

**In the National Company Law Tribunal**

**Special Bench, (Court-II), Kolkata**

*IA (IB) No. 1523/(KB)/2022*

*In CP(IB) No. 64/(KB)/2021*

*Application under section 60 (5) of the Insolvency & Bankruptcy Code, 2016 read with  
Rule 11 of the National Company Law Tribunal Rules, 2016.*

**In the Matter of:**

Sreenath Finvest Pvt Ltd. &Ors.

**...Financial Creditor**

**And**

Pami Metals Private Limited

**....Corporate Debtor**

**And**

In the matter of:

RAJESH KUMAR DAMANI, son of Gopi Kishan Damani, working for gain from 246/247, Block-A, Lake Town, South Dum Dum Municipality, 24 Parganas (North), Kolkata 700 089, West Bengal.

**..Applicant**

1. MR. JITENDRA LOHIA, Resolution Professional of Pami Metals Private Limited, having Registration No. IBBI/IPA-001/IP- P00170/2017-18/10339 working for gain from 2/7, Sarat Bose Road, 2nd Floor, Vasundhara Building, Near Hindusthan Club, Kolkata 700 020;
2. STATE BANK OF INDIA, having its office at 8th Floor, Nagaland House, 11 & 13, Shakespeare Sarani, Kolkata - 700071.
3. ADITYA BIRLA FINANCE LIMITED, having its office at Room No. 401, 4th Floor, 24 Camac Square, Kolkata – 700016.
4. TATA CAPITAL FINANCIAL SERVICES PRIVATE LIMITED, having its office at 11 Floor, Tower A, Peninsula Business Park, Ganpatrao Kadam Marg. Lower Parel, Mumbai – 400013.
5. SREENATH FINVEST PRIVATE LIMITED, having its office at 51, Nalini Seth Road, 6th Floor, Room No. 601, Kolkata – 700007.
6. KAMNA COMMERCIAL PRIVATE LIMITED, having its office at 51, Nalini Seth Road, 6th Floor, Room No. 601, Kolkata 700007.

7. CHIKI FINANCE PRIVATE LIMITED, having its office at 51, Nalini Seth Road, 6th Floor, Room No. 601, Kolkata – 700007.
8. SRI BALAJI DEAL TRADE PVT. LTD, having its office at 224, M.G. Road, 3rd Floor, Kolkata – 700007.
9. JAJOO COMMERCIAL PRIVATE LIMITED, having its office at 21, Hemanta Basu Sarani, 4th Floor, Room No. 410, Kolkata 700001.
10. IIFL FINANCE LIMITED, having its office at 3rd Floor, IIFL Finance Ltd, Sun Unforthech Park, Road No. 16V Wagale Estate, Thane West, Mumbai – 400604.
11. ICICI BANK LIMITED, having its office at 228A, A.J.C. Bose Road, 11th Floor, Landmark Building, Kolkata – 700020.
12. AROHAN FINANCIAL SERVICES LTD, having its office at PTI Building, 4th Floor, DP - 9, DP Block, Sector 5, Saltlake, Kolkata-700091.
13. EVER STRONG METAL PVT LTD, having its office at 9, Weston Street, 3rd Floor, Room No 309, Kolkata-700012.
14. JAGDAMBA COMMOSALES PVT LTD, having its office at 16A, Exchange Place, 2nd Floor, Room No. 14, Kolkata – 700001.
15. Capital Float Financial Services Private Limited, having its office at B-36, Opp. Metro Pillar, 125, Pusa Road, Block, 11, Old Rajinder Nagar, New Delhi – 110005.
16. EASTERN COPPER MANUFACTURING COMPANY PRIVATE LIMITED, having its office at 27, Weston Street, Room No. 601E, 6<sup>th</sup> Floor, Kolkata – 700 012.

