

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
SPECIAL BENCH (Court– I)  
KOLKATA**

I.A. No. 106/KB/2022  
in  
C.P. (I.B) 13/KB/2022

*An application under section 60(5) of the Insolvency and Bankruptcy Code, 2016 read  
with Rule 11 of the National Company Law Tribunal Rules, 2016*

*In the matter of:*

**Chaitanya Alloys Private Limited.**

..... *Operational Creditor*

*-versus-*

**Y.R. Traders Private Limited**

..... *Corporate Debtor*

*And*

**Anand Vihar Reality Private Limited.**

..... *Applicant*

*-versus-*

**Mr. Sushanta Kumar Choudhary,  
Resolution Professional of  
Y.R. Traders Private Limited**

..... *Respondent*

**Date of Hearing:** 26.07.2023

**Date of Pronouncement of the order:** 28.02.2024

**Coram:**

**Bidisha Banerjee, Member (Judicial)**

**Balraj Joshi, Member (Technical)**

**Appearances (via video conferencing/physical):**

*For the Liquidator:*

Mr. Rishav Banerjee, Adv.

Mr. Aritra Ray, Adv.

Mr. Zeenat Shahab, Adv.

Mr. Sushanta Kumar Choudhury, liquidator in person

*For Applicant in I.A. (IBC) 106/KB/2023:*

Mr. Shadab Jan, Adv.

Ms. Perna Wagh, Adv.

Mr. Mufaddal, Adv.

**ORDER**

***Balraj Joshi, Member (Technical):***

1. This Court convened through hybrid mode.
2. This is an application under section 60(5) of the Insolvency and Bankruptcy Code, 2016 (herein after referred as “the Code” or “IBC”) by **Anand Vihar Reality Private Limited**, seeking the following reliefs:

- a. *Declare that Clause X(e) & XVIII(o) of Part II to the Request for Resolution Plan is illegal, ultra vires and bad in law;*
- b. *Declare that the decision of the Committee of Creditors of Y. R. Traders Private Limited to forfeit the Earnest Money Deposit submitted by the Applicant is premature, illegal and bad in law;*
- c. *Set aside and quash Letter dated 19th November 2022 (Exhibit A herein);*

- d. *Direct the Respondent to repay Rs. 12,00,000/- (INR Twelve Lakh Only) along with interest at 12% per annum from 9th December 2022 till date of filing of the present application and further interest (as this Hon'ble Court may determine) from the date of order till realization;*
- e. *Pending hearing, adjudication and final disposal of the application, restrain the Resolution Professional from banking/encashing/depositing or in any manner appropriating Demand Draft No. 85334 dated 30th September 2022 drawn on Canara Bank in favor of the Corporate Debtor;*
- f. *Pending hearing, adjudication and final disposal of the application, restrain the Resolution Professional from distributing or in any manner apportioning/appropriating any part of Rs. 12,00,000/- (INR Twelve Lakh Only);*
- g. *Pending hearing, adjudication and final hearing of the present application, direct Respondent No. 1 to disclose the Minutes of COC Meeting held on 25th October 2022 and on 16th November 2022 along with audio-video recording of such meetings;*
- h. *Pass any other order or issue any direction or grant any other relief as this Hon'ble Tribunal may deem fit, proper or necessary in the interest of justice or circumstances of the case;*
- i. *Cost of this application;*
3. The Respondent Company is a public limited company incorporated on 16.06.2004. The authorized share-capital of the company ₹38,00,00,000/- and the paid-up share capital of the company is ₹37,83,17,500/-.

