &
Mr. Allwin Godwin, Advocate.
- For the CoC : Mr. Bishwajit Dubey, Advocate.

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[Per Bench]

ORDER

1. This Application is filed by M/s Riddhi Siddhi Gluco Biols Limited seeking following reliefs:
 - a. Direct the Respondent No.1 and Respondent No.2 to accept the EOI and declare the Applicant as a prospective resolution applicant in terms of Regulation 36A of CIRP Regulations and provide requisite time thereto for submitting a Resolution Plan and thereafter accept the resolution plan submitted by the Applicant and consider the same on its merits.
 - b. In alternative to the prayer clause (a) this Hon'ble Tribunal be pleased to direct the Respondent No.1 and Respondent No.2 to issue a fresh Form – G inviting EOI and thereby enlarging the field for multiple potential resolution applicants and not only to select players under the current process.
 - c. That this Tribunal by an order and injunction restrain the CoC from proceeding ahead on the current rushed up process, thereby obtaining and approving any other resolution plan without considering the Resolution Plan of the Applicant.
2. Brief facts as stated by Applicant are as under:
 - a. That post approval for publication of Expression of Interest (“EOI”) by the CoC of the Corporate Debtor, the RP issued public announcement in Form G for “Invitation of Expression of Interest” (“EOI”) for submission of Resolution Plan by the prospective Resolution Applicants. The prospective Resolution Applicants were requested to submit their EOI to Resolution Professional on or before 17.10.2019. It is understood that, due to various reasons including the prevalence of the pandemic the time line for submission of EOI was extended multiple times for the prospective resolution applicants and submission of Resolution Plan thereto.
 - b. Since initial EOI stage revised Form G dated 13.11.2020, a new development has arisen on 01.01.2021 when the Adjudicating Authority initiated corporate insolvency resolution process (“**CIR process**”) against KSK Water Infrastructures Private Limited in C.P. No.813/7/HDB/2019 and against Raigarh Champa Rail Infrastructures Private Limited in C.P. No.187/7/HDB/2020.

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- c. That on 16.06.2021, the Applicant became aware that the Respondent No.2's plan for debt resolution at this Adjudicating Authority hit a hurdle and that the Respondents have moved the National Company Law Appellate Tribunal (NCLAT). Further vide the article dated 16.06.2021 it was pointed out that the resolution process of the Corporate Debtor ran into difficulties and four bidders, i.e., Adani group, TATA group, Brookefield, Jindal Steel and Power pulled out their bids and bidders reportedly wanting to club the rail road and water assets with the Corporate Debtor.
- d. On making enquiries, the applicant gathered that total of seven prospective resolution applicants have submitted their expression of Interest, however none of them have submitted their resolution plan yet. The applicant was eagerly awaiting publication of a revised Form-G for making the necessary expression of interest. The Applicant was very keen to participate by submitting its EOI to Respondent No.1 but the revised Form G has not been issued.
- e. Therefore, the Applicant addressed an email to the Respondent No.1 on 28.06.2021 requesting him to provide an opportunity to the Applicant to participate in the Resolution Process of the Corporate Debtor. The applicant received no response from Respondent No.1 on the above request made.
- f. Stealthily an enablement was made for one of the potential EOI Parties i.e. Jindal Steel and Power Limited, wherein in the guise of clarification under the bid process, the following was communicated to the select EOI applicants.

*The Prospective Resolution Applicant may submit the Resolution Plan **either itself or through any of its group company** (as defined in the RFRP) subject to compliance ...*

- g. The applicant became aware of this very significant development which is in complete contravention to established due procedure, to facilitate participation of a new entity from Jindal Group, completely replacing the earlier EOI submitted by Jindal, under an apparent justification of being a Group company. This is nothing but entertaining selectively a new applicant.
- h. That in as much it has been repeatedly held that as the commercial wisdom of COC is the guiding principle, the same cannot be at the cost of maintaining requisite process

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transparency and fair play that provides equal opportunity to all potential applicants. Permitting such indirect entry for select participants defeats the very purpose of the code and the various elaborate regulations notified therein.

