

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT-V**

**I.A. No. 5042 of 2023
In
C.P. No. 610 of 2021**

Under Section 60(5) of Insolvency
& Bankruptcy Code, 2016 read
with Rule 11 of the National
Company Law Rules 2016

I. A. No. 5042 of 2023

**Nakshatra Asset Ventures
Limited**

.....Applicant/

vs.

**Mr. Huzefa Fakhri Sitabkhan
Resolution Professional of Zicom
Electronic Security Systems
Limited**

.....Respondent No. 1

**Committee of Creditors
Through Resolution Professional of
Zicom Electronic Security Systems
Limited**

...Respondent No. 2

In the matter of
IDBI Bank Limited

.... *Financial Creditor*

vs.

M/s Zicom Electronic
Security Systems Limited
.... *Corporate Debtor*

Order Dated: 01.03.2024

Coram:

Hon'ble Reeta Kohli, Member (Judicial)
Hon'ble Madhu Sinha, Member (Technical)

Appearance in Physical Mode:

For the Applicant/ Resolution Professional: Adv. Sneha Phene (PH)
For Respondent No. 1: Adv. Smiti Tewari (PH)

ORDER

Per: Madhu Sinha Member (Technical)

1. *The present Application has been filed by Nakshatra Asset Ventures Limited (Hereinafter referred to as the “**Applicant**”) seeking the following reliefs:*
 - a. *Direct the Respondents to forthwith refund the EMD amount of Rs. 25,00,000/- deposited by the Applicant with Respondent No. 1:*
 - b. *Pass such further and other orders as the nature and circumstances of the case may require;*
 - c. *Grant costs of the present application to the Applicant*

Brief Facts and Submissions by the Applicant

1. Corporate Insolvency Resolution Process was initiated against the Corporate Debtor by the Hon'ble National Company Law Tribunal, Mumbai Bench vide an order dated 29.07.2022.
2. On 18.04.2023, the Applicant submitted Expression of Interest (Hereinafter referred to as "**EOI**") in relation to the Corporate Insolvency Resolution Process (Hereinafter referred to as "**CIRP**") of the Corporate Debtor. The Applicant thus being one of the Prospective Resolution Applicants was eventually included in the final list of Prospective Resolution Applicants and was furnished with the Information Memorandum and Request for Resolution Plan (Hereinafter referred to as "**RFRP**"). On 12.05.2023, it submitted a Resolution Plan in the matter of the Corporate Debtor along with remittance of the Earnest Money Deposit (EMD) of Rs. 25,00,000/-
3. Respondent No. 1 vide an email dated 18.05.2023 pointed out certain deficiencies in the Resolution Plan submitted by the Applicant. The Applicant therefore, vide email dated 23.05.2023 provided an addendum to the plan, updating the resolution plan in terms of all observations made by Respondent No. 1. The composition and ownership structure as also the proof of funds as required by Respondent No. 1 by his email of 18.05.2023, were also provided separately. Furthermore, the original copy of the Board Resolution and Notarized Copy of the Power of Attorney as required by Respondent No. 1 were furnished to him during the course of the CoC meeting held on 25.05.2023.
4. It is the case of the Applicant that vide emails dated 25.05.2023 and 31.05.2023, Respondent No. 1 once again called upon the Applicant to provide the composition and ownership structure, as also details

of source of funds, both of which were already provided earlier. Respondent no. 1 also called upon the Applicant to provide the Authorization from Banks in Format IV provided in the RFRP despite the fact that the Applicant had specifically stated in its Resolution plan that this requirement was not applicable to the Applicant as it was utilizing its own funds for the purpose of the plan and was not intending to borrow any amount from banks/financial institutions. Thus the Applicant alleges that the above stated emails were apparently sent only with a view to create a false record, to enable the Respondents to unjustifiably forfeit the amount of the Applicant.

5. On 11.07.2023, after lapse of considerable amount of time since the last communication, the Applicant inquired about the present status of CIRP of the Corporate Debtor and also stated that if the resolution plan submitted by the Applicant was not being considered, then the EMD amount of Rs. 25,00,000/- be refunded. In reply thereto, vide email dated 12.07.2023, Respondent No. 1 stated that refund of EMD's would be undertaken at the end of voting by CoC.
6. On 03.08.2023, the Applicant once again wrote to Respondent No. 1 asking for an update on the status of refund to which Respondent No. 1 vide email dated 04.08.2023 requested for further time in the matter in view of the fact that an application had been made to this Hon'ble Tribunal for extension of the CIRP period.
7. On 25.08.2023, Respondent No. 1 vide an email to the Applicant stated that CoC had declared the Applicant's plan as "non-responsive" in its meeting held on 18.08.2023. Furthermore, in terms of clause 1.9.2(b) of the RFRP, the CoC instructed in favour of forfeiture of the EMD amount of Rs. 25,00,000/- furnished by the Applicant. Vide email dated 26.09.2023, the Applicant categorically put on record that the Respondents had no authority whatsoever to withhold the EMD amount and called for an immediate refund of the EMD amount.