**4. Submissions on behalf of the Applicant:**

- 4.1 The case of the Applicant is that On 7th June 2022, this Adjudicating Authority passed an Order in CP(IB)/13/KB/2022 thereby initiating the corporate insolvency resolution process of Y. R. Traders Private Limited ("Corporate Debtor"). Pursuant thereto the Respondent was appointed as the Interim Resolution Professional. As such, the Resolution Professional caused publication of public announcement in Form A on 9th June 2022 inviting claims from the creditors of the Corporate Debtor.
- 4.2 Since the Corporate Debtor did not have any financial creditors, the Resolution Professional constituted the COC comprising of operational creditors in terms of Reg. 16 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("CIRP Regulations").
- 4.3 On 23 July 2022, the Resolution Professional published a notice in Form G<sup>1</sup> inviting expressions of interest from prospective resolution applicants. The last date for submission of resolution plans as per the published Form G was 31 October 2022.
- 4.4 In view of the same, the Applicant herein submitted its Expression Of Interest<sup>2</sup> (EOI) along with refundable deposit of Rs. 2,00,000/- (INR Two Lakh Only) and thereafter was shortlisted by the Resolution Professional in the final list of Prospective Resolution Applicants ("PRAs"). Accordingly, the Resolution Professional made available and supplied a copy of the Request for Resolution Plan<sup>3</sup> ("RFRP") dated 20 July 2022 in terms of Regulation 36B of the CIRP Regulations. Notably, the RFRP explicitly provided that the EMD accompanying any plan shall be subject to forfeiture on specific grounds stated in Clause X(e) of Part II.
- 4.5 The Applicant submitted its Resolution Plan<sup>4</sup> on 30th September 2022 along with EMD of Rs. 10,00,000/- (INR Ten Lakh Only). On 11th October 2022, the COC held a meeting to discuss the Resolution Plan submitted by the Applicant and found the same to

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<sup>1</sup>Annexure C

<sup>2</sup>Annexure D

<sup>3</sup>Annexure E

<sup>4</sup>Annexure F

be deficient. The Applicant was informed about the said deficiencies vide letter<sup>5</sup> dated 13<sup>th</sup> October 2022 and was called upon to submit a revised plan for consideration of the COC.

4.6 In response, the Applicant addressed its Letter<sup>6</sup> dated 18th October 2022 inter alia providing its revised terms for the consideration of the COC and proposing to submit its revised resolution plan in terms thereof. Notably, in the said letter, it was explicitly communicated by the Applicant that the revised Resolution Plan (for consideration of the COC) would be submitted by the Applicant once the decision of the COC is informed on the revised terms. Therefore, the Applicant had made it explicitly clear that the revised resolution plan would be submitted for consideration after the assessment of the COC, and neither the Resolution Professional nor the COC addressed any protest or notice of dispute with respect to the same.

4.7 On 25th October 2022, the COC held another meeting wherein the revised terms proposed by the Applicant were discussed. The CoC suggested further modifications and suggested that the Applicant submit a revised plan after considering the same.

4.8 Surprisingly, despite the Applicant having explicitly communicated that the revised resolution plan would be submitted after such discussions, the COC proceeded to vote upon the approval of the resolution plan without having the revised resolution plan being submitted by the Applicant. The factum of the above development was intimated by the Resolution Professional vide its email<sup>7</sup> dated 12th November 2022 wherein it was suggested that the purported resolution plan submitted by the Applicant has been approved by the COC and EMD amount would be adjusted towards the Performance Bank Guarantee (PBG) in terms of the RFRP.

4.9 Upon receipt of the above email, the Applicant issued an immediate response placing on record the correct narration of facts and reminding the Resolution Professional that the Applicant was required by the COC to submit a revised resolution plan. It was also informed that the revised resolution plan could not be submitted due to certain change in circumstances which would have rendered the performance of the plan vulnerable to failure. Accordingly, it was informed that the Resolution Plan submitted by Applicant

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<sup>5</sup>Annexure G

<sup>6</sup>Annexure H

<sup>7</sup>Annexure I

stands withdrawn and thus called upon the Resolution Professional to refund the EMD. The Resolution Professional, *vide* email<sup>8</sup> dated 15th November 2022, addressed its response to the above email and informed that the decision to allow withdrawal would be taken by the COC.

4.10 In the meeting held on 16<sup>th</sup> November 2022, the COC took a decision to allow the withdrawal of the plan but also decided to forfeit the EMD submitted by the Applicant. The Resolution Professional communicated the Impugned Decision of the COC by the Impugned Letter dated 19th November 2022 wherein it was revealed that:

- a) The COC has sought to forfeit the EMD in exercise of its purported powers under Clause XII(e) of the RFRP;
- b) The COC has sustained loss and the reasons for forfeiture is based on the purported indemnity under Clause XII(f) of the RFRP.

4.11 Pursuant thereto, the Applicant addressed its letter<sup>9</sup> dated 9th December 2022 thereby informing the Resolution Professional that the Impugned Decision of the COC is illegal and the RFRP does not empower the COC to forfeit the EMD/PBG of any PRA prior to approval of the plan by the Adjudicating Authority. In response, the Resolution Professional placed the objections before the CoC which (rather than changing its decision) maintained its position and decided to forfeit the EMD.