....Respondents

....Resolution Professional / Applicant

**Date of Pronouncement of order: 05.01.2024**

**Coram:**

**Smt. Bidisha Banerjee** : **Member (Judicial)**

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

**Counsel appeared physically / through video Conferencing**

1. Mr. Shaunak Mitra, Adv. ] For the Resolution Professional
2. Mr. Jitendra Lohia, Adv.

1. Mrs. Manju Bhuteria, Adv. ] For State Bank of India
2. Ms. Tanvi Luhariwala, Adv.
3. Mr. Debasish Chakraborty, Adv.
4. Mr. Snehasish Chakraborty, Adv.

1. Mr. Jishnu Saha, Sr. Adv. ]For the Petitioner in IA(I.B.C)/1523(KB)2022
2. Mr. Abhijit Sarkar, Adv.
3. Ms. Urmila Chakraborty, Adv.

1. Mr. Ratnanko Banerjee, Sr. Adv. ] For the Respondent  
Ms. Madhujā Barman, Adv. in IA(I.B.C)/1523(KB)2022
2. Mr. Amandeep Singh, Adv.
3. Mr. Pratim Bayal, RP in person

**ORDER**

**Per Bidisha Banerjee, Member (Judicial):**

1. Heard the Ld. Sr. Counsel / Ld. Counsel for the parties.
2. This application has been preferred by Sreenath Finvest Pvt. Ltd. (SFPL) to seek the following reliefs:
  - a. Appropriate and necessary orders be passed thereby setting aside and / or quashing the voting process whereby the resolution Plan of the Applicant was rejected and the purported resolution plan of respondent no. 16 was approved.
  - b. Appropriate and necessary orders be passed thereby setting aside and / or quashing the e-voting result and / or the scrutinizer's e-voting dated 21<sup>st</sup> October, 2022;
  - c. Appropriate and necessary orders be passed thereby sending back the matter to the CoC for reconsideration and fresh voting on the resolution plans after giving adequate opportunities to the applicant to clarify, and if required to negotiate and revise his plan.
  - d. Appropriate order be passed for the removal of the present RP and an appointment of the new RP to conduct the CIRP transparently.
  - e. An Appropriate order be passed to stay the notice dated 10.11.2022 issued by the State Bank of India, till the disposal of this application.
  - f. Appropriate orders and directions be passed upon the RP and the CoC to adopt Swiss challenge method in the voting process for approval of the resolution plan.

- g. An order of injunction be passed restraining the respondents from taking any steps in respect of the e-voting result and / or the scrutinizer's e-voting report dated 21<sup>st</sup> October, 2022;
3. Ld. Sr. Counsel Mr. Jishnu Saha, appearing for the Applicant contends that the Resolution Plan filed by the Applicant was a better one which took care of the all Stakeholders of the Corporate Debtor.
  4. The proposed Plan value was for an amount of Rs. 12 Crores with a further Clause of infusion of 2 Crores towards the working Capital for meeting Operations of the Corporate Debtor.
  5. The Plan Proposed to pay 815 lakhs to Secured Financial Creditors, 200 lakhs for Unsecured Financial Creditors, 24.50 lakhs for Workmen and 160 lakhs towards CIRP cost to operational creditor. The Applicant proposed to make upfront payment to be made within 60 days and Plan provided for maximum value to all the `Creditors.
  6. Ld. Sr. Counsel also contends that while the Resolution Plan submitted by Respondent No. 16 which is of 10.51 Crores was approved with 86.02% voting, the Plan of the Applicant was rejected / not approved with 76.11% vote. Only 11.84% Voted in favour of the Plan and 0.83% abstained from voting, though the Applicant scored highest marks in Evaluation Matrix.
  7. Ld. Sr Counsel alleged that the RP had adopted wide variation of principle in the process of Evaluation Matrix and the CoC are vitiate the provisions of IBC and Regulations. Ld. Sr. Counsel further contends that plan order dated 30.09.2022 passed by this Tribunal was not made. In terms of which revised Plan was submitted by the Applicant and the same had to be considered afresh by way of a Swiss Challenge method which was not adopted.
  8. The applicant had not been provided with a level -playing field although as an MSME promoter keeping in view the legislative intent to encourage the promoters of MSME

to pay back the amount in default, regain control of the Corporate Debtor thereby promote the entrepreneurship by allowing filing of resolution plan by the MSME promoters, the Applicant's plan ought to have been approved by all the Members.