8. The Applicant submitted that Regulation 36B (4) of the CIRP Regulations provides that any deposit taken at the time of submission of the resolution plan from prospective resolution applicants must necessarily be refunded to them if their plan is not approved. Therefore, any attempt to forfeit the EMD amount furnished by the applicant is clearly against the provisions of CIRP Regulations.
9. The Applicant further submitted that even if it is assumed that the Respondents were allowed to forfeit the EMD amount even then in the present case they would have been unsuccessful as there were no grounds arisen for the same. There was no deficiency in the plan submitted by the Applicant, in as much as all the information required was provided, in spite of which Respondent no. 1 kept unjustifiably asking for the same information.
10. It is the further case of the Applicant that its resolution plan was not a conditional plan as alleged by respondent no. 1. This is because of the reason that the Information Memorandum itself stated in point 2.3(1) that Respondent No. 1 had declared the leave and license agreement in respect of the premises of the Corporate Debtor, as void. Therefore, it would not be incorrect to assume that the premises were available for use of the Corporate Debtor, which was merely confirmed by the applicant in its email dated 02.06.2023.
11. Application for initiation of the Corporate Insolvency Resolution Process (CIRP) was filed on 05.06.2021 and subsequently on 18.05.2022 (i.e. almost a year later), Leave and License Agreements were entered into by the erstwhile promoter in respect of the premises of the Corporate Debtor. Having already sent notices to have alleged leave and license agreement declared void, it was the bounden duty of Respondent No. 1 to take all steps to take control and custody of the premises including making an Application to this Hon'ble Tribunal under Regulation 30 of the IBBI (CIRP) Regulations, 2016. Therefore, by the email dated 02.06.2023, the

Applicant merely brought the same to the notice of Respondent No. 1. As it was stated in the Information Memorandum that the leave and license agreements were declared to be void, the Applicant merely based on the facts provided by the Respondent No. 1 itself and based on the duties of Respondent No. 1, stated that vacant possession of the premises of the Corporate Debtor may be obtained. The observation made in the email dated 02.06.2023 did not amount to any amendment in the plan or making it conditional. The plan submitted by the Applicant on 12.05.2023 along with the addendum thereto submitted on 23.05.2023 was final and not conditional, nor was it found to be so by the Respondents.

Submission by the Respondent No. 1

1. The Respondent submitted that CIRP was initiated against the Corporate Debtor by the Hon'ble National Company Law Tribunal, Mumbai Bench vide an order dated 29.07.2022 and he was first appointed as the Interim Resolution Professional by the order dated 29.07.2022 itself. Later he was approved as the Resolution Professional of the Corporate Debtor by the order of this Hon'ble Tribunal dated 21.10.2022.
2. On 27.09.2022, a public announcement was made inviting Expressions of Interest from Prospective Resolution Applicants (hereinafter referred to as "**PRAs**"). Subsequently, the resolution plans received from 3 PRAs were considered by the CoC. However, Respondent no. 2 had reservations over the amounts offered under the resolution plans. Moreover, then ongoing resolution plan process would be closed and the same would be run again in accordance with the Minutes of the 12th meeting of Respondent No. 2 dated 28.03.2023.
3. Thereafter, a 90 days extension for the completion of CIRP was granted by this Hon'ble Tribunal from 25.01.2023 to 24.04.2023.

4. On 04.04.2023, a fresh announcement in Form G inviting EOIs from PRAs was issued. On 25.04.2023 the final list of PRAs was issued and shared with Respondent No. 2.
5. On 25.04.2023, in terms of Regulation 36B of IBBI (CIRP) Regulations, a RFRP was issued to the PRAs including the Applicant. This RFRP is governing the entire resolution plan process and is prepared and finalized in terms of the Code read with the CIRP Regulations and after consulting and receiving confirmation from the members of Respondent No. 2.
6. It is the case of Respondent No. 1 that an undertaking in Format I and VI of RFRP, thereby signifying that the Applicant had also unconditionally accepted the terms and conditions of the RFRP.
7. Vide the Order dated 08.06.2023, this Hon'ble Tribunal granted a further 60 days extension of the CIRP from 26.04.2023 to 24.06.2023.
8. At the 15th meeting of Respondent no. 2 held on 18.05.2023, several discrepancies were noted in the plan of the Applicant and on the same day an email was addressed to the Applicant listing the discrepancies in the resolution plan submitted and calling upon the Applicant to rectify the same.
9. By its email dated 23.05.2023, the Applicant provided some of the information/documents sought however, the Applicant failed to provide the authority letter as required under formats III and IV in the RFRP, citing reasons as "non-applicable".
10. In the 16th meeting of Respondent No. 2, held on 25.05.2023 the Applicant's Representative categorically stated that the details of the demat accounts covering the investments made in listed entities of an amount of Rs. 40 crores and the requisite formats as required under the RFRP would be submitted in due course of time. It is the case of the Respondent that the Applicant's representative for the first time ever stated that the resolution plan was subject to getting vacant possession of the Corporate Debtor's assets. This came as a shock to Respondent No. 2 as before this instance there was no

mention of the same anywhere by the Applicant nor was anything spelt out in its resolution plan in relation thereto. Further, in the same meeting it was also mentioned to the Applicant to submit the revised/modified resolution plan in compliance with the RFRP by 8 p.m. on 29.05.2023. An email was also sent on the same day mentioning about the requirement and deadline however it was not adhered to by the Applicant.