4.12 Being aggrieved by the Impugned Decision and the Impugned Letter, the Applicant prefers the present Application under Section 60(5) of the Code on the following grounds:

- a) The Impugned Decision of the COC is illegal and beyond the terms of the RFRP. The forfeiture of EMD/PBG under the RFRP is envisaged in specific cases under Clause X(e) of Part II, and the Applicant did not fall in any of such cases.
- b) The COC having considered the EMD as compliant with condition of submission of PBG, the question of violating any provision of RFRP did not arise.

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<sup>8</sup>Annexure K

<sup>9</sup>Annexure L

- c) The Code as well as the regulations therein do not prohibit withdrawal of plan prior to approval by the Adjudicating Authority and the condition in RFRP prohibiting withdrawal of plan or forfeiting the EMD/PBG, prior to approval of the plan, is in contravention of the scheme of the Code and Reg. 36B of the CIRP Regulations.
- d) The Applicant did not enter into any contract of indemnity (express or implied) with the COC or the Resolution Professional which would entitle the COC to forfeit the EMD/PBG. Furthermore, the Applicant has not committed any breach of the RFRP or any other applicable law which entitle the COC to forfeit the EMD/PBG.
- e) The COC cannot act on assumptions and unilaterally forfeit the EMD/PBG by assuming that loss or harm has been caused to the COC. By doing so, the COC has wrongly acted assumed judicial functions and proceeded to forfeit the EMD/PBG without taking recourse to remedies available in law.
- f) The Applicant was the sole resolution applicant for the Corporate Debtor and that the process conducted by the Resolution Professional did not elicit any other suitors. Further, nothing prevented the COC from floating a fresh Form G to invite further plans from PRA since the CIRP period of the Corporate Debtor was yet to expire, and there was sufficient time available to explore further resolution. Therefore, the reasons provided by the Impugned Letter are clearly mala fide and seem to be an afterthought.
- g) The Applicant did not submit a revised resolution plan and thus the COC could not have taken any decision on the revised terms submitted by the Applicant without having a complete revised plan (in terms of the RFRP).

4.13 Furthermore, as regards the events that transpired on 25th October 2022, the Resolution Professional has sought to create a false record of the events that have occurred in the meetings held with the COC. The Resolution Professional has refused to provide minutes of such meeting when called upon by the Applicant. The refusal of the Resolution Professional is deliberate and mala fide. Therefore, during the pendency of the present application, it is necessary that the minutes of such meeting be shared along with the

audio-video recording thereof in order that the adjudication of the matter be conducted in an effective manner.

**5. Submissions on behalf of the Respondent:**

The submissions on behalf of the Respondent are summarized hereinafter:

- 5.1 The Corporate Debtor is currently undergoing liquidation under the provisions of the IBC in accordance of the order passed by the Adjudicating Authority on 31.01.2023.
- 5.2 The application filed by the Applicant is not maintainable in light of the judgment of the Hon'ble Supreme Court in *Ebix Singapore (P) Ltd. vs Educomp Solutions Ltd*<sup>10</sup> wherein it has been expressly held by the Hon'ble Supreme Court of India in paragraph 221 that:

*"The residual powers of the adjudicating authority under the IBC cannot be exercised to create procedural remedies which have substantive outcomes on the process of insolvency. The framework, as it stands, only enables withdrawals from the CIRP process by following the procedure detailed in Section 12-A of the IBC and Regulation 30- A of the CIRP Regulations and in the situations recognized in those provisions. Enabling withdrawals or modifications of the resolution plan at the behest of the successful resolution applicant, once it has been submitted to the adjudicating authority after due compliance with the procedural requirements and timelines, would create another tier of negotiations which will be wholly unregulated by the statute. Since the 330 days' outer limit of the CIRP under Section 12(3) of the IBC, including judicial proceedings, can be extended only in exceptional circumstances, this open-ended process for further negotiations or a withdrawal, would have a deleterious impact on the corporate debtor, its creditors, and the economy at large as the liquidation value depletes*

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<sup>10</sup>(2022) 2 SCC 401

*with the passage of time. A failed negotiation for modification after submission, or a withdrawal after approval by the CoC and submission to the adjudicating authority, irrespective of the content of the terms envisaged by the resolution plan, when unregulated by statutory timelines could occur after a lapse of time, as is the case in the present three appeals before us. Permitting such a course of action would either result in a downgraded resolution amount of the corporate debtor and/or a delayed liquidation with depreciated assets which frustrates the core aim of IBC."*