9. A chain of events in the matter are the following:
- a. This Tribunal ordered for CIRP of the Corporate Debtor vide its order dated 03.11.2021. Form 'G' was published on 17.01.2022.
  - b. At the 6<sup>th</sup> CoC meeting a discussion took place on Resolution Plans submitted by the Prospective Resolution Applicants (PRAs) when it was pointed out that the exemption available to MSME in regard to waiver of EMD was not available, hence plan of a MSME without the EMD of Rs.1 Crore was not acceptable. The exemption that was available only under Section 29(A).
  - c. The Applicant as an MSME promoter submitted its plan on 06.04.2022. As he felt that was entitled to exemption of EMD, he had not put the same with the Plan, and as such his Plan as MSME Promoter was rejected. Later this Tribunal vide order dated 30.09.2022 directed for revert back of Resolution Plan submitted by Mr. Damani, for a consideration afresh subject to deposition of required EMD amount of Rs. 1 Crore within two days from the date of its order. Hence, it was resubmitted with EMD.
  - d. It was pointed out that based on the evaluation Matrix ECMCPL stands at 39.24 points making them H1 bidder and SFPL stands at 24.07 points making them H2 bidder.
  - e. PRAs were requested to submit their revised bid through Swiss challenge mechanism. In Round 1, ECMCPL revised their Resolution Plan to Rs. 10.51 Crores and SFPL revised their Resolution Plan amount to Rs. 9 Crores. In Round 2, SFPL was further given an opportunity to increase its bid. However, SFPL refused to further increase its Plan. Hence, ECMCPL was announced as the H1 bidder and SFPL was announced as H2 bidder.

- f. In IA (IBC)/900(KB)2022, vide order dated 30.09.2022, this Tribunal permitted Rajesh Kumar Damani the Applicant therein to deposit an EMD since he was a promoter of MSME. It is asserted that he was given an assurance that his plan would be considered by the CoC afresh as his plan value was higher than the plan value of SFPL and ECMCPL. This Tribunal permitted the CoC to consider the all the plans on their merit with a open mind, while condoning the delay and permitting Mr. R.K. Damani to put an EMD of 1 (one) Crore.
- g. In the 7<sup>th</sup>CoC meeting held on 01.10.2022, Mr. Damani referred to the order in IA (IBC)/900(KB)2022 and intended to handover two bank drafts of Rs. 50,00,000/- each crediting to One Crore towards the EMD to be furnished along with Plan.
- h. At the 8<sup>th</sup> CoC Meeting held on 08.10.2022 by the Committee of Creditors of Pami Metals Private Limited (PMPL), the voting rights of each of the Creditors was discussed upon.
- i. At the 9<sup>th</sup> Meeting held on 15.10.2022, the Plan submitted by Mr. R.K. Damani (PMPL) was discussed / deliberated upon and it was decided that it will be placed for e-voting on 16.10.2022.
- j. The records depicts that the Resolution Plan of Mr. Damani and the Resolution Plan of Respondent No. 16 was allowed but Resolution Plan of Respondent No. 16 (ECMCPL) got passed with 86.02% votes, whereas the Resolution Plan submitted by Mr. Damani (PMPL) received only 11.84% positive votes.
10. The Applicant has depicted the following chart to show the comparative assessment of the Plans put up by Mr. Damani (PMPL) and ECMCPL(SRA):

**(Amount in INR Crores)**

<b>Stakeholders</b>	<b>Resolution Plan of Eastern Copper Manufacturing Co. Pvt. Ltd.</b>	<b>Resolution Plan of MSME Promoters of the Corporate Debtor (The Applicant)</b>
a) CIRP Cost	0.32	Actuals
b) Workmen & Employees	-	0.25
c) Secured Financial Creditor	9.68	8.15
d) Unsecured Financial Creditor	0.51	2.00
e) Operational Creditors	-	1.60 less Actual CIRP Cost
<b>Sub-Total</b>	<b>10.51</b>	<b>12.00</b>
f) Working Capital	-	3.00
<b>TOTAL RESOLUTION AMOUNT</b>	<b>10.51</b>	<b>15.00</b>

11. Ld. Sr. Counsel also take us through the 7<sup>th</sup> CoC Meeting, where three Prospective Applicants being ECMCPL, SFPL and R.K. Damani (PMPL) were considered as per Swiss Challenge method.