11. Thereafter, despite being invited, the Applicant did not attend the 17th meeting of Respondent No. 2 held on 31.05.2023 and also did not respond to the email of the Respondent dated 29.05.2023 and 31.05.2023 which extended the deadline for submission of revised resolution plan till 5 pm.
12. On 02.06.2023, the Applicant sent an email stating that its resolution plan is subject to it being handed over vacant possession of the Corporate Debtor's premises. However, no clarification was provided in relation to the deficiencies in the resolution plan. The Applicant did not even attend the 18th meeting of Respondent No. 2 on 02.06.2023 despite being invited.
13. On 06.06.2023, in the 19th Meeting of Respondent No. 2 it was agreed that on grounds of failure on the part of the Applicant to provide requisite formats under RFRP and in light of the email of the Applicant dated 02.06.2023, Respondent No. 2 would vote upon whether to declare the Applicant's resolution plan as non-compliant and to forfeit the EMD.
14. The deadline for voting on resolution plans was extended from 20.06.2023 to 10.07.2023. Since 330th day of CIRP was falling on 24.06.2023 therefore an extension was sought and this Hon'ble Tribunal vide its Order dated 04.07.2023 extended the period of CIRP up to 24.07.2023.
15. On 18.08.2023, after seeking various extensions for CIRP, by a voting share of 96.58%, Respondent No. 2 declared the Applicant's plan as non-responsive in terms of RFRP and also forfeited the

EMD. This decision was communicated to the Applicant vide an email dated 25.08.2023.

16. The Applicant thereafter sent a letter dated 26.09.2023 in response to this email making baseless allegations and seeking refund of the EMD.
17. It is the case of the Respondent that Regulation 36B (4) of the CIRP Regulations which prohibits the requirement of any non-refundable deposit for submission along with a resolution plan is categorically not attracted to the present case as the RFRP never demanded any resolution applicant to make a non-refundable deposit. The RFRP clearly provided for the forfeiture of EMD amount if the Resolution Plan is found non-responsive and a conditional resolution plan was one of the grounds for considering the plan as non-responsive.
18. The Applicant was duly sent the Information Memorandum and the RFRP dated 25.04.2023 and therefore, was deemed to have constructive notice of its contents. Therefore, the Applicant knew that the EMD could be forfeited if its resolution plan was declared non-responsive, despite which, the Applicant chose not to make its resolution plan compliant with the RFRP and to the contrary, made it conditional, which is a ground for forfeiture of the EMD, as per the RFRP. Additionally, the decision to declare the Applicant's resolution plan as non-responsive and forfeit the EMD was duly voted upon by Respondent No. 2 and further the said agreements, actions undertaken, and the current status were all made available to the PRAs, including the Applicant, in the Virtual Data Room and thus, the Applicant was free to exercise its sole and independent due-diligence and decisions prior to submission of resolution plan.

Findings

1. The main contention of the Applicant is that the EMD amount was forfeited even though the resolution plan submitted by it is unconditional. In response to the same, the Resolution

Professional states that as per Para 1.9.2 of the RFRP it is clearly mentioned that EMD amount will be forfeited if the resolution plan becomes unresponsive and one of the conditions stated for non-responsiveness of the resolution plan is when it is conditional.

2. All the PRAs were having knowledge of these terms and conditions of the RFRP after which they willingly chose to submit their resolution plans.
3. The Resolution Professional declared the Applicant's plan as non-responsive and also forfeited the EMD in terms of RFRP, only after approval from the Committee of Creditors by a voting share of 96.58%. in accordance with Respondent no. 2's resolution dated 18.08.2023 and attached at Page 167 of the Reply.
4. As contented by Respondent No. 1, the Applicant's representatives communicated to the Respondents that the resolution plan was subject to getting vacant possession of the Corporate Debtor's assets at a very later stage i.e. on 25.05.2023, during the 16th CoC meeting of Respondent No. 2. This essentially took the Respondents by surprise and therefore, on 18.08.2023, Respondent No. 2 resolved to declare the Applicant's resolution plan as non-responsive in terms of the RFRP and forfeit the EMD amount as per decision of Respondent No. 2 stated above.
5. Respondent No. 2, which is the Committee of Creditors, has exercised its Commercial Wisdom while taking the above decision which is also in line with the published RFRP made available to all PRAs including the Applicant before submission of their respective plans and they have willingly and knowingly decided to participate in the process. The bench therefore finds no reason to intervene in Respondent no. 2's decision taken this regard.

6. In conclusion, we find no merits in the present case and hence this I.A. No. 5042 of 2023 is **dismissed**.

Sd/-
MADHU SINHA
MEMBER (TECHNICAL)
//VLM//

Sd/-
REETA KOHLI
MEMBER (JUDICIAL)