- 5.3 The resolution plan been approved by the COC by 90.61% voting share in its 7th meeting held 25.10.2022 in the presence of the representative of the RA who was invited in the meeting to provide clarifications, if required by the COC members, so that CIRP process could be completed within the scheduled period. The same is evident from the minutes<sup>11</sup> of the 7th COC Meeting and the voting result.
- 5.4 Only after approval of the Resolution Plan submitted by the Applicant herein by the COC, the Applicant decided to withdraw such resolution plan and sent the email dated 12.11.2022 communicating the same. The Applicant did not give any reason for the withdrawal of such resolution plan.
- 5.5 It is a settled principle of law that a Resolution Applicant cannot withdraw its resolution plan after approval by the COC and such is the clear mandate of law as has now been settled by the Apex Court in *Ebix Singapore (P) Ltd.* (supra).
- 5.6 since the Applicant decided to withdraw the Resolution Plan after approval by the COC and since there was no other resolution plan submitted in respect of the corporate debtor, the respondent filed an application for liquidation and in the liquidation application, the respondent duly mentioned about withdrawal of the Resolution Plan by the Applicant. It is on this basis that this Adjudicating Authority duly passed the order of liquidation dated 31.01.2023.

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<sup>11</sup>Annexure A2 to the reply

- 5.7 According to Clause (X)(e) of the RFRP<sup>12</sup> issued by the respondent herein, the COC has a right to forfeit the EMD of the Successful Resolution Applicant/Resolution Applicant. Moreover, as per Clause (XVIII)(0) of the RFRP, the Resolution Applicant cannot unilaterally withdraw the Resolution Plan after it is submitted to the Resolution Professional.
- 5.8 In the instant case at hand, the Applicant has withdrawn its resolution plan after the same has been approved by the Committee of Creditors of the Corporate Debtor and thus, the EMD submitted by the Applicant deserves to be forfeited as per the binding RFRP which is binding upon the Applicant as well as under the CIRP Regulations.
- 5.9 In any event, the Committee of Creditors in its commercial wisdom has decided to forfeit the EMD of the Applicant and the commercial wisdom of the COC cannot be interfered with.
- 5.10 The Applicant has admittedly received the 'Request for Resolution Plan (RFRP)' dated 20.07.2022 which explicitly mentions about the forfeiture of the EMD on specific grounds as provided in Clause X (e) of the Part-II.
- 5.11 The 6th COC meeting was held on 11.10 2022 to review the feasibility of implementation of the Plan and financial viability of the Resolution Applicant. The Resolution Applicant has also admitted that after review, the respondent had written a letter<sup>13</sup> to the Resolution Applicant on 13.10.2022 informing about the deficiencies in the Plan and requested the Resolution Applicant to remove the deficiencies and improve upon five (5) specific points. The RA improved on all the said points and communicated the same *vide* their letter dated 18.10.2022. However, the Respondent had never called upon the Resolution Applicant to submit any revised resolution plan in the said letter dated 13.10.2022 as alleged by the Applicant. The said letter dated 13.10.2022 does not include a single word/ line calling upon the applicant to submit a revised plan.

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<sup>12</sup>Annexure A-7 to the Reply- Affidavit

<sup>13</sup>Annexure A4 to the Reply Affidavit

- 5.12 The Applicant has also admitted at Paragraph 13 of their application that the RA had responded on 18.10.2022 to the above letter of the RP. The submission of the revised plan was unilaterally proposed by the RA in the said letter dated 18.10.2022 and same was uncalled for as the RP had never asked for the revised resolution plan. Further, the unilateral proposal/ condition of the RA does not have any recognition in the RFRP as the RA cannot unilaterally change the Resolution Plan submitted by them to the RP under Clause No. XVIII (o) of Part-II of the RFRP and as such, it does not change the binding or irrevocability of the character of the resolution plan as mentioned in Clause VIII (f) of Part-II of the RFRP.
- 5.13 The applicant has admitted/ acknowledged in the Paragraph 14 application that the improvements as proposed by the applicant were discussed 7th COC meeting held on 25.10.2022. The discussions on the revised terms or improvements took place in the presence of the representative of the RA who was invited to attend the COC meeting as an invitee. The above arrangement was made with a view to obtain the clarification of the RA, if required by the COC, on the spot so that the approval of the COC can be obtained in the same meeting in the presence of the RA without further loss of time and close the CIRP process within the scheduled time of 180 days. The Applicant has deliberately refrained from mentioning the same.
- 5.14 The minutes of the said meeting (MOM) was not shared initially as the RA was not a member of the COC. However, subsequently after withdrawal of the resolution plan, when the RA asked for a copy of the MOM, the COC felt that since the RA had withdrawn the resolution plan, it has lost its locus standi to obtain the copy of the MOM. Further,
- 5.15 The Resolution Professional, as a part of the implementation of the resolution plan, communicated the Applicant *vide* e-mail dated 12.11.2022 about the transfer of the EMD amount available with the RP to the Performance Bank Guarantee (PBG) Account as per requirement under the terms and conditions of the RFRP. The Resolution Applicant then