Since H1, H2 were already announced, the Minutes of the meeting indicates that the CoC Members went through the Resolution Plan of Mr. Damani and prima facie found that the Plan was not feasible and viable. Mr. Damani had specified that he would raise funds from friends and relatives which the CoC Members found to be very vague, the Plan further specified selling of Howrah Units for making payments to the Creditor. CoC found the other two Plans as feasible and viable which stipulated complete revival of the Corporate Debtor.

The CoC Members decided to put only such Plans which were feasible and viable both, up for voting. Since the Plan submitted by ECMCPL and SFPL were found compliant with IBC Code, 2016 and requisite undertakings under Section 29(A) of the IBC Code were available, they were put up for voting. It was agreed upon by the Members of the CoC that in case of a tie-breaker situation, the Resolution Plan with highest Evaluation Matrix score consisting of qualitative and quantitative scoring would be considered as approved for further approval of NCLT.

12. Ld. Sr. Counsel for the Applicant / Mr. Damani would vociferously argue that the CoC completely ignored the defects in ECMCPL Plan. The Resolution Plan of ECMCPL allocated NIL amount to workmen and employees and Operational Creditors. Since the Financial Creditors found their share to be higher, the ECMCPL plan got passed. Whereas the amount allocated to unsecured financial creditors in the PMPL Plan was higher than ECMPL Plan. Further, the PMPL Plan showed intention towards fresh infusion of funds to run the company successfully which ECMPL (or ECMPCL) Plan lacked.
13. It was urged that in terms of the evaluation Matrix, the score of PMPL was higher than that of ECMPCL, yet the Plan of PMPL was discarded. Ld. Sr. Counsel would further argue that the decision making process has tilted and to the detriment of the MSME Promoter, that this Adjudicating Authority can always tear the veil of commercial wisdom, which if done would clearly manifest that Evaluation Matrix was thrown to the winds and Swiss Challenge method was abandoned and the MSME Promoter was left in the lurch. It was not provided a negotiating platform, it was deprived a chance of improving its Plan and hence act of CoC was against “commercial wisdom”.
14. It was alleged that there cannot be any attempt to justify arbitrariness when the main object of the Code is to reconstitute, to revive and to resolve this issue.
15. We have considered the submissions. We have already extracted the gist of CoC Minutes particularly the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Meetings. We have already noticed that the Plan of PMPL was deliberated upon and found to be not viable and feasible in view of the fact that the Plan proposed selling of the the Kolkata Plant and disclosed

that an interested buyer has given its commitment on 15.11.2022 etc. It was argued for PMPL that at least Mr. Damani had disclosed the source of funds which ECMPL Plan did not do.

It was argued that the ECMPL Plan is feasible but not viable, since it does not disclose source of funds, provides NIL payments to Operational Creditors and yet it is passed without giving the MSME Promoter a level playing field.

16. Per contra, Ld. Counsel Mr. Shaunak Mitra appearing for the RP in course of hearing would submit that the CoC's decision should not be challenged and this Adjudicating Authority cannot substantiate its views with the Commercial Wisdom in rejecting a Resolution Plan and particularly drawn out attention to the following decisions:

- i. **Pratap Technocrats (P) Ltd. V. Monitoring Committee of Reliance Infratel Ltd. & Anr., (2021) 10 SCC 623**, where the Hon'ble Apex Court emphasised on "*Fair and equitable treatment, in other class, and not between different classes of creditor and held that "The statute has indicated that once the requirements of Section 30 (2)(b) are fulfilled, the distribution in accordance with its provisions is to be treated as fair and equitable to the Operational Creditors."*