- i. Upon becoming aware of the new development, Applicant followed it up with an email dated 04.07.2021 to the Respondent No.1 requesting him to provide an opportunity for the Applicant to participate in the Resolution Process of the Corporate Debtor by allowing it to file its EOI. However, Respondent No.1, vide his email dated 06.07.2021 rejected the proposal of the Applicant stating *"We have already communicated to you that the last date for receipt **of EOI for submission of the Resolution Plan is already over many months back** and hence the undersigned is unable to accept at this stage of the process"*
- j. That while one part of it may be an accurate description, permitting the substitution of Jindal Steel and Power with another party is discriminatory (merely justifying on the ground of the Group Company) by violating the basic principles of natural justice and right to equality. Further, if the applicant is not being permitted on the ground of the expression beyond the cut off dated i.e., 25.11.2020, then the new company of Jindal group also should not be permitted.
- k. The Applicant to substantiate its contention draws its support and refers to the judgement of Adjudicating Authority in the matter of Kotak Investment Advisors Ltd vs Mr. Krishna Chamadia & Ors. (Company Appeal (AT) (Insolvency) no.344-345 of 2020) wherein it is held that :

"30. We are of the considered opinion that after the expiry of the deadline for submission of Resolution Plan, the Resolution Professional, with the approval of CoC, was fully authorized to invite fresh invitation for Expression of Interest for submission of Resolution Plan..."
- l. That in light of the above judgement in the present case where at this stage no Resolution Plan is submitted by any resolution applicant, the Respondent No.1 with the approval of Respondent no.2 could have comfortably issued a fresh publication in Form G, inviting EOIs in respect of the Corporate Debtor.

- m. The Applicant further relying on the Judgment of ICICI Bank Limited V/s Unimark Remedies Limited, MA No.1529 of 2018 in C.P.No.197 of 2018, submits that the object of the Code is to enable maximization of the value of Corporate Debtor's assets with a view to promote entrepreneurship, availability of credit and balancing the interest of all stakeholders.
3. Counsel for RP/R1 filed counter stating as under:-
- a. That as per Section 25(2)(h) of the Insolvency and Bankruptcy Code, 2016 ("IBC"), the Respondent No.1 is required to invite prospective resolution applicants having regard to the complexity and scale of operations of the business of the Corporate Debtor and such other conditions as may be specified by the Board, to submit a resolution plan(s). In view of the same the detailed "Invitation of Expression of Interest" ("IEOI") dated 24 June 2020 basis the EOIs received by the Respondent No.1, a provisional list of eligible prospective resolution applicants was issued by Respondent No.1 on 10 August 2020 as per Regulation 36A(12) of the CIRP Regulations, the Respondent No.1 issued the final list of prospective resolution applicants on 25 August 2020.
 - b. The last date for submission of resolution plans as per RFRP, was extended by Respondent No.1 with the approval from the Respondent No.2, the Committee of Creditors ("CoC"), from time to time.
 - c. That the Respondent No.1, is unable to exercise any discretionary power as per the CIRP Regulations, with respect to the rejection/acceptance of an EOI submitted beyond the due date for submissions as per the Final form G. Regulation 36A(6) of the CIRP Regulations in verbatim extracted herein below:

"(6) The expression of interest received after the time specified in the invitation under clause(b) of sub-regulation(3) shall be rejected."
 - d. In the case of *Bilagi Sugar Mill Limited vs. Mr. M.V. Sudarshan*, I.A. No.111 of 2020 in C.P. (IB) No.43/BB/2019,, the mandatory procedure to be followed by the resolution professional to reject an EOI which is submitted beyond the due date for submission, was detailed by the Adjudicating Authority.
 - e. Further, in the case of *Amit Gupta vs. Yogesh Gupta*, Company Appeal (AT) (Ins) No.903 of 2019, an observation was made by the

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- Adjudicating Authority that even an email sent to the resolution professional as an EOI, post a few hours of the due time line prescribed in the IEOI, is liable to be rejected by the resolution professional.
- f. Thus, as per the provisions of the IBC and CIRP Regulations, it can be understood that the Respondent No.1 had no other choice than to reject the request for submission of EOI by the Applicant and the same would only be in execution of the duties of the Respondent No.1 as per the CIRP Regulations. The Respondent No.1 has acted in accordance with the due process as envisaged by the amendment to Regulation 36A of the CIRP Regulations vide Notification No. IBBI/2018-19/GN/REG 031, dated 03 July 2018 w.e.f. 4 July 2018. That as the CIRP of a Corporate Debtor is a time bound process and therefore, allowing the Applicant to enter into the resolution process of the Corporate Debtor at this belated stage will lead to further inordinate delays. As per the meeting of the Respondent No.2 on 9 July 2021, the last date for submission of resolution plans is 26 July 2021, and if the Applicant is now allowed to submit its EOI, the Respondent No.1 will have to undertake additional diligence to examine the eligibility of the applicant in terms of Regulation 36A (8) of the CIRP Regulations, which will further take time.
- g. That by entertaining such claims, this Adjudicating Authority will only be burdened by other third persons will also want to participate at this belated stage, and hence the CIRP of the Corporate Debtor will never be completed in time. This was the main reason that Regulation 36A(6) was inserted in the CIRP Regulations, to disallow participation by any other parties post the final timeline specified in Form G.
- h. It is also alleged by the Applicant that the Respondent No.1 has unfairly treated the Applicant by allowing one of the group companies of Jindal Power Limited ("JPL"), a shortlisted prospective resolution applicant to participate in the resolution process of the Corporate Debtor, without submitting an EOI. It is clarified herein that the Respondent No.2 did not specifically provide any clarification to JPL, but clarified and resolved in general to all prospective resolution applicants. Therefore, any

allegations by the Applicant stating unfairness on the part of the Respondent No.1 and Respondent No.2 in allowing the group companies of JPL to participate in the CIRP of the Corporate Debtor is wholly unfounded and baseless.

- i. That the decision of the Respondent No.2 in allowing the group companies of the prospective resolution applicants to participate in the resolution process of the Corporate Debtor, is in line with the IEOI and RFRP issued by the Respondent No.1. The deliberations of the Respondent No.2, is based on well settled law as laid down by the Hon'ble Supreme Court in Committee of Creditors of Essar Steel India Limited vs. Satish Kumar.Gupta, Civil Appeal No.8766-67 OF 2019. The relevant paragraph is extracted herein below for easy reference:

“10. What is important is that it is the commercial wisdom of this majority of creditors which is to determine, through negotiation with the prospective resolution applicant, as to how and in what manner the corporate resolution process is to take place.”

- j. Therefore, the decision of Respondent No.2 to allow the participation of group companies of the prospective resolution applicants in the CIRP of the Corporate Debtor, vide meeting of the Respondent No.2 on 18 June 2021, in accordance with the IBC, CIRP Regulations, IEOI and RFRP is within its commercial wisdom.
- k. Thus, the reliefs sought by the Applicant is without any merit as it is in direct contravention of the duties of a resolution professional in terms of the IBC and is an attempt to coerce the Respondent No.1 to act in dereliction of his duties. Further, the allegations made by the Applicant in relation to JPL and its group companies is baseless and is irrelevant to the prayers sought for in the present application. As per numerous judgments of the Supreme Court including Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta, Civil Appeal No.8766-67 OF 2019, it is submitted herein that the Applicant does not have any right, let alone any vested right to seek for acceptance of submission of its EOI at this far-belated stage (one year). Therefore, this Applicant does not have any locus to interfere in the CIRP of the Corporate Debtor at this stage, and this

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Application is a waste of judicial resources and time and is therefore liable to be dismissed in limine.

4. Heard both sides and perused the record.
5. It is seen from the record that the RP and CoC allowed other group Companies of M/s. Jindal Power Ltd, to submit the Resolution Plan changing Form-G, although that group Company was not a Resolution Applicant at all. Even the Resolution Plan submitted by the group company of M/s. Jindal Power Ltd is still under consideration by CoC. The Applicant approached the CoC and requested them to allow to submit the Resolution Plan, in view of the above changed circumstances, but, CoC did not consider the prayer. It is to be noted that the Applicant has already submitted the EOI vide emails dated 28.06.2021 and 04.07.2021 along with its Net worth certificate showing its desire to submit the Resolution Plan. The RP has not controverted the eligibility of the Applicant on the basis of any criteria as laid down under RFRP.
6. It appears to us that CIRP period is already over but since one plan is pending and since there is likelihood of Resolution of Insolvency of Corporate Debtor, we did not pass order of Liquidation.
7. To maintain parity of process, we direct the RP and CoC to allow the Applicant to submit the Plan on the basis of amendment of Form – G on which the Group Companies of M/s. Jindal power Ltd were allowed to submit the plan.
8. The Applicant to submit the Resolution Plan within two weeks from today without fail. We further direct the RP and CoC to consider both Resolution Plans within two weeks thereafter.
9. We further direct the RP to complete the CIRP process within 30 days without fail because CIRP period is already over (excluding the lockdown period and period under which CIRP was stayed).
10. With the above, IA No. 325/2021 stands disposed of. Interim order if any shall stand merged with this order.

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DR. BINOD KUMAR SINHA
MEMBER TECHNICAL

Santi/SKRathi

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MADAN B. GOSAVI
MEMBER JUDICIAL