by a return e-mail<sup>14</sup> dated 12.11.2022 expressed their intention to withdraw the resolution plan without assigning any valid reason.

5.16 Under Clause XI (a) of the Part-II of the RFRP (Page No. 18) the successful RA was required to submit the PBG equivalent to 7.5% of the offer value after adjustment of the EMD within 7 (seven) days of the after the approval of the resolution plan by the COC. The Resolution plan was approved in its 7th meeting held on 25.10.2022 in the presence the representative of the RA and the RA was informed about adjustment/ transfer of the EMD to the PBG Account vide mail dated 12.11.2022. In the instant case, since the amount of EMD of Rs. 12.00 lakhs (Rupees Twelve Lakhs only) was higher than the required amount of PBG of Rs.7.50 lakh (Rupees Seven lakh Fifty Thousand only), the RP did not feel it necessary to remind the RA for payment of PBG amount. Instead, the RA was communicated the approval of the resolution plan and conversion/transfer of the EMD to PBG on 12.11.2022. In response, the Applicant RA informed about the withdrawal of the plan without assigning any valid reason and requested to refund their EMD which was unacceptable to the CoC.

5.17 In view of the above facts, the COC in its capacity has invoked the Clause No. X (e) of Part-II of the RFRP (Page No. 18) which provides that the COC is entitled to forfeit EMD in case the Resolution Applicant fails to submit the PBG within the stipulated time or the successful Resolution Applicant is found to have made a false or misleading representation or statement or in case of any other non- compliance with the resolution plan process by the successful resolution applicant.

**6. Analysis and Findings:**

6.1 Heard the Ld. Counsels on behalf of the parties and perused the records.

6.2 Upon perusal of the records, the following timeline can be arrived at:

Date	Event
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<sup>14</sup>Annexure A-5 to the Reply Affidavit

IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH  
(Court-I)

I.A. 106/KB/2023 in  
C.P. (IB) No. 13/KB/2022

20.07.2022	RFRP was issued tot the Applicant
30.09.2022	The Resolution Plan was submitted by Applicant along with EMD of Rs. 10,00,000/-
1/10/2022	Binding Plan Due Date
11/10/2022	CoC found efficiencies in the Resolution Plan in the __ Coc Meeting
13.10.2022	Resolution Professional communicated to the Applicant regarding said deficiencies with a request to improve on the same
18.10.2022	Applciant replied to the Resolution Professional with revised terms for the consideration of CoC and proposing to submit a revised resolution plan.
25.10.2022	CoC approved the Resolution Plan submitted by the Applicant in presence of the Representative of the Resolution Applicant.
12.11.2022	Resolution Professional communicated to the Applicant regarding approval of the resolution plan on 25.10.2022 and the adjustment of the Performance bank guarantee from the EMD.
12.11.2022	Applicant communicated to the Resolution Professional regarding withdrawal of the Resolution Plan. Further, the Applicant requested for the refund of the EMD
15.11.2022	Resolution Professional informed the Applicant that the Applicant's decision to withdraw would be taken to the CoC
16.11.2022	CoC allowed the withdrawal of the Resolution Plan and decided to forfeit the EMD amount
20.11.2022	Resolution Professional communicated to the Applicant the decision of CoC.

6.3 Further, upon going through the Request for Resolution Plan (RFRP), the following terms become clear:

- (a) **Clause X (e):***The CoC is entitled to forfeit the EMD where:*
- (i) *A successful resolution applicant fails to submit the performance guarantee within the stipulated time; or*
  - (ii) *Successful Resolution Applicant/ Resolution Applicant is found to have made a false or misleading representation or statement*
  - (iii) *in case of any other non-compliance with the Resolution Plan Process by the Successful Resolution Applicant/ Resolution Applicant.*
- (b) **Clause XI (a):***Within 7 (Seven) days of the date of approval of the Successful Plan by the CoC, the Successful Resolution Applicant(s) shall provide a Performance Guarantee (PG) equivalent to 7.5% of the offer value after adjusting EMD given in favour of "Y. R. Traders Private Limited". The Performance Guarantee should be payable at Kolkata and should be executed from a Scheduled Bank located in India. The form of the Performance Guarantee has been in the form provided in Appendix-4. In case, Resolution Applicant is unable to give Performance Guarantee, they can transfer the balance amount in INR as mentioned above in the account of the Corporate Debtor (CD) maintained with "Indian Overseas Bank". The PG shall be valid for an initial period of 6 (Six) months from the date of issue of the PG and shall be extended /renewed by the Successful Resolution Applicant(s) for such period until 100% (one hundred percent) of the successful Resolution Applicant(s) contribution is made by the successful Resolution Applicant(s) in accordance with the Resolution Plan ("Performance Guarantee Validity Period"). The PG shall have a claim period of 3 (Three) months after expiry of the validity period of the PG.*
- (c) **Clause XVIII (h):***No change of supplemental information to the Binding Resolution Plan shall be accepted after the Binding Plan Due Date. The CoC may, at its sole discretion, ask for additional information/RFRP and or seek clarifications from a Resolution Applicant(s), after the Binding Plan Due Date.*

*Delay in submission of additional information and/or documents sought by the CoC shall make the Plan liable for rejection.*

*(d) **Clause XI (o):** The Resolution Applicant(s) cannot unilaterally change / withdraw the Resolution Plan once submitted to the Resolution Professional.*

6.4 It is clear from the RFRP that the CoC would be entitled to forfeit the entire EMD amount only in three scenarios:

- (a) In case of failure of the successful resolution applicant in submitting the performance guarantee within the stipulated time or
- (b) Successful Resolution Applicant/ Resolution Applicant is found to have made a false or misleading representation or statement in the resolution plan; or
- (c) In case of any other non-compliance with the Resolution Plan Process on part of the Successful Resolution Applicant/ Resolution Applicant.

6.5 As per the terms of the RFRP, the Resolution Applicant was not allowed to change or withdraw the Resolution Plan once it was submitted to the Resolution Professional without the consent of the CoC. None of that has happened in the instant matter. The Applicant, *vide* letter dated 18.11.2022, expressed its intention to submit a revised resolution plan but from the documents on record, it does not appear that the Resolution Professional replied to the same. Instead the CoC approved the resolution Plan submitted by the Applicant in light of the improvements in the 7<sup>th</sup> CoC Meeting held on 25.10.2022. Thereafter, the intention to withdraw the resolution plan was communicated to the Resolution Professional on 12.11.2022. The CoC in the 8<sup>th</sup> CoC Meeting held on 16.1.2022, approved the said withdrawal. As such the withdrawal was not unilateral, but with consent of the CoC. As such, there is no non-compliance on part of the Successful Resolution Applicant/ Resolution Applicant with the Resolution Plan Process.

- 6.6 Further, nowhere in the Reply Affidavit has the Respondent contended that there were any discrepancies in the statements made by the Applicant in the resolution plan. As such, examining the particulars of the Resolution Plan, we hold that the representations and statements made in the Resolution Plan by the Applicant are in order.
- 6.7 Furthermore, from the email dated 11.12.2022 sent by the Resolution Professional to the Applicant herein, it can be seen that the Resolution Professional, while informing about the approval of the Resolution plan on 25.10.2022, also informed the Applicant that since the PBG is lower than the EMD, the EMD was going to be held towards PBG as per the conditions mentioned in the RFRP. As such, since no demand was made to the Applicant to furnish any PBG and the same was adjusted against the EMD, the question of failure on part of the Applicant in submitting the performance guarantee within the stipulated time does not arise.
- 6.8 As such, none of the conditions mentioned in the RFRP that would entitle the CoC to forfeit the EMD get triggered in the instant case.
- 6.9 Further, the Code read with regulations made thereunder has categorically mandated that EMDs submitted along with Resolution Plans cannot be non-refundable. Furthermore, the Regulations have also provided that the only scenario in which the Resolution Professional would be allowed to forfeit the EMD is upon non implementation of Resolution Plan after the approval by the Adjudicating Authority was obtained. Reg. 36B(4) & 36B(4A) of the IBBI (Insolvency Resolution Process) Regulations, 2016 are reproduced herein-below for reference:

***"36B. Request for Resolution Plan***

*(4) The request for resolution plans shall not require any non-refundable deposit for submission of or along with resolution plan.*

*[(4A) The request for resolution plans shall require the resolution applicant, in case its resolution plan is approved under sub-section (4) of section 30, to provide a performance security within the time specified therein and such performance security shall stand forfeited if the resolution applicant of such plan, after its approval by the Adjudicating Authority, fails to implement or contributes to the failure of implementation of that plan in accordance with the terms of the plan and its implementation schedule.*

*Explanation I.- For the purposes of this sub-regulation, "performance security" shall mean security of such nature, value, duration and source, as may be specified in the request for resolution plans with the approval of the committee, having regard to the nature of resolution plan and business of the corporate debtor.*

*Explanation II. - A performance security may be specified in absolute terms such as guarantee from a bank for Rs. X for Y years or in relation to one or more variables such as the term of the resolution plan, amount payable to creditors under the resolution plan, etc."]*

In the present case, the Resolution Plan submitted by the Applicant was never approved by the Adjudicating Authority, and was withdrawn prior to any such approval. It is seen from the emails dated 15.11. 2022 and 20.11.2022 that the Applicant's decision to withdraw the resolution plan was taken to the CoC for consideration in the 8<sup>th</sup> CoC Meeting. Further, it is seen that in the 8<sup>th</sup> CoC Meeting, a resolution for liquidation was passed with 91.54% votes whereas section 12A of the Code necessitates the approval of 90% voting share of the Committee of Creditors for the purpose of withdrawal of a resolution plan. As such, by approving the liquidation resolution, the CoC shall be deemed to have fulfilled such stipulation of section 12A. The CoC has *de facto* allowed the withdrawal of the Resolution Plan and such withdrawal *inter alia* means that the entire process has come to an end by the CoC itself which in essence means that nothing needs to be forfeited as a matter of penalty. As such,

the forfeiture of the EMD by the CoC is in contravention to the aforementioned Regulations.

6.10 According to the Respondent's letter dated 19.11.2022, the EMD was forfeited by the CoC in light of the damages caused to the Corporate Debtor due to such withdrawal. In this regard, we would like to rely on the landmark judgment of *Kailash Nath Associates Vs. Delhi Development Authority &Anr.*<sup>15</sup>, wherein the Hon'ble Supreme Court, clarifying on the position of forfeiture of EMD, has held that :

*“42. In the present case, forfeiture of earnest money took place long after an agreement had been reached. It is obvious that the amount sought to be forfeited on the facts of the present case is sought to be forfeited without any loss being shown. In fact it has been shown that far from suffering any loss, DDA has received a much higher amount on re-auction of the same plot of land.*

*43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:-*

*43.1 Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable*

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<sup>15</sup>(2015) 4 SCC 136

*compensation.*

*43.2 Reasonable compensation will be fixed on well known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.*

*43.3 Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the Section.*

*43.4 The Section applies whether a person is a plaintiff or a defendant in a suit.*

*43.5 The sum spoken of may already be paid or be payable in future.*

*43.6 The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.*

*43.7 Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application."*

6.11 In the instant matter, the Respondents have failed to make out any case to prove any damages or losses suffered on account of the withdrawal of the Resolution Plan by the Applicant.

6.12 It is also noted that the Applicant has alleged that the Resolution Professional has sought to create a false record of the events that have occurred in the meetings held with

the COC. However, there is nothing on record to substantiate the same and as such, this particular allegation is not maintainable.

6.13 Be that as it may, in light of the aforesaid facts, circumstances and the law laid down by the Apex court in this regard, it is clear to us that the forfeiture of the EMD by the CoC in the instant case was bad in law. As such, we allow the instant application and direct the Respondent to refund the entire amount of EMD being Rs. 12,00,000/- within 15 days of this order.

6.14 *IA (IBC) No.106/KB/2023* shall stand disposed of accordingly.

6.15 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.

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

**Balraj Joshi**  
**Member (Technical)**

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

The order is pronounced on the 28<sup>th</sup> day of February, 2024

SM\_(LRA)