17. Whereas, Ld. Sr. Counsel for the Applicant in course of hearing would refer to the following decisions as quoted hereunder to contend that the CoC was bound to pass a Plan based upon evaluation Matrix and Promoters of MSME should be encouraged to submit Plan:

- a. In the matter of **Indian Potash Limited (Unsuccessful Resolution Applicant) through authorized signatory Vs. Naresh Kumar Varma, RP**, the Hon'ble NCLAT has directed as under:

*"39(3) The committee shall evaluate the resolution plan received under sub-regulation (1) strictly as per the evaluation matrix to identify the best resolution plan and may approve it with such modification as it deems fit: Provided that the committee shall record its deliberations on the feasibility and viability of the resolution plan."*

- b. In the matter of **Ebix Singapore (P) Ltd. Vs. Educomp Solutions Ltd.** (COC) (2022) 2 SCC 401, the Hon'ble Supreme Court held that "*Regulation 39 provides for the process of approval of a resolution plan by the CoC, and under sub-regulation (3) the CoC has to evaluate every resolution plan based on an "evaluation matrix" it has come up with under Regulation 5(ha).*"
- c. In the matter of **Mr. C. Raja John, Vs. Mr. Raghavendran & Ors. At Company Appeal (AT) (CH) (INS) No. 207 OF 2021**, the Hon'ble Chennai Bench referred to an amendment to Section 240-A of the IBC, 2016 and held "*By the above amendment, the intention of the Legislation is to encourage the promoters of MSME*"
- d. In The matter of **Binani Industries Limited Vs. Bank of Baroda & Anr. At 2018 SCC OnLine NCLAT 521**, the Hon'ble NCLAT held that "*that the 'Committee of Creditors' have not acted in terms with the provisions of the 'I&B Code' and the 'process document'. The maximization of the value assets of the 'Corporate Debtor' cannot be ignored nor it can be ignored that the same should balance all the stakeholders.*"
- e. In the matter of **Swiss Ribbons Pvt. Ltd. Vs Union of India and Ors'. Writ Petition (Civil) No. 99 of 2018**, the Hon'ble Supreme Court has categorically reminded that "*a resolution plan cannot pass muster under Section 30(2)(b) read with Section 31 unless a minimum payment is made an operational Creditors.*"
- f. In the matter of **Saravana Global Holdings Ltd. & Anr. Vs. Bafna Pharmaceuticals Ltd. & Ors. At Company Appeal (AT)(Insolvency) No. 203 of 2019**, the Hon'ble NCLAT New Delhi, held "*in exceptional circumstances, if the 'Corporate Debtor' is MSME, it is not necessary for the Promoters to compete with other 'Resolution Applicant' to regain the control of the 'Corporate Debtor'.*"
- g. The decision rendered by this Tribunal in CP (IB)No. 361(KB)2017 whichj says that **Genius Security** (referred by RP) rendered by Hon'ble NCLAT

cannot be considered as it is as per incuriam and fails to take into account the law laid down by Hon'ble Supreme Court's decision in the Essar Steel matter.

18. We have noted that the CoC has discussed and deliberated upon the Plan of the MSME Promoter Mr. Damani (PMPL) at length and found that the Plan it is not feasible and viable due to reasons mentioned in the Minutes extracted above.
19. It is almost trite and settled law that the commercial wisdom of CoC cannot be called into question unless there are glaring omissions and the deficiencies are stark. In view of the fact that the CoC is of the opinion that the PMPL Plan in fact, does not deal with the source of funds and is based on contingencies which is a fact evident from records, we find no reason to interfere with the well considered decision of the CoC in rejecting the said Plan with reasons.
20. The allegation that the Plan was not put up for voting or the same was not considered or deliberated upon is not substantiated as the Minutes of CoC Meeting would suggest.
21. We thus find no merit in the application. Accordingly, this **IA(IB)No.1523/(KB)/2022 is dismissed.**
22. 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 05<sup>th</sup> day of January, 2024

M. Jana (